ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – May 20, 2011

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 appeals filed by Kent and Ingrid Vipond, Bernie and Margie Brown, Robert and Lisa Cowling, Bruce and Marcia Jeffers, Ian and Corrinne Zeer, and Jesse, Sarah, and Harji Hari and Haralta Ranches, with respect to *Environmental Protection and Enhancement Act* Approval No. 241939-00-00 issued to EcoAg Initiatives Inc. by the Director, Southern Region, Environmental Management, Alberta Environment.

Cite as: Interim Costs: *Vipond et al.* v. *Director, Southern Region, Environmental Management, Alberta Environment*, re: *EcoAg Initiatives Inc.* (20 May 2011), Appeal Nos. 09-006-009, 016 & 019-IC (A.E.A.B.).

BEFORE:	Mr. Alex G. MacWilliam, Panel Chair; Mr. Jim Barlishen, Board Member; and Ms. A.J. Fox, Board Member.
SUBMISSIONS BY:	
Applicants:	Mr. Robert and Ms. Lisa Cowling and Mr. Bruce and Ms. Marcia Jeffers, represented by Ms. Teresa Meadows, Miller Thomson LLP.
Appellants:	Mr. Kent and Ms. Ingrid Vipond; Mr. Bernie and Ms. Margie Brown; Mr. Ian and Ms. Corrinne Zeer; and Mr. Jesse, Ms. Sarah, and Mr. Harji Hari and Haralta Ranches.
Director:	Mr. Brock Rush, Director, Southern Region, Environmental Management, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.
Approval Holder:	EcoAg Initiatives Inc., represented by Mr. Kelly Nicholson, Field LLP.

EXECUTIVE SUMMARY

Alberta Environment issued an approval under the *Environmental Protection and Enhancement Act* to EcoAg Initiatives Inc., authorizing the construction, operation, and reclamation of the High River Waste Management Facility, located near High River, Alberta, for the collection and processing of waste to produce fuel (commonly referred to as biogas).

The Board granted standing to six appellants. The hearing is scheduled for February 9 to 11, 2011.

The Board received an interim costs application from Mr. Robert and Ms. Lisa Cowling and Mr. Bruce and Ms. Marcia Jeffers seeking costs of $24,700.00, made up of $15,000.00 for an expert hydrogeologist and $9,700.00 for legal counsel.

The Board was prepared to award $3,000.00 for legal counsel and $1,375.00 for expert costs for a total interim costs award of $4,375.00. However, the Board was concerned the applicants did not provide any satisfactory evidence that they sought contributions from the community they claimed to represent and/or from the other appellants. As one of the factors the Board looks at is whether other sources of funding were explored, the award was reduced by $1,000.00. Accordingly, the total interim costs award was $3,375.00, to be paid by the approval holder, EcoAg Initiatives Inc., on or before February 2, 2011.

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I. BACKGROUND

[1] On June 23, 2009, the Director, Southern Region, Environmental Management, Alberta Environment (the "Director"), issued Approval No. 241939-00-00 (the "Approval") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), to EcoAg Initiatives Inc. ("EcoAg" or the "Approval Holder") authorizing the construction, operation, and reclamation of the High River Waste Management Facility (the "Facility") located near High River, Alberta, for the collection and processing of waste to produce fuel and soil amendments.

[2] Between July 22 and September 29, 2009, the Environmental Appeals Board (the "Board") received Notices of Appeal from Mr. Kent and Ms. Ingrid Vipond (the "Viponds") (09-006), Mr. Bernie and Ms. Margie Brown (the "Browns") (09-007), Mr. Robert and Ms. Lisa Cowling (the "Cowlings") (09-008), Mr. Bruce and Ms. Marcia Jeffers (the "Jeffers") (09-009), Mr. Ian and Ms. Corrinne Zeer (the "Zeers") (09-016), and Mr. Jesse, Ms. Sarah, and Mr. Harji Hari and Haralta Ranches (the "Haris") (09-019) (collectively, the "Appellants").

[3] On January 14, 2011, the Board received an application for interim costs from the Cowlings and the Jeffers (collectively, the "Applicants" in this decision).

[4] Between January 17 and 24, 2011, the Board received comments on the application from the Appellants, Approval Holder, and Director.

II. SUBMISSIONS

A. Applicants

[5] The Applicants reported that they have worked countless hours on providing the community with information regarding the approvals process, the status of the appeals, and how interested community members could become involved. The Applicants stated they have been represented by legal counsel since July 2009.

[6] Further, the Applicants reported that they had pursued mediation from October 2009 until August 2010 and even though they worked diligently to move the matter forward as expeditiously as possible, the mediation became a protracted process that required significant involvement of legal counsel.

[7] The Applicants asserted that they had worked to advance the appeals, including addressing important preliminary motions. The Applicants stated that, since the filing of the Notice of Appeal, they have paid legal fees, disbursements, and GST in the amount of $30,210.77. The Applicants explained that of the total fees paid, $4,196.81 was for the preparation of the Notice of Appeal and $5,600.00 was for the preparation of submissions for the preliminary motions.

[8] The Applicants anticipated their counsel, Ms. Teresa Meadows, will require 24 hours to prepare written submissions for the hearing, brief and instruct experts, assist the Applicants in preparing for their appearance at the hearing, and prepare for the hearing. They noted that, at a discounted rate of $385.00 per hour, these fees will amount to $9,240.00 plus $462.00 for GST for a total of $9,702.00 in additional legal fees for preparation for the hearing.

[9] The Applicants declared that they have kept the other Appellants informed and advised of the Applicants' progress in retaining experts to provide joint technical evidence at the hearing, and the Applicants' submissions have addressed issues of interest to the Appellants and community members.

[10] The Applicants have retained the services of Mr. Roger Clissold of Hydrogeological Consultants Ltd. to prepare a report and provide expert evidence on groundwater issues at the hearing. The Applicants said Mr. Clissold's costs for his proposed involvement, including two days attending at the hearing, are estimated to be just over $23,000.00.

[11] The Applicants stated they are experiencing considerable financial and emotional stress since they are carrying the burden of the costs to date, and they have concerns they will be unable to continue their preparations for the hearing if interim costs are not granted.

[12] The Applicants recognized the Board's starting point when considering a costs application is that costs incurred with respect to an appeal are the responsibility of the individual parties. The Applicants said they accepted more than a little responsibility for bringing environmental issues to the forefront through their on-going commitment and participation in the approval and regulatory process associated with the Facility. The Applicants argued this is an exceptional case where they have contributed at great personal and financial costs to ensuring the concerns of the community are addressed.

[13] The Applicants reported that they are the only Appellants represented by legal counsel, and they have been responsible for paying the costs themselves despite the fact the participation of their legal counsel has furthered the aims of all the Appellants in the mediation and in the hearing.

[14] The Applicants argued this is an exceptional case given the protracted mediation attempt and the 10 months of effort and expenses totaling approximately $16,000.00 incurred by the Applicants before it became evident the mediation would not be successful. They said they have assumed more than some responsibility for bringing environmental issues to the forefront and, therefore, this is an appropriate case for the Board to consider an interim award of costs.

[15] The Applicants stated that, but for their appeals, they would not have retained the services of Ms. Meadows or Mr. Clissold and, therefore, these costs are directly related to the preparation of the Applicants' case at the hearing. The Applicants explained Ms. Meadows and Mr. Clissold are senior professionals in their fields with directly relevant experience who will contribute to an efficient and effective hearing. The Applicants said that even though Ms. Meadows' current billing rate is $425.00 per hour, she has maintained a discounted rate of $385.00 per hour and, since she could be deployed from the Calgary office of her law firm, she has not included travel expenses from Edmonton to Calgary.

[16] The Applicants maintained that their submissions assisted in:

1. establishing the scope of the hearing;
2. determining the parties to the hearing;
3. identifying potential intervenors; and
4. identifying gaps in the records before the Board.

They said their focus has been on ensuring the environmental issues of greatest concern to the community are identified and addressed. The Applicants argued that it is difficult to imagine a more active contributor to the hearing process than themselves.

[17] The Applicants explained the costs being sought are related specifically to out-of-pocket expenses for retaining a hydrogeology expert and for costs associated with legal counsel preparing written materials and preparing the Applicants and herself for the hearing. The Applicants said the purpose of their interim costs application was to ensure a lack of financial resources will not limit their ability to adequately prepare and present their case.

[18] The Applicants said their primary sources of income are farming and a small, home-based consulting practice. The Applicants referenced the Board's decision of *Oxtoby et al.* v. *Director, Central Region, Regional Services, Alberta Environment* re: *Capstone Energy Ltd.* (29 December 2004) Appeal Nos. 03-118, 120, 121, and 123-IC (A.E.A.B.) ("*Oxtoby*"), noting the Board was mindful of the difficulties facing the agriculture industry. The Applicants stated the conditions of high input costs, adverse weather, and little control over product prices continue to adversely impact farmers' incomes, including the Applicants'. The Applicants asked the Board to take judicial notice of the effects of the economic downturn in 2009-2010 that have adversely impacted the economic situation of all Albertans, including the Applicants' farming and consulting incomes.

[19] The Applicants explained they have exchanged numerous e-mails with various regulatory officials, consultants, academics, and technology providers and repeatedly sought information from the Director and Approval Holder in an attempt to gather the necessary background to understand the project, the approval process, and the environmental impacts that may be associated with the project. The Applicants indicated the number of local Alberta experts with experience in these types of facilities and the environmental impacts associated with these facilities is limited. The Applicants further stated that many such experts provided advice and direction under the Alberta Bioenergy Grant Program, a program that provided funding to the Approval Holder in the past and, therefore, were unable to advise the Applicants due to concerns over potential current or future conflicts of interest.

[20] The Applicants stated there is little publicly available information regarding the environmental impacts associated with facilities like those proposed by the Approval Holder. Further, the Applicants stated there are considerable gaps of information regarding the Facility and how it will actually be constructed, and this lack of information required the Applicants to seek additional information and to retain experts to provide an updated and more complete view of the issues.

[21] The Applicants explained they have consulted with the Appellants and interested community members throughout the process to ensure the environmental issues of greatest concern to the community have been considered. The Applicants stated they continue to coordinate their submissions with the Appellants, including advising the Appellants of the

participation of Mr. Clissold as an expert hydrogeologist and making Ms. Meadows available to the Appellants to respond to general process-related questions.

[22] The Applicants requested that, given the significant financial and personal costs they have incurred to date, interim costs of $24,700.00 be granted to defray the costs of preparing expert evidence for the hearing (anticipated to be approximately $15,000.00), and the costs of legal representation (anticipated to be approximately $9,600.00).

B. Appellants

[23] The Browns stated the Applicants should be granted interim funding for their work and effort. The Browns said the Applicants have given their time and spent a considerable amount of money to help themselves and their neighbours impacted by the Facility. The Browns argued the Applicants' efforts cannot be measured monetarily, and they should be compensated for their costs.

[24] The Zeers felt the Applicants should be paid the full amount of the costs requested because they have carried most of the financial and personal burden of these proceedings. The Zeers said they are unable to retain their own lawyer and have depended heavily on the Applicants for advice and information leading up to the hearing. The Zeers stated they would not have been able to participate in these appeals without the assistance of the Applicants who answered hundreds of telephone calls and e-mails.

[25] The Viponds were in favour of the Applicants being granted interim costs because the Applicants:

1. consulted a lawyer on their neighbours' behalf;
2. provided advice on submissions and proceedings;
3. put countless hours into letters, presentations, and telephone calls; and
4. should not have to encounter such financial stress in appealing a facility which will have a devastating effect on an entire community.

[26] The Haris stated the Applicants should be granted interim costs because their counsel was beneficial to the proceedings.

C. Approval Holder

[27] The Approval Holder submitted it is not appropriate to award interim costs to the Applicants, because they did not demonstrate that the requirements of the *Environmental Appeal Board Regulation*, Alta. Reg. 11493 (the "Regulation") were met.

[28] The Approval Holder noted that, in previous decisions, the Board did not award interim costs for legal fees but considered legal fees were more appropriately dealt with in a final costs application. The Approval Holder argued the Board cannot predetermine legal counsel's effectiveness in keeping submissions focused during the hearing. The Approval Holder stated "…it is possible that focus will be lost at the hearing, and much time will be spent by the Applicants attempting to bring up matters that are not relevant to the Approval."[1] The Approval Holder submitted it would be inappropriate to award interim costs for legal fees at this time.

[29] The Approval Holder noted most of the amount claimed by the Applicants was to defray costs associated with retaining an expert hydrogeologist to review data, prepare a written report, and attend at the hearing. The Approval Holder stated it is unclear how a hydrogeologist's report on groundwater in the area will assist the Board in these appeals for the following reasons:

1. Any data reviewed regarding the existing groundwater conditions would have nothing to do with the proposed Facility's operation because it has not begun to operate;
2. The approved process operates in a building in a contained environment. All emissions are filtered through a biofilter so there is no mechanism for groundwater contamination;
3. All runoff and stormwater must be treated and stored as industrial wastewater; and
4. Groundwater monitoring is another level of protection.

[30] The Approval Holder noted that currently there is no groundwater impact data relating to the Facility, because it is not yet operating.

[31] The Approval Holder argued the costs claimed in respect of Mr. Clissold's work were excessive and unclear, because the Applicants did not indicate what portion of the

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[1] Approval Holder's submission, dated January 24, 2011, at paragraph 17.

$15,000.00 related to preparation for the hearing, attendance at the hearing, or time already spent by the expert. The Approval Holder said the amount should be much less given:

1. The Board does not yet know the value of the evidence that will be given;
2. The groundwater data reviewed cannot reflect impacts from a Facility that has not begun operations and, as a result, the expert's evidence will go to matters not in issue in these appeals; and
3. The expert's costs were not itemized in a fashion that allows the Board to determine what amounts have already been expended.

[32] The Approval Holder said it has already spent a considerable amount of money responding to the requirements of the Director with respect to groundwater monitoring and reporting, conducting permeability and pile testing on the building housing the Facility, and paying for two third party, licenced hydrogeologists to submit findings in relation to the site. The Approval Holder submitted that imposing a further financial burden on it in this context would be inappropriate.

[33] The Approval Holder stated the Applicants did not provide actual information related to their finances to support their assertion that they are economically disadvantaged. It said no information relating to the financial performance of the Applicants' farming or consulting businesses or income was made available, so it would be impossible to determine whether they are actually disadvantaged economically.

[34] The Approval Holder submitted that the rationale found in the *Oxtoby* decision, which is more than six years old, cannot serve as an "automatic pass" for applicants in the agriculture industry to avoid the requirement to demonstrate a need for interim costs. The Approval Holder argued there is no material before the Board to support the position that the unique factor that militated in favour of interim costs in *Oxtoby* is still a contributing factor to economic disadvantages for the Applicants.

[35] The Approval Holder noted the Applicants asked the Board to take judicial notice of the economic downturn of 2008 to 2010. The Approval Holder submitted that, while the Board may take judicial notice of the economic trends from 2008 to 2010, it is not obliged to treat as a matter of judicial notice the corollary, that the Applicants have been economically disadvantaged by the economic downturn. The Approval Holder said it is possible the

Applicants were unaffected or may have even benefited by the economic downturn. The Approval Holder argued the Applicants' argument that the Board should take judicial notice of the economic downturn and thereby excuse the Applicants from otherwise demonstrating economic need on that basis is without merit.

[36] The Approval Holder claimed the Applicants' submission regarding their attempts to use other funding sources only relates to their attempts to locate different sources of information relating to the Facility. The Approval Holder noted the Applicants did not mention what steps they might have taken to secure other sources of funding and, therefore, the requirement under the Regulation to demonstrate an attempt to use other funding sources was not met.

[37] The Approval Holder argued the Applicants made little effort to demonstrate they attempted to consolidate common issues or resources with other parties. The Approval Holder said this is particularly important in a matter like this one where there are so many parties and the risk of duplication of evidence is high. The Approval Holder submitted that interim costs should only be granted where it is clear the applicant has taken steps to consolidate issues and resources with the other parties.

[38] The Approval Holder asked that the application for interim costs be denied.

D. Director

[39] The Director submitted that he should not be responsible for paying any of the interim costs to the Applicants. He made no submission with respect to whether the Board or the Approval Holder should pay any of the interim costs.

[40] The Director noted the Board and the Courts have developed principles regarding costs specific to the Director given his unique role as statutory decision-maker whose decision is being appealed. The Director stated his statutory role has been considered a vital factor in not ordering costs against the Director as long as the Director was acting on good faith. The Director stated these principles are applicable to this interim costs claim and, as 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, he should not be responsible to pay the interim costs claimed.

III. Analysis

[41] 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."

[42] 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.*:[2]

> "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."

[43] 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….'"

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

[45] 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 had determined all parties to the appeal.

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

(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."

[46] 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."

[47] The Board has generally accepted, as the starting point, that costs incurred in an appeal are the responsibility of the individual parties. 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.

[48] The Board has generally viewed interim costs as those costs associated with work that has to be done in preparation for and attendance at the hearing and does not include costs associated with work that has already been completed. Therefore, costs associated with attending mediation meetings, community meetings, and preparation of preliminary submissions are not considered in interim costs awards. This does not preclude the parties from choosing to claim such costs in a final costs application.

[49] To determine whether interim costs should be awarded, the Board looks at whether the party applying 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. In their costs application, the Applicants divided the anticipated costs between legal costs and costs associated with retaining an expert.

[50] An application for interim costs needs to include enough detail to understand where the funds will be used if awarded. There must be an explanation as to why specific amounts are claimed, including estimates of the number of hours that will be required for preparation and attendance at the hearing.

[51] The Applicants asked for legal costs totalling $9,600.00 for 24 hours at a rate of $385.00 per hour. The Applicants anticipated another 24 hours would be required for their counsel to prepare for the hearing. It is unclear how they decided on the 24 hours. It can be assumed they determined there would be one hour of preparation for each hour of the hearing. Since the hearing is over three days, and based on an eight hour day, that would amount to 24 hours. Although an explanation of how this number was chosen would have been beneficial, the Board is willing to accept this ratio of preparation time to hearing time is reasonable and well within the expected time the Board considers appropriate for preparing for a hearing.

[52] The Board is of the opinion that legal counsel at the hearing will be beneficial to ensure the evidence remains focussed on the issues previously defined by the Board. The Approval Holder also noted there may be benefits of having legal representation present at the hearing to assist in keeping the Applicants focussed on the issues. Therefore, the Board will award interim costs for the involvement of the Applicants' legal counsel.

[53] According to Ms. Meadows' curriculum vitae, she was called to the Alberta Bar 18 years ago. Based on the tariff of fees used by the Government of Alberta for outside counsel,

a lawyer of her experience would charge for her services at the rate of $250.00 per hour. The Board considers the Government of Alberta rate as an appropriate tariff against which to judge the appropriateness of legal fees, but it is always cognizant that there may be circumstances in which it may not be appropriate.[3]

[54] The costs claimed for legal counsel is reasonable given the three-day hearing scheduled. Based on a rate of $250.00 per hour for 24 hours, the costs for legal counsel would be $6,000.00. When awarding costs, the Board starts at half of the reasonable costs claimed, and it will adjust the costs awarded from this starting point. This recognizes the parties' responsibility for bringing issues forward and allows the Board to adjust the costs based on the parties' assistance or, in an interim costs application the anticipated assistance, in bringing the issues forward. The Board considers that legal costs in the amount set out above are reasonable and the Board anticipates Ms. Meadows' participation at the hearing will be beneficial. Therefore, the Board will allow interim costs for legal counsel at $3,000.00.

[55] Mr. Clissold's rate is $425.00 per hour. Although this rate may be within the range for an expert with Mr. Clissold's expertise and experience, the rate appears high for an interim costs award.

[56] In order to find a reasonable rate, the Board used the following formula to determine the appropriate cost for consultants: (((salary + overhead) x profit)/billable hours worked per year).[4] To determine annual salary, the Board referred to the Association of Professional Engineers, Geologists and Geophysicists of Alberta document, 2010 Value of Professional Services. Given Mr. Clissold's experience, the Board used the top level salary mean for geologists, which is $206,147.00 per annum. It is common practice to use the annual salary as the amount required to cover overhead. In addition, the Board allowed for a profit of 20 percent, which is represented by 1.2 in the formula. The Board expects that a person with Mr. Clissold's years of experience would be entitled to 4 weeks of holidays per year. Based on 48 weeks per year and 37.5 billable hours per week (7.5 hours x 5 days), the total billable hours per year would be 1800 hours. When these values are placed in the equation, (((206,147 + 206,147)

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[3] See: Costs Decision re: *Kievit et al.* (12 November 2002), Appeal Nos. 01-097, 098, and 101-CD (A.E.A.B.) at paragraph 42 and associated footnotes.

[4] This formula is used by the United States State Department. See: <http://www.state.gov/documents/organization/75157.doc>

x 1.2)/1800), the hourly rate would be $274.86. For the Board's purposes, it will use $275.00 per hour.

[57] The Board notes that surface water and groundwater are only two of some 13 issues that have been identified as relevant for the hearing. Therefore, it is reasonable to expect Mr. Clissold, although attending the hearing for two days, will have a limited role when evidence on issues beyond his expertise is presented. Therefore, the Board will consider, as a starting point, 10 hours for his attendance at the hearing.

[58] Based on an hourly rate of $275.00 for 10 hours, the Board will consider $2,750.00 of the costs claimed for Mr. Clissold. As stated above, the Board's starting point in assessing costs award is 50 percent of eligible costs. Based on this starting point, the Board awards interim costs of $1,375.00 for Mr. Clissold's preparation for and attendance at the hearing.

[59] Based on the above, the Board is prepared to consider the total interim costs for the Applicants' legal counsel ($3,000.00) and expert ($1,375.00) is $4,375.00. However, one of the factors the Board must apply when determining whether interim costs should be awarded is whether the applicant made adequate attempts to obtain funding from other sources. Although the Applicants in this case explained they have contacted non-governmental organizations, educational institutions, and other entities to obtain *information* and possibly appear as witnesses, they did not provide any evidence as to whether they attempted to obtain funding from these entities or from the other Appellants to help defray costs. Given the absence of such evidence, the Board must conclude that adequate attempts were not made. Accordingly, the Board is reducing the total costs determined above by $1,000.00, resulting in a total interim costs award of $3,375.00.

[60] It is clear from the other Appellants' submissions that they have also been relying on the legal assistance of the Applicants' counsel. These Appellants stated the Applicants have devoted much time and resources to the appeals for the benefit of the Applicants themselves and the community at large, including the Appellants. Since all of the Appellants recognized the value of the Applicants' efforts, it would seem reasonable that the Appellants should be willing to offer some funding towards the costs incurred to date, and to be incurred, by the Applicants.

A. Who Should Bear the Costs?

[61] 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…."[5] 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 project's financing, than upon the public at large as would be the case if they were to be assessed against the Department."[6]

[62] 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,[7] that costs should not be awarded against the Director providing his actions, while carrying out his statutory duties, were done in good faith. At this stage of the process, there is no indication the Director's decision was made in bad faith.

[63] The Board considers it appropriate in this case that the Approval Holder bears the responsibility of paying interim costs associated with these appeals. It is the Approval Holder that is benefitting from the Approval, and the Approval Holder knows there is a risk of an appeal when an application is made for an approval.

B. Final Costs

[64] Each party to this appeal can make an application for final costs. If they choose to do so, they must advise the Board in their written submissions and prior to the close of the hearing. The Applicants are free to submit a final costs submission and request the Board consider any additional costs incurred, legal and otherwise. However, the Applicants must remain aware of section 19(5) of the Regulation, which provides:

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[5] 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 Alberta Environment 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.)

[6] 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.

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

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

IV. DECISION

[65] For the foregoing reasons and pursuant to section 96 of the *Environmental Protection and Enhancement Act*, the Board awards interim costs to the Applicants totaling $3,375.00. The Board orders that on or before February 2, 2011, EcoAg Initiatives Inc. shall pay the amount of $3,375.00 in trust to legal counsel for the Applicants for the purpose of paying legal and consulting costs. EcoAg Initiatives Inc. shall provide the Board with written confirmation of this payment.

Dated on May 20, 2011, at Edmonton, Alberta.

"*original signed by*"

Alex G. MacWilliam
Panel Chair

"*original signed by*"

Jim Barlishen
Board Member

"*original signed by*"

A.J. Fox
Board Member