ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – May 13, 2016

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 appeals filed by Roxanne Walsh and Julie Walker with respect to the decisions of the Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource Development, to issue Amending Approval Nos. 1242-02-02, 1242-02-04, and 1242-02-05 under the *Environmental Protection and Enhancement Act* and Approval No. 00334295-00-00 under the *Water Act* to the Town of Turner Valley.

Cite as: Costs Decision: *Walsh and Walker* v. *Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: *Town of Turner Valley* (13 May 2016), Appeal Nos. 13-022-025, 14-011 and 14-018-CD (A.E.A.B.).

BEFORE: Mr. Alex MacWilliam, Board Chair,
Mr. Jim Barlishen, Board Member, and
Dr. Dave Evans, Board Member.

PARTIES:

Appellants:	Ms. Roxanne Walsh and Ms. Julie Walker.
Approval Holder:	Town of Turner Valley, represented by Mr. Ron Kruhlak, Q.C. and Ms. Jessica Proudfoot, McLennan Ross LLP.
Director:	Mr. Brock Rush, Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource Development,* represented by Ms. Alison Altmiks, Ms. Wendy Thiessen, and Ms. Nicole Hartman, Alberta Justice and Solicitor General.

* AESRD is now called Alberta Environment and Parks. However, all relevant events occurred regarding this appeal while the Department was called Alberta Environment and Sustainable Resource Development.

EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development (AESRD)* issued three Amending Approvals under the *Environmental Protection and Enhancement Act* and an Approval under the *Water Act* to the Town of Turner Valley (the Town) to construct, operate, and reclaim a waterworks system for the Town and to construct an infiltration gallery below the bank of the Sheep River.

Ms. Roxanne Walsh and Ms. Julie Walker (the Appellants) appealed the decisions to issue the Amending Approvals and *Water Act* Approval.

The Board held a hearing at which the Board heard evidence and argument on eight issues. The Board provided the Minister with its Report and Recommendations and the Minister issued an Order incorporating the recommendations.

The Board received costs applications from the Appellants (totalling $75,095.61 for consultants' fees and disbursements and the Appellants' costs) and the Town (totalling $584,563.09 for expert witness fees and disbursements, legal fees and disbursements, and the Town's costs).

Prior to the hearing, the Appellants applied to the Board for interim costs. After considering submissions from the Appellants and the Town, the Board awarded costs totalling $2,191.88, including GST to the Appellants in respect of fees to be paid to their consultants, WDA Consultants Inc. for their assistance at the hearing. These costs were payable by the Town. The Board subsequently determined the contribution of the Appellants' consultants at the hearing warranted retention of the interim cost award. The Board determined that no additional costs should be awarded to the Appellants.

The Board denied the costs application filed by the Town. The Board determined the costs associated with an appeal are part of the approval process and part of doing business, even though the approval holder in this case is a municipality.

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* AESRD is now called Alberta Environment and Parks. However, all relevant events occurred regarding these appeals while the Department was called AESRD.

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I. INTRODUCTION

[1] This is the Environmental Appeals Board's reasons for decision on the costs applications in respect of appeals of Amending Approval Nos. 1242-02-02, 1242-02-04, and 1242-02-05 (collectively, the "Amending Approvals") issued under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), and Approval No. 00334295-00-00 (the "*Water Act* Approval") under the *Water Act*, R.S.A. 2000, c. W-3. The Amending Approvals and the *Water Act* Approval (collectively, the "Approvals") were issued to the Town of Turner Valley (the "Approval Holder" or the "Town") by Alberta Environment and Sustainable Resource Development ("AESRD")[1] for the purposes of constructing, operating, and reclaiming a water works system for the Town, and for the construction of an infiltration gallery below the bank of the Sheep River at NW 6-20-2-W5M. Ms. Roxanne Walsh and Ms. Julie Walker (collectively, the "Appellants") appealed the decisions to issue the Approvals.

[2] The Board held a hearing in Turner Valley from April 28 to May 1, 2015. The Board provided its Report and Recommendations to the Minister, and the Minster issued an Order confirming Amending Approval No. 1242-02-04 and the *Water Act* Approval, and varying Amending Approval Nos. 1242-02-02 and 1242-02-05.

[3] The Appellants and Approval Holder submitted costs applications pursuant to section 96 of EPEA.

[4] The Board awarded costs totalling $2,191.88, payable by the Approval Holder, to the Appellants' consultants for their assistance in the hearing. Since the Approval Holder had previously paid this amount to the Appellants as part of an interim costs award, no additional costs were required to be paid by the Approval Holder.

[5] The Board denied the costs application filed by the Approval Holder as its involvement in an appeal is recognized as a potential consequence of seeking an approval under EPEA or the *Water Act*.

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[1] AESRD is now called Alberta Environment and Parks. However, all relevant events occurred regarding these appeals while the Department was called AESRD.

II. BACKGROUND

[6] The procedural history of the appeals is contained in the Board's Report and Recommendations in Appendix A.[2]

[7] The Board provided its Report and Recommendations to the Minister on August 14, 2015. On October 6, 2015, the Board provided its Report and Recommendations and the Ministerial Order to the Parties.[3]

[8] On November 30, 2015, the Appellants and Approval Holder submitted applications for costs.

[9] On December 11, 2015, the Board received response comments from the Parties in response to the costs applications.

[10] On January 20, 2016, the Board notified the Parties that the interim costs of $2,191.88 to the Appellants' consultants were confirmed and that no additional costs would be awarded to the Appellants' consultants. The Board also stated it would not be awarding costs to the Appellants or the Approval Holder.

III. LEGAL BASIS FOR COSTS

A. Statutory Basis for Costs

[11] The legislative authority giving the Board jurisdiction to award costs is section 96 of EPEA which provides: "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." This section gives the Board broad discretion in awarding costs. As stated by Mr. Justice Fraser of the Court of Queen's Bench in *Cabre*:

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2 See: *Walsh and Walker* v. *Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: *Town of Turner Valley* (14 August 2015), Appeal Nos. 13-022-025, 14-011 and 14-018-R (A.E.A.B.).

3 See: *Walsh and Walker* v. *Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: *Town of Turner Valley* (14 August 2015), Appeal Nos. 13-022-025, 14-011 and 14-018-R (A.E.A.B.).

"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."[4]

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.)[5]

[12] The *Environmental Appeal Board Regulation*,[6] (the "Regulation") provides that:

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

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

(a) the matters contained in the notice of appeal, and
(b) the preparation and presentation of the party's submission.

...

20(1) Where an application for an award of final costs is made by a party, it shall be made at the conclusion of the hearing of the appeal at a time determined by the Board.

(2) In deciding whether to grant an application for an award of final costs in whole or in part, the Board may consider the following:

(a) whether there was a meeting under section 11 or 13(a);
(b) whether interim costs were awarded;
(c) whether an oral hearing was held in the course of the appeal;
(d) whether the application for costs was filed with the appropriate information;
(e) whether the party applying for costs required financial resources to make an adequate submission;
(f) whether the submission of the party made a substantial contribution to the appeal;

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4 *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraph 23 (Alta. Q.B.).

5 *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

6 *Environmental Appeal Board Regulation*, A.R. 114/93.

(g) whether the costs were directly related to the matters contained in the notice of appeal and the preparation and presentation of the party's submission;
(h) any further criteria the Board considers appropriate.

(3) In an award of final costs the Board may order the costs to be paid in whole or in part by either or both of

(a) any other party to the appeal that the Board may direct;
(b) the Board.

(4) The Board may make an award of final costs subject to any terms and conditions it considers appropriate."

[13] When applying these criteria to the specific facts of the appeal, the Board must remain cognizant of the purposes of the *Water Act* as stated in section 2.[7]

[14] The Board has stated in prior decisions that it has the discretion to decide which of the criteria listed in EPEA and the Regulation should apply to a particular claim for costs.[8] The Board also determines the relevant weight to be given to each criterion, depending on the specific circumstances of each appeal.[9] In *Cabre*, Mr. Justice Fraser noted that section "...20(2) of the Regulation sets out several factors that the Board 'may' consider in deciding whether to

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7 Section 2 of the *Water Act* provides:

"The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing:

(a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
(b) the need for Alberta's economic growth and prosperity;
(c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
(d) the shared responsibility of all 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;
(e) the importance of working co-operatively with the governments of other jurisdictions with respect to transboundary water management;
(f) the important role of comprehensive and responsive action in administering this Act."

8 *Zon* (1998), 26 C.E.L.R. (N.S.) 309 (Alta. Env. App. Bd.), (*sub nom. Costs Decision re: Zon et al.)* (22 December 1997), Appeal Nos. 97-005 to 97-015 (A.E.A.B.)).

9 *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.).

award costs..." and concluded "...that the Legislature has given the Board a wide discretion to set its own criteria for awarding costs for or against different parties to an appeal."[10]

[15] As stated in previous decisions, the Board evaluates each costs application against the criteria in EPEA and the Regulation and the following:

> "To arrive at a reasonable assessment of costs, the Board must first ask whether the Parties presented valuable evidence and contributory arguments, and presented suitable witnesses and skilled experts that:
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> (a) substantially contributed to the hearing;
> (b) directly related to the matters contained in the Notice of Appeal; and
> (c) made a significant and noteworthy contribution to the goals of the Act.
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> If a Party meets these criteria, the Board may award costs for reasonable and relevant expenses such as out-of-pocket expenses, expert reports and testimony or lost time from work. A costs award may also include amounts for retaining legal counsel or other advisors to prepare for and make presentations at the Board's hearing."[11]

[16] Under section 18(2) of the Regulation, costs awarded by the Board must be "directly and primarily related to ... (a) the matters contained in the notice of appeal, and (b) the preparation and presentation of the party's submission." These elements are not discretionary.[12]

B. Courts vs. Administrative Tribunals

[17] In applying these costs provisions, it is important to remember there is a distinct difference between costs associated with civil litigation and costs in quasi-judicial proceedings. The Board must take the public interest into consideration when making its final decision or recommendation. The outcome is not simply a determination of a dispute between parties. Therefore, the Board is not bound by the "loser-pays" principle used in civil litigation. In

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[10] *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

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

[12] *New Dale Hutterian Brethren* (2001), 36 C.E.L.R. (N.S.) 33 at paragraph 25 (Alta. Env. App. Bd.), (*sub nom. Cost Decision re: Monner*) (17 October 2000), Appeal No. 99-166-CD (A.E.A.B.).

determining whether an award of costs is appropriate, the Board will consider the public interest generally and the overall purposes listed in section 2 of the *Water Act*.

[18] The distinction between costs awarded in judicial and quasi-judicial settings was stated by the Federal Court of Appeal in *Bell Canada* v. *C.R.T.C.*:

> "The principle issue in this appeal is whether the meaning to be ascribed to the word [costs] as it appears in the Act should be the meaning given it in ordinary judicial proceedings in which, in general terms, costs are awarded to indemnify or compensate a party for the actual expenses to which he has been put by the litigation in which he has been involved and in which he has been adjudged to have been a successful party. In my opinion, this is not the interpretation of the word which must necessarily be given in proceedings before regulatory tribunals."[13]

[19] The effect of this public interest requirement was also discussed by Mr. Justice Fraser in *Cabre*:

> "...administrative tribunals are clearly entitled to take a different approach from that of the courts in awarding costs. In *Re Green, supra* [*Re Green, Michaels & Associates Ltd. et al. and Public Utilities Board* (1979), 94 D.L.R. (3d) 641 (Alta. S.C.A.D.)], the Alberta Court of Appeal considered a costs decision of the Public Utilities Board. The P.U.B. was applying a statutory costs provision similar to section 88 (now section 96) of the Act in the present case. Clement J.A., for a unanimous Court, stated, at pp. 655-56:
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> > 'In the factum of the appellants a number of cases were noted dealing with the discretion exercisable by Courts in the matter of costs of litigation, as well as statements propounded in texts on the subject. I do not find them sufficiently appropriate to warrant discussion. Such costs are influenced by Rules of Court, which in some cases provide block tarrifs [*sic*], and in any event are directed to *lis inter partes*. We are here concerned with the costs of public hearings on a matter of public interest. There is no underlying similarity between the two procedures, or their purposes, to enable the principles underlying costs in litigation between parties to be

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[13] *Bell Canada* v. *C.R.T.C.*, [1984] 1 F.C. 79 (Fed. C.A.). See also: R.W. Macaulay, *Practice and Procedure Before Administrative Tribunals*, (Scarborough: Carswell, 2001) at page 8-1, where he attempts to

> "...express the fundamental differences between administrative agencies and courts. Nowhere, however, is the difference more fundamental than in relation to the public interest. To serve the public interest is the sole goal of nearly every agency in the country. The public interest, at best, is incidental in a court where a court finds for a winner and against a loser. In that sense, the court is an arbitrator, an adjudicator. Administrative agencies for the most part do not find winners or losers. Agencies, in finding what best serves the public interest, may rule against every party representing before it."

> necessarily applied to public hearings on public concerns. In the latter case the whole of the circumstances are to be taken into account, not merely the position of the litigant who has incurred expense in the vindication of a right.'"[14]

[20] EPEA and the Regulation give the Board authority to award costs if it determines the situation warrants it. As stated in *Mizera*:

> "Section 88 (now section 96) of the Act and section 20 of the Regulation give the Board the ability to award costs in a variety of situations that may exceed the common law restrictions imposed by the courts. Since hearings before the Board do not produce judicial winners and losers, the Board is not bound by the general principle that the loser pays, as outlined in *Reese*. [*Reese* v. *Alberta (Ministry of Forestry, Lands and Wildlife)* (1992) Alta. L.R. (3d) 40, [1993] W.W.R. 450 (Alta.Q.B.).] The Board stresses that deciding who won is far less important than assessing and balancing the contributions of the Parties so the evidence and arguments presented to the Board are not skewed and are as complete as possible. The Board prefers articulate, succinct presentations from expert and lay spokespersons to advance the public interest for both environmental protection and economic growth in reference to the decision appealed."[15]

IV. APPELLANTS' COSTS APPLICATION

A. Submissions

1. Appellants

[21] The Appellants claimed costs of $75,095.61, including GST. The claim comprised: (1) WDA Consultants Inc. ("WDA") fees and disbursements - $69,263.09[16]; (2) Ms. Walsh's costs - $3,056.61; (3) Ms. Walker's costs - $2063.22; and (4) Ms. Walsh's and Ms. Walker's shared costs - $712.69.

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[14] *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraph 32 (Alta. Q.B.).

[15] *Mizera* (2000), 32 C.E.L.R. (N.S.) 33 at paragraph 9 (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.). See: Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C at paragraph 9 (A.E.A.B.).

[16] The total costs amount claimed for WDA included a reduction of $2,191.88 that was awarded as interim costs and $1,237.90 paid through Crowd Funding sources. Two people from WDA attended the hearing, Dr. Udo Weyer and Mr. James Ellis.

[22] The Appellants stated the work done for the appeals included: (1) reviewing the application; (2) obtaining evidence; (3) preparing submissions for the hearing; and (4) attending the hearing.

[23] The Appellants said an award of costs would be consistent with, and further the goals set out in, section 2 of EPEA, particularly sections 2(a), (d), (f), and (g).[17]

[24] The Appellants stated the costs claimed were directly related to the matters in their Notices of Appeal and to the preparation for and presentation at the hearing. The Appellants explained Dr. Udo Weyer and his assistant, Mr. James Ellis, were retained to assess the interaction between groundwater, the infiltration gallery and reservoir, and the effectiveness of the sampling protocols and parameters.

[25] The Appellants said they, and their experts, prepared an organized, thorough submission that was clear and succinct.

[26] The Appellants explained that Ms. Walsh's costs related to researching the history of the Turner Valley Gas Plant and past waste disposal practices which she considered were relevant to the issues identified by the Board.

[27] The Appellants said the costs claimed were reasonable, in line with going rates for the work performed, and covered wages for time taken away from work to attend the hearing.

[28] The Appellants stated the Board recommended amendments to the Approvals, indicating the Appellants had considerable success in their appeals. The Appellants noted the contribution they made in raising the issues in their appeals. The Appellants noted the Board

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17 Sections 2(a), (d), (f), and (g) of EPEA state:

"The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:

(a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;...

(d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;...

(f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;

(g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment...."

recommended the Approval Holder conduct low flow water testing as a result of Dr. Weyer's and Mr. Ellis' participation in the hearing.

[29] The Appellants noted the Director and Approval Holder were represented by legal counsel and retained numerous experts to address the technical issues.

[30] The Appellants stated they required financial resources to make an adequate submission, and their evidence would not have been as effective or useful if they had not retained experts. Ms. Walsh explained she had not earned an income since 2006, and Ms. Walker had a modest income, making it difficult to finance an appeal. The Appellants said they used an internet crowd source funding platform to help offset the costs of their experts, successfully raising $1,237.90 which was paid directly to Dr. Weyer. They said they approached other environmental organizations for funds but were unsuccessful.

[31] The Appellants argued they had many obstacles to overcome as a result of the Director's and Approval Holder's approach to the Approvals and appeals, including the nature of the Approvals, in that the Approvals were issued one after another, which made it impossible to determine the issues at the outset.

[32] The Appellants expressed concern regarding the Water Works Advisory Committee that was set up as a result of a mediated agreement between the Approval Holder and Ms. Walsh in a previous appeal.[18]

[33] The Appellants stated the costs should be paid by the Approval Holder and Director.

[34] Ms. Walsh asked for personal costs totalling $2,331.61, which included costs for office supplies ($68.63), photocopying ($221.10), transit and mileage ($2,004.26), postage ($13.07), and parking ($24.55). Ms. Walsh explained mileage was charged at the same rate as her consultant. Ms. Walsh noted she did not charge for time travelling to Calgary and Edmonton to conduct research, time negotiating preliminary matters in the Board's process, and time spent analyzing materials, conducting research, and preparing submissions. Ms. Walsh said costs were

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[18] See: *Walsh* v. *Director, Southern Region, Environmental Management, Alberta Environment,* re: *Town of Turner Valley* (15 July 2009), Appeal No. 08-019-DOP (A.E.A.B.).

reduced because she did not have legal counsel at the hearing. She noted she shared resources when appropriate with Ms. Walker. Ms. Walsh claimed 14.5 hours at $50.00 per hour for the time she spent assisting Ms. Walker, for a total of $725.00. The total costs claimed by Ms. Walsh were $3,056.61.

[35] Ms. Walker explained she had to take time off from work to prepare for the hearing, prepare her submission, and attend the hearing. Ms. Walker said she lost $1,504.00 in income as a result. Ms. Walker stated she had additional costs for office supplies ($316.50) and parking ($8.00). In addition, Ms. Walker said there were mileage costs driving to Calgary to meet with the consultants and the lawyer the Appellants had retained ($234.72). Ms. Walker explained she charged mileage at a rate of $0.45 per kilometre, the rate she charges through her business. The total costs claimed by Ms. Walker were $2,063.22.

[36] The Appellants also claimed $712.69 for shared expenses.

[37] The Appellants' consultants prepared a submission in support of the costs application. WDA explained they reviewed the Records and documents, evaluated the data contained in the Records, prepared a report on behalf of the Appellants and submitted it to the Board, prepared a presentation for the hearing, reviewed the hydrogeological portion of the Approval Holder's and Director's submissions, testified at the hearing and underwent cross-examination, and assisted the Appellants in cross-examining witnesses and preparing closing statements.

[38] WDA stated the issues at the hearing were complex and required a significant amount of technical expertise. They explained they focussed on the annual monitoring reports for the reservoir and monitoring network, the details of the construction and plans for the vault well and infiltration gallery, and the post-2013 flood activities. WDA said they analyzed the hydrogeological data in great detail using WDA's proprietary program, which improved the evaluation of the data. WDA said it processed the chemical data provided by the Approval Holder to evaluate trends in the chemistry. WDA stated these assessments were necessary to develop an understanding of the hydrogeological systems to assess their impact on the issues. WDA said that, based on the professional data evaluation, Dr. Weyer came to conclusions that had been missed, such as the periodicity of the chemical data and the necessity of low-flow

sampling at the site. WDA noted Dr. Weyer's conclusions were incorporated into the Board's recommendations.

[39] WDA stated it did not attend the final day of the hearing in order to reduce costs.

[40] WDA stated its rates were within comparable rates charged for professionals of similar experience. WDA noted that, according to the Scale of Costs established by the Alberta Energy Regulator, Dr. Weyer would be entitled to a rate of $270.00 per hour rather than the $200.00 per hour he charged the Appellants. Dr. Weyer charged $44,992.50, including GST, for 214.25 hours of work. WDA explained that, whenever possible, Mr. Ellis performed the bulk of the data collection and processing work, reducing the rate charged to $100.00 per hour. Total hours claimed for Mr. Ellis were 261 for a total of $27,405.00, including GST.

[41] WDA explained expenses charged included: (1) parking fees and transit costs when collecting documents and meeting with the Appellants and the lawyer who initially agreed to take on the case ($33.46); (2) mileage, at the government rate of $0.46 per kilometre, for traveling from Calgary to the hearing in Turner Valley ($199.29); and (3) meals ($48.53).

[42] WDA acknowledged the Appellants do not have significant financial resources to enable them to finance the bill for the complex hydrogeological review these appeals required. WDA stated the safety of the Town's waterworks system is important to all of the people impacted by the system, justifying the Appellants' concerns. WDA acknowledged crowdfunding monies, totalling $1,237.90, were contributed towards WDA's costs.

[43] WDA said it could not work for free to any significant degree, and the delay and possible lack of payment put WDA under financial strain.

[44] WDA noted the following about the Board's recommendations:

1. The Board accepted WDA's arguments that the remediation of the industrial landfill site across the river from the water supply was not complete, and that contamination to the water supply from the site was "unlikely;"
2. In response to concerns identified by Dr. Weyer that the proposed sampling frequency would miss seasonal extremes, the Board recommended the timing of the extremes be identified and the sampling period adjusted to match; and

3. The Board found merit in Dr. Weyer's testimony regarding the sampling protocol and recommended the Approval Holder develop and implement a pilot project to test the reliability of low-flow sampling.

[45] WDA stated their participation in the hearing helped to determine whether the Town's water system is a safe source of drinking water, and they provided technical advice to the Appellants and cross-examined other witnesses.

[46] WDA said their costs in the entire amount of $69,263.09 were justified as the appeals were an exceptional case where the Appellants' participation supported the public interest in environmental protection.

2. Approval Holder's Response

[47] The Approval Holder stated the Appellants failed to show why the Board should award costs. It said the Appellants' decision to use the appeal process to raise general concerns about the historical contamination in Turner Valley instead of participating in the Waterworks Advisory Committee ("WWAC") did not support the purposes set out in section 2 of EPEA.

[48] The Approval Holder submitted the Appellants' costs claims should be dismissed because they did not show their submissions contributed to the determination of the issues. It stated the Appellants did not demonstrate how their costs were directly related to the preparation and presentation of their submissions respecting the issues.

[49] The Approval Holder noted the Appellants used their cost claims to:

(a) continue expressing their grievances with the Town and its consultants;

(b) express their dissatisfaction with the terms of the Approvals;

(c) tender new evidence and arguments unrelated to their application for costs; and

(d) file a commentary of the Board's Report and Recommendations.

[50] The Approval Holder stated the Appellants prolonged and complicated the appeal process by refusing to:

(a) attend WWAC meetings, which were specifically designed to cater to consultation concerns raised by Ms. Walsh in an earlier appeal;

(b) participate in mediation;

(c) limit their written and oral submissions and cross-examination to the issues set for the hearing; and

(d) comply with the Board's deadlines.

[51] The Approval Holder said the Appellants made the process costlier by:

(a) making numerous document requests which resulted in the Town incurring significant expense locating and producing reports and data which proved largely irrelevant to the issues;

(b) bringing several unsuccessful pre-hearing applications, including a stay application, last minute adjournment requests, and applications for interim costs;

(c) demanding the attendance of Mr. Sunil Beeharry at the hearing; and

(d) making presentations that were unfocussed narratives of supposition, opinion, conjecture, and speculation.

[52] The Approval Holder noted the majority of Ms. Walsh's claimed expenses related to trips to the Provincial Archives in Edmonton to collect information. The Approval Holder believed these trips provided the information used by Ms. Walsh in her written submission on the history of natural resource development in Turner Valley and area, but this information did not assist in reviewing the issues. The Approval Holder said these expenses were not necessary to the Appellants' submissions on the issues.

[53] The Approval Holder said Ms. Walker used her appeals to advance arguments about perceived deficiencies in the Canadian Drinking Water Guidelines and to discuss her concern that unidentified "chemical soups" could endanger the Town's water supply.

[54] The Approval Holder submitted the Appellants' broad concerns went beyond the provisions in the Approvals and did not contribute to the issues.

[55] The Approval Holder noted Ms. Walker argued she is entitled to costs because her involvement at the hearing identified an error in the Town's groundwater flow models arising from data temporarily skewed by the destruction of a piezometer and she demonstrated gaps in AESRD's ability to obtain documents. The Approval Holder submitted that neither of these

points were relevant to the issues, and these points had already been considered. The Approval Holder stated the Director's staff had noted the effect of the destroyed piezometer and discussed it with the Approval Holder's consultant prior to the appeals, and the Director and Approval Holder already understood the Director's limited jurisdiction to compel third party records in these circumstances.

[56] The Approval Holder stated the Appellants failed in their efforts to completely reverse all of the Approvals under appeal.

[57] The Approval Holder submitted the Appellants should not be entitled to costs for their personal involvement in the appeals.

[58] The Approval Holder stated WDA did not substantially contribute to the issues, and they tendered evidence that was not directly related to the issues and was based on groundwater flow theories which Dr. Weyer admitted were not accepted in the scientific community.

[59] The Approval Holder noted WDA raised the potential use of low-flow testing and compared it to the Approval Holder's current purge-and-sample method. The Approval Holder stated it had considered the low-flow testing method, but the purge-and-sample method was the standard method prescribed by the Director.

[60] The Approval Holder argued the remainder of WDA's report and evidence consisted largely of conjecture, which extended the debate on issues which could have otherwise been eliminated from the hearing. The Approval Holder said WDA used the hearing to raise general concerns about the Town's monitoring program instead of providing specific technical evidence in response to the issues.

[61] The Approval Holder argued WDA did not make a significant contribution to the goals of EPEA.

[62] The Approval Holder noted the Appellants were awarded interim costs in the amount of $2,191.88, including GST, in respect of work to be done by WDA. The Approval Holder submitted WDA did not meet the Board's expectations for interim costs, and WDA's

submission was conjecture and supposition. The Approval Holder stated the ambiguous and irrelevant material did not assist in narrowing the issues, nor did it assist the Board.

[63] The Approval Holder stated WDA's interpretation of groundwater flow data was based on theories not generally accepted, and WDA's attempts to explain and justify these novel theories were time consuming, distracting, and unnecessarily complicated the Board's consideration of the issues.

[64] The Approval Holder stated Dr. Weyer commented on matters beyond his area of expertise, such as arguing the Director should be permitted to make changes to the Ministerial Order. The Approval Holder said WDA took a more active role in the hearing than what is usually expected of an objective technical expert.

[65] The Approval Holder noted WDA made numerous recommendations that were not adopted by the Board.

[66] The Approval Holder said WDA opposed the Town's request to reduce the monitoring frequency for PCBs, NORMS, and petroleum hydrocarbon fractions F3 and F4 but did not provide any technical evidence to support that view.

[67] The Approval Holder noted WDA believed it added value to the hearing because the Board accepted Dr. Weyer's assessment that contamination to the water supply from the remediated landfill was unlikely. In response, the Approval Holder submitted WDA failed to acknowledge:

(a) the Town submitted the conversion to a well capture system did not increase the risk of contamination to the Town's water supply from the remediated landfill;

(b) there was no objective evidence which would support a conclusion that the Town's water supply was actually impacted by any potential residual contamination at the remediated landfill; and

(c) Dr. Weyer was non-committal in his conclusions.

[68] The Approval Holder noted WDA asked that it be credited with informing the Board's recommendation to adopt a low-flow sampling pilot project. The Approval Holder explained it was aware of the low-flow alternatives but decided not to implement any change

until there was a policy change by AEP. The Approval Holder argued the additional information WDA provided respecting low-flow sampling was overshadowed by the large volume of speculative evidence given by WDA.

[69] The Approval Holder noted the Board disagreed with WDA's suggestion that the Director should not have relied on reports, data, and other information.

[70] The Approval Holder submitted the Appellants should not be entitled to costs in respect of the work done by WDA.

3. Director's Response

[71] The Director confirmed he was not seeking costs.

[72] The Director stated he should not be responsible for paying any of the costs claimed by the Appellants. The Director took no position regarding the costs claimed by the Appellants and Approval Holder.

[73] The Director noted it has been consistently held that costs are not awarded against the Director as long as the Director was acting in good faith and carrying out his statutory mandate, given the unique role of the Director as a party to an appeal and as a statutory decision-maker.

[74] The Director noted the Board's Report and Recommendations did not find the Director erred or was not acting in good faith. The Director said his decisions were not substantially varied or reversed.

[75] The Director stated the Appellants did not establish any special circumstances that would warrant costs be payable by the Director.

B. Discussion

[76] The purpose of a costs award is to acknowledge the assistance the party made to the Board in determining the recommendations it makes to the Minister. Costs awarded against a party are not intended to be a punitive measure.

[77] The Board notes Ms. Walsh labelled the final closing of her costs submission as "Public Document." The Board wants to make it clear all the submissions from the Parties are public documents and form part of the record of the appeals.

[78] In the Appellants' costs application, the Appellants analyzed the Board's Report and Recommendations and took issue with some of the Board's conclusions and comments. The purpose of a costs application is to attain an award of costs, when warranted, to offset the expenses a party incurred as a result of participating in a hearing. A costs application is not intended as an opportunity for a party to review and note disagreement with the Board's recommendations or to provide more evidence or arguments. The substantive hearing on the appeals is complete and the Minister has made her decision.

[79] The Approval Holder commented on the protracted appeal process in this case. The Board notes the issuance of sequential amendments lengthened the appeal process considerably. However, hearing the appeals of all the amendments at the same time saved time and effort for all the Parties.

[80] The Board recognizes the efforts taken by the Appellants to secure additional funds to offset the costs they incurred in bringing the appeals forward.

[81] In assessing whether a party should receive a costs award, the main factor the Board considers is the degree to which the party assisted the Board in determining the recommendations it provides to the Minister.

[82] The Appellants raised concerns regarding the potable water system used by the Town. However, their main focus was potential contamination sources from past events. Unless the Appellants had been able to demonstrate that former contamination sources continued to be an issue or reasonably had the potential to impact the water supply, the evidence they provided was of little value to the Board in determining recommendations with respect to the issues. Much of the Appellants' evidence concerning potential impacts was speculative and not based on fact. Even the Appellants' consultant conceded there was unlikely to be an impact on the infiltration wells from the reclaimed landfill across the river.