

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

Date of Decision – October 30, 2008

**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-**

**IN THE MATTER OF** an appeal filed by Lee and Marilyn Fenske with respect to *Environmental Protection and Enhancement Act* Approval No. 20754-01-00 issued to Beaver Regional Waste Management Services Commission by the Director, Central Region, Environmental Management, Alberta Environment.

Cite as: Interim Costs: *Fenske v. Director, Central Region, Environmental Management, Alberta Environment re: Beaver Regional Waste Management Services Commission* (30 October 2008), Appeal No. 07-128-IC (A.E.A.B.).

**BEFORE:**

Dr. Steve E. Hrudehy, Chair,  
Dr. M. Anne Naeth, Board Member, and  
Dr. Alan J. Kennedy, Board Member.

**SUBMISSIONS BY:**

**Appellants:** Mr. Lee and Ms. Marilyn Fenske, represented  
by Ms. Karin Buss, Ackroyd LLP.

**Director:** Mr. Neil Holland, Director, Central Region,  
Environmental Management, Alberta  
Environment, represented by Ms. Shannon  
Keehn, Alberta Justice.

**Approval Holder:** Beaver Regional Waste Management Services  
Commission, represented by Ms. Cherrise  
Killick-Dzenick, Reynolds Mirth Richards &  
Farmer LLP.

## **EXECUTIVE SUMMARY**

Alberta Environment issued an Approval to Beaver Regional Waste Management Services Commission (BRWMSC) authorizing the construction, operation, and reclamation of the Beaver Regional Class II landfill near Ryley, Alberta, where more than 10,000 tonnes per year of waste is disposed. The Approval is a renewal of an approval issued in 1998.

The Environmental Appeals Board received a Notice of Appeal from Mr. Lee and Ms. Marilyn Fenske, adjacent landowners to the landfill. BRWMSC advised it did not see any merit in pursuing mediation and requested the appeal proceed to a hearing with issues being identified for the hearing.

The Board received an interim costs application from the Fenskes, asking for funding for legal expenses and expenses for retaining an expert.

The Board determined costs will be awarded to the Fenskes for a total of \$1,200.00 to offset the costs of retaining an expert. The costs will be paid by the Beaver Regional Waste Management Services Commission by November 17, 2008. Any award of interim costs is subject to a redetermination in an award of final costs.

The hearing of this appeal is scheduled for December 17 and 18, 2008.

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## **I. BACKGROUND**

[1] On September 1, 2007, the Director, Central Region, Environmental Management, Alberta Environment (the “Director”), issued Approval No. 20754-01-00 (the “Approval”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”) to the Beaver Regional Waste Management Services Commission (the “Approval Holder” or “BRWMS”) authorizing the Beaver Regional Class II landfill (the “Landfill”) near Ryley, Alberta, in Beaver County (“County”) where more than 10,000 tonnes per year of waste is disposed.<sup>1</sup>

[2] On October 4, 2007, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Mr. Lee and Ms. Marilynn Fenske (the “Appellants”) appealing the Approval. The Board has addressed appeals from these Appellants regarding previous approvals issued for this Landfill.

[3] On October 5, 2007, the Board wrote to the Appellants, the Approval Holder, and the Director (collectively the “Parties”) acknowledging receipt of the Notice of Appeal and notifying the Approval Holder and the Director of the appeal. The Board requested that the Parties provide available dates for a mediation meeting, preliminary motions hearing, or hearing.

[4] On October 30, 2007, the Board received a letter from the Approval Holder advising that it saw no merit in pursuing mediation and requested that the issues for a hearing be identified and that the matter proceed directly to a hearing. The Board provided the Parties with a copy of the letter.

[5] In the Board’s letter of November 14, 2007, it advised the Parties that, since the Approval Holder saw no merit or benefit in pursuing mediation and it requested a submission schedule be set to determine the issues for a hearing, the Board would proceed to schedule a hearing and set a written submission process to determine the issues. The Board requested that any further preliminary motions be provided to the Board by November 21, 2007.

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<sup>1</sup> The Approval replaces a previous approval issued to the Beaver Regional Waste Management Services Commission in 1998 (the “1998 Approval”) and subsequent amendments (the “2005 Amendment”). The 1998 Approval had an expiry date of 2008, requiring the Approval Holder to apply for a new approval.

[6] On November 19, 2007, the Approval Holder requested the Appellants "...provide, in advance, details of expert evidence upon which they will rely in the appeal, including names of experts and copies of reports, testing and findings. As well, if the Appellants have obtained any previous testing which will be relied upon by the Appellants, we request that that be provided to the [Approval Holder] in advance."

[7] The Approval Holder further requested clarification on what issues in the Notice of Appeal are properly before the Board "...taking into consideration that there has been no change in groundwater, surface water, containment and discharge." The Approval Holder sought determination of "...which issues are land use issues that are within the jurisdiction of the County, and which will not be dealt with by the Board." The Board advised the Parties on November 21, 2007, that the request by the Approval Holder to the Appellants to provide detailed evidence in advance was a request for a staggered submission process for the hearing to which the Board had agreed.

[8] On November 21, 2007, the Appellants advised they would be submitting an application for advanced interim costs.

[9] The Director, in his letter of November 21, 2007, requested the Board address in the preliminary issues the matter of: issue estoppel because a number of issues had been adequately dealt with in the Board's previous decisions regarding the Landfill; those issues under appeal that are not within the Director's or the Board's jurisdiction; and a request that the Board consider conducting the preliminary motions and hearing in writing. The Appellants advised the Board on November 27, 2007, they objected to a written hearing, if that was the Director's intent, and advocated for an opportunity to provide *viva voce* evidence.

[10] The Board advised the Parties on November 29, 2007, that it wished to receive written submissions on the following preliminary motions.

1. Issue Estoppel: whether the issues contained in the Notice of Appeal have been adequately dealt with in the Board's previous decisions.
2. Jurisdiction: whether there are grounds for appeal that are not within the Director's or the Board's jurisdiction, and therefore, should not be part of the appeal.

3. Whether there are land use issues that are within the jurisdiction of the County, and not within the jurisdiction of the Board.
4. The issues to be dealt with at a hearing, should one be held.

The Board stated that it would not conduct the hearing of this appeal via written submissions; however, it would request written submissions from the Parties in a staggered manner in preparation for the hearing, should one be held.<sup>2</sup>

[11] The Appellants' initial submission was received on December 21, 2007, response submissions were received on January 14, 2008 from the Approval Holder and the Director, and the rebuttal submission was received from the Appellants on February 7, 2008.

[12] On May 9, 2008, the Board notified the Parties that it required additional information regarding the issues to be heard at the hearing, should one be held, and it wanted to hear arguments on the issues at an oral preliminary motions hearing. The Board explained it understood the arguments on issue estoppel and jurisdiction and it only wanted additional submissions on what issues should be heard if the appeal proceeds to a hearing.

[13] The preliminary motions hearing was held June 16, 2008.

[14] On July 24, 2008, the Board notified the Parties that the issues that will be heard at the hearing are as follows.

1. The appropriateness and adequacy of the conditions in the Approval with respect to the abandoned wells
  - a. that have been identified, and
  - b. that have not been identified, which may yet be encountered during constructionin the area where the expansion of the Landfill is approved.
2. The effects of the expansion of the Landfill on the surface water regime in the area, including but not limited to Bible Creek.
3. The appropriateness and adequacy of the conditions of the Approval with respect to the development and operation of special cells.
4. The operation of the Landfill as it relates to litter, odour, noise, operating hours, and aesthetics.

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<sup>2</sup> In the Board's view, the principles of natural justice require that, with respect to a substantive hearing, if one of the parties requests an oral hearing, they are generally entitled to it.

These are the only issues the Board will hear.

[15] The Board provided its reasons for setting the issues on September 22, 2008.<sup>3</sup>

[16] On September 15, 2008, the Appellants submitted a request for interim costs. On September 16, 2008, the Board acknowledged the request and set the submission process. The Board noted the Appellants requested costs associated with legal fees already incurred. The Board informed the Appellants that it would not consider the costs already incurred because the purpose of interim costs is to cover future costs in preparation for the hearing. The Board stated it would consider the hearing preparation costs, additional legal costs, and anticipated disbursements. The Board received additional arguments from the Appellants on September 18, 2008. The Approval Holder and Director provided their responses on September 26, 2008. The Appellants' rebuttal submission was received on October 2, 2008.

## **II. Submissions**

### **A. Appellants' Submission**

[17] The Appellants explained there is no other person to put forward the concerns and issues identified by the Appellants, so their submission is necessary to the hearing of the appeal. They stated there are no other funding sources available.

[18] The Appellants explained the most efficient way of proceeding on the issues is to focus on the operational issues, including litter, odour, noise, operating hours, aesthetics, the operation of the special cells, impacts on the surface water migration off-site to the Appellants' property, and identifying the impacts and consequences on the Appellants' health and well being. The Appellants stated that, in the previous report and recommendations, the Board accepted that the Landfill operation has potential health impacts and neighbours were being impacted through stress.

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<sup>3</sup> See: Preliminary Motions: *Fenske v. Director, Central Region, Environmental Management, Alberta Environment*, re: *Beaver Regional Waste Management Services Commission* (22 September 2008), Appeal No. 07-128-ID1 (A.E.A.B.).

[19] The Appellants provided a summary of their expert's qualifications. The Appellants stated their expert intends to assess the impacts of nuisance and other appeal issues to determine the impact on the Appellants' health and well being, to identify what mitigation may be required, and what changes would be necessary and most beneficial for the Appellants' health needs and way of life.

[20] The Appellants explained they do not have the resources to pay for legal or expert costs. They stated they have a small farm and have been struggling under adverse micro and macro economic conditions. The Appellants explained they were the victims of arson in 2001, resulting in loss of their feed supply, and the following years the Appellants were affected by drought conditions. The Appellants stated they were affected by the BSE scare and they are now slowly building up their herd. The Appellants advised that, if required, they will provide detailed financial information to the Board if it can be done in confidence. The Appellants stated their household income falls below the Alberta average.

[21] The Appellants requested 75 percent of the anticipated cost of \$8,200.00 for retaining an expert. This included \$6,000.00 for five days of preparation for the hearing; \$1,200.00 for attendance at the hearing; and \$1,000.00 for disbursements, including travel to and from Edmonton, accommodation, meals, photocopying, long distance, faxes, and miscellaneous expenses. The Appellants also requested 75 percent of the legal fees that is anticipated to total \$40,664.69, including \$24,664.69 for preparation of submissions for the preliminary motions hearing, \$15,000.00 for preparation and attendance at the hearing, and \$1,000.00 for anticipated disbursements.

[22] The Appellants noted the legislation does not have a restriction on the timing of a request for interim costs. The Appellants explained they interpret the provision of interim costs to mean that the order is provisional subject to confirmation or reversal at the time when a final costs award or decision is made by the Board. The Appellants stated they included these fees to show how much had been expended to date to give the Board confidence in their estimate, because they are aware tribunals are hesitant to award interim costs that may be greater than actual costs or the final costs award.

[23] The Appellants stated the legislation or regulation does not require an application for interim costs be made prior to incurring any expense for the hearing preparation. The Appellants argued the awarding of interim costs accords with the general purposes of EPEA to increase public participation and to allow parties to prepare useful and relevant evidence and participate meaningfully in the appeal process. The Appellants acknowledged that any interim costs award is provisional and subject to the Board's final decision on costs at the conclusion of the hearing.

**B. Approval Holder**

[24] The Approval Holder noted the Appellants included legal costs for the preparation and attendance at the preliminary motions hearing. The Approval Holder argued these costs should not be considered by the Board for interim costs.

[25] The Approval Holder argued the Appellants did not properly address the factors necessary for the Board to consider in an interim costs application, and the Appellants did not provide sufficient information to support an award for interim costs. The Approval Holder stated the Board needs information to assess whether the Appellants satisfy the criteria to award any interim costs, and without that information, the application for interim costs should be denied.

[26] The Approval Holder stated the Appellants did not demonstrate a need for interim costs other than presenting broad statements based on Statistics Canada information. The Approval Holder stated the Appellants did not provide any information on their financial position other than an offer to disclose the information to the Board in confidence. The Approval Holder argued this breaches the fundamental principle of the Approval Holder to have access to the information and evidence presented to the Board and have the opportunity to respond to that information.

[27] The Approval Holder stated the Appellants did not provide evidence to show whether the Appellants made an adequate attempt to use other funding sources, other than a general statement that no other funding sources are available.

[28] The Approval Holder argued the Appellants have not presented evidence to satisfy the requirements of the legislation, the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93, (the “Regulations”) or the Board’s Rules of Practice. The Approval Holder submitted that each Party should bear their own costs at this stage and no interim costs should be awarded.

**C. Director**

[29] The Director submitted that he should not be responsible for paying any of the interim costs claim of the Appellants. The Director made no submissions on whether the Approval Holder or the Board should pay any interim costs to the Appellants.

[30] The Director explained the Board and the Courts have developed additional principles for costs claim as they relate to the Director because of the unique role the Director has in the appeals as the statutory decision-maker whose decision is being appealed. The Director stated EPEA sets out the specific statutory authorities of the Director, including considering applications submitted by an applicant and making decisions whether to issue the applied for environmental authorizations along with certain terms and conditions. The Director stated this statutory role makes the Director an automatic party to every appeal. The Director stated this statutory role is considered a vital factor in not ordering the Director to pay costs as long as the Director is acting in good faith.

[31] The Director noted that the application is for interim costs, so there has been no determination made by the Board of any bad faith or special circumstances that would attract an award of costs against the Director.

**D. Appellants’ Rebuttal Submission**

[32] In their rebuttal submission, the Appellants stated they are in a unique position because they had the misfortune of having a landfill, which continues to grow, built across the road from their farm. The Appellants stated they are burdened with all of the direct adverse effects of the Landfill. They explained they are interested in the environmental effects and the consequences on their livelihood, well being, health, and lands. The Appellants stated they are

not bringing the appeal for any general public interest purpose, although a public benefit might be achieved and is desirable.

[33] The Appellants explained they are vulnerable to the owner of the Landfill, a statutorily created government body. The Appellants stated the County is one of two regulators of the Landfill and one of the owners. The Appellants noted the County sets the land use and bylaws, and the County and the other municipal owners have the power to address the Appellants' situation by directing the Approval Holder to make some accommodation since it has accommodated other neighbours by purchasing their lands. The Appellants stated they feel vulnerable and at an unequal position compared to the Approval Holder. The Appellants stated they are sensitive to revealing their financial position to the Approval Holder because that information could be used to the Appellants' detriment.

[34] The Appellants stated that, if the Board requires further evidence to support the suggestion that the Appellants do not have the financial resources to pursue the appeal, then the Appellants could provide the information in confidence to the Board or to undertake to lead evidence during the hearing while they are under oath that they do not have the financial resources for this appeal. The Appellants assured the Board that the Appellants do not have the resources to retain legal counsel or experts.

[35] The Appellants stated the reason the Landfill is expanding is because it is very profitable for its owners. The Appellants explained the Landfill was designed and built for municipal purposes, and if that was still the case, there may be some argument that the environmental costs should be borne locally. The Appellants explained the Landfill has grown into a major business that benefits its operators and the several municipalities that own it. The Appellants argued the primary and direct effects are being endured by only a few, so the Approval Holder is generating profit at the expense of the Appellants. The Appellants submitted that it is equitable that the Approval Holder pays the costs of the Appellants. The Appellants noted they were modest in their request for expert assistance.

[36] The Appellants explained the costs associated with the preliminary motions hearing were incurred but have not been paid.

### III. INTERIM COSTS

#### A. Jurisdiction

[37] The legislative authority giving the Board jurisdiction to award costs is section 96 of EPEA which states:

“The Board may award costs of and incidental to any proceedings before it on a final or interim basis and may, in accordance with the regulations, direct by whom and to whom any costs are to be paid.”

[38] 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.*:<sup>4</sup>

“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.”<sup>5</sup>

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.]<sup>6</sup>

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

[39] Sections 18 and 19 of 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

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<sup>4</sup> *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (9 April 2001), Calgary 0001-11527 (Alta. Q.B.).

<sup>5</sup> *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (9 April 2001), Calgary 0001-11527 (Alta. Q.B.) at paragraph 23.

<sup>6</sup> *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (9 April 2001), Calgary 0001-11527 (Alta. Q.B.) at paragraphs 31 and 32.

- (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.
- (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.”

[40] 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.”

[41] The Board has generally accepted that the starting point is that costs incurred with an appeal are the responsibility of the individual parties.<sup>7</sup> It believes there is an obligation for each member of the public to accept some responsibility for bringing environmental issues to the forefront. This applies to interim costs as well as final costs.

## **B. Discussion**

[42] The Appellants requested costs of \$48,864.69, which included \$40,664.69 for legal expenses and \$8,200.00 to retain an expert.

[43] The Board is hesitant to award interim costs, because the Board considers an award of costs is recognition of the assistance a party has provided to the Board in its deliberations of its recommendations. When interim costs are awarded, the Board does not know if the party or its experts will be of any assistance to the Board. Although the Board can readjust the costs award in a final costs decision, it must also be cautious in awarding costs that may be more than what would be awarded in final costs. The Board believes it is the responsibility of those appearing before the Board to pay their own costs. If costs are awarded, the Board normally uses half of the legitimate costs claimed as a starting point in determining the costs awarded and then adjusts the award based on the helpfulness of the evidence presented.

[44] As noted in the Board’s previous decision, *Capstone Energy*,<sup>8</sup> the Board has recognized the challenges facing the agricultural community in the past few years:

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<sup>7</sup> Costs Decision: *Paron et al.* (8 February 2002), Appeal Nos. 01-002, 01-003 and 01-005-CD (A.E.A.B.).

<sup>8</sup> 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.) (“*Capstone Energy*”).

“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.”<sup>9</sup>

[45] In this case, the Board recognizes the struggles the Appellants have had to recover from the effects of the BSE issue that plagued the agricultural industry and the struggles of small family farms. The Appellants are directly affected by the Landfill and the Board needs to hear from the Appellants and their experts to determine the extent of the effects.

[46] In assessing costs, the Board looks at the issues being argued. In this case, the issues have a public interest, but the prime interest is limited to those living in the vicinity of the Landfill, and in particular, the Appellants. Therefore, it is important for the Board to hear the Appellants’ evidence. The Board accepts the Appellants have limited, if any, alternate sources of funding available to them.

[47] To determine whether interim costs should be awarded, the Board looks at whether the party has a specific plan to show where it is anticipated the costs will be incurred. The more specifics included in the plan, the clearer the Board will understand whether the interim costs are warranted. The Appellants provided a brief plan in that they explained the fees that would be attributed to legal costs and information on the expert they intended to retain and his approach to the issues. The plan provided by the expert indicates the hours he anticipates to spend preparing for the hearing and attending at the hearing, his hourly rate, and anticipated disbursements. The plan for legal costs was not as detailed in that it did not provide hourly rates, time anticipated to be spent on the file, or any detailed break down of the costs. This lack of detailed plan distinguishes it from the plan provided in *Capstone Energy*, where the Board awarded interim costs for legal fees. In *Capstone Energy*, the appellants provided a conservative costs plan broken down into hours that they anticipated would be spent on preparation, travel time, attending the hearing, and consultation time. The hourly rate was also provided. In the

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<sup>9</sup> 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.) at paragraph 32.

present case, the Appellants simply gave an estimate of the anticipated total legal costs. No further detail was provided.

[48] The legal expenses claimed included \$24,664.69 for work that has been completed, such as reviewing the Notice of Appeal and preparing submissions for the preliminary motions hearing. The intent of interim costs is to provide a party with assistance in preparing their submissions for the hearing. Essentially, interim costs are prospective in nature in that the work that is included in an interim costs application has yet to be completed.<sup>10</sup> Because the costs associated with the preliminary motions hearing have already been incurred, they cannot be considered in the interim costs application. The remaining \$16,000.00 being claimed is for costs legal counsel anticipates will be incurred in preparation for the hearing, including \$1,000.00 for disbursements.

[49] Although the Board anticipates legal counsel will help in keeping the submissions and cross examination focused on the issues during the hearing, the Board, at this point in time, cannot make any determination as to how effective counsel will be. Therefore, the Board will not award interim costs for the legal fees claimed. The Appellants are free to reserve their right to file a final costs application and include all of the legal fees assessed at the end of the hearing.

[50] The Board considers it reasonable that the Appellants retained a person with qualifications to advance the Appellants' issues. Although a human health risk expert may provide information that will assist the Board, the usefulness of the information cannot be assessed until after the hearing is held.

[51] The costs claimed for the Appellants' expert seems reasonable at \$1,200.00 per day. The expert claimed one day for attending the hearing and five days of preparation time. Disbursement costs included costs for travel, accommodation, and miscellaneous expenses. Because the disbursement costs are for costs actually expended, the Board will not consider these costs at this time. Considering the issues that will be heard, the Board believes it appropriate to

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<sup>10</sup> See: Re: TransAlta Utilities Corp. (2001), 38 C.E.L.R. (N.S.) 94 (A.E.A.B.), (sub nom. Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation*), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID (A.E.A.B.) at paragraph 150; and Costs Decision: *Paron et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation*) (8 February 2002), Appeal Nos. 01-002, 01-003 and 01-005-CD (A.E.A.B.).

have an expert assist in the presentation of the Appellants' evidence. Taking into consideration the issues and the financial limitations of the Appellants, the Board is willing to award costs for the Appellants' expert. However, at this stage of the Board's process, the Board will only consider the day claimed to attend the hearing and one day of preparation time. Therefore, the starting point for the costs claim is \$2,400.00, and given that the Board does not know the value of the evidence that will be given, the Board will reduce this amount to \$1,200.00. Therefore, the interim costs allowed total \$1,200.00.

**C. Who Should Pay the Costs?**

[52] The Appellants submitted that the Approval Holder should bear the costs.

[53] 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..."<sup>11</sup> 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."<sup>12</sup>

[54] The Board considers it appropriate in this case that the Approval Holder bears the responsibility of paying interim costs associated with this appeal. It is the Approval Holder that is benefitting from the changes allowed in the Approval, and the Approval Holder knows there is a risk of an appeal being filed when the project proceeds in a populated area.

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<sup>11</sup> 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.)

<sup>12</sup> 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.

[55] 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,<sup>13</sup> that costs should not be awarded against the Director providing his actions, while carrying out his statutory duties, were done in good faith. 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.

[56] Therefore, the Board concludes that no such special circumstances exist to warrant costs being awarded against the Director. Costs in the circumstances of this appeal will be paid by the Approval Holder.

#### **E. Final Costs**

[57] All of the Parties 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. 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 Regulation, which provides:

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

#### **IV. DECISION**

[58] The request for interim costs is reasonable and the Board believes an expert on human health risks will benefit the hearing process. Therefore, pursuant to section 96 of the *Environmental Protection and Enhancement Act*, the Board awards interim costs in the amount of \$1,200.00 to the Appellants. Costs are payable by Beaver Regional Waste Management Services Commission. The Board orders the costs be paid to the Appellants by November 17, 2008, and that the Beaver Regional Waste Management Services Commission provide the Board with confirmation that the costs have been paid by that date.

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<sup>13</sup> See: *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2001), 33 Admin. L.R. (3d) 140 (Alta. Q.B.).

[59] The Hearing is scheduled for December 17 and 18, 2008.

Dated on October 30, 2008, at Edmonton, Alberta.

*“original signed by”*

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Dr. Steve E. Hrudehy, FRSC, PEng  
Chair

*“original signed by”*

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Dr. M. Anne Naeth  
Board Member

*“original signed by”*

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Dr. Alan J. Kennedy  
Board Member