ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – February 10, 2010

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 Amil Shapka with respect to *Environmental Protection and Enhancement Act* Approval No. 248406-00-00 issued to the Evergreen Regional Waste Management Services Commission by the Director, Northern Region, Environmental Management, Alberta Environment.

Cite as: *Shapka* v. *Director, Northern Region, Environmental Management, Alberta Environment*, re: *Evergreen Regional Waste Management Services Commission* (10 February 2010), Appeal No. 08-037-ID2 (A.E.A.B.).

PANEL MEMBERS:	Mr. Alex G. MacWilliam, Panel Chair, Dr. Alan J. Kennedy, Board Member, and Dr. Dan L. Johnson, Board Member.
SUBMISSIONS BY:	
Appellant:	Dr. Amil Shapka, represented by Ms. Eva Chipiuk, Ackroyd LLP.
Intervenor:	Mr. Robert Tomlinson.
Approval Holder:	Evergreen Regional Waste Management Services Commission, represented by Mr. William Barclay, Reynolds Mirth Richards & Farmer LLP.
Director:	Mr. Kem Singh, Director, Northern Region, Environmental Management, Alberta Environment, represented by Ms. Michelle Williamson, Alberta Justice.

EXECUTIVE SUMMARY

Alberta Environment issued an Approval to the Evergreen Regional Waste Management Services Commission, authorizing the construction, operation, and reclamation of the Evergreen Regional Landfill (Class II), where more than 10,000 tonnes per year of non-hazardous waste is disposed of in the County of St. Paul, Alberta. The Board found Dr. Amil Shapka had a valid appeal, and the hearing was scheduled for January 18 and 19, 2010.

The Board considered three preliminary matters: (1) the intervenor request of Mr. Robert Tomlinson; (2) the request that the Board order the Approval Holder to grant access to the landfill for the Appellant's consultant; and (3) an interim costs application by the Appellant.

The Board received an intervenor request from Mr. Robert Tomlinson in response to the Board's Notice of Hearing. The Board accepted Mr. Tomlinson as an intervenor because he lives in the area of the landfill, has a genuine concern about the effects of the landfill on the environment and himself, and his submission appeared not to be duplicative of the parties' submissions.

The Board did not have the jurisdiction to order the Commission to allow a site visit by the Appellant's consultant.

The Board allowed interim costs for the Appellant in the amount of $11,760 to be paid by the Approval Holder. The interim costs were awarded to the Appellant in respect of fees for his consultant to prepare for and attend at the hearing. No interim costs were awarded for legal fees.

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I. BACKGROUND

[1] On December 30, 2008, the Director, Northern Region, Environmental Management, Alberta Environment (the "Director"), acting under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") issued Approval No. 248406-00-00 (the "Approval") to the Evergreen Regional Waste Management Services Commission (the "Approval Holder") authorizing the construction, operation, and reclamation of the Evergreen Regional Landfill (Class II), ("Landfill") where more than 10,000 tonnes per year of non-hazardous waste is disposed of in the County of St. Paul, Alberta. The Landfill previously operated under a registration, and the Approval allows the Landfill to expand.

[2] On February 2, 2009, the Environmental Appeals Board (the "Board") received a Notice of Appeal from Dr. Amil Shapka (the "Appellant").

[3] The Board's Notice of Hearing was published in the Lamont Farm 'n' Friends, Redwater Review, Bonnyville Nouvelle, Elkpoint Review, St. Paul Journal, and the Smoky Lake Signal. It was also provided to the Saddle Lake First Nations, the Municipal District of Bonnyville, the County of St. Paul, and the Town of St. Paul. A news release was forwarded to the Public Affairs Bureau for distribution to media throughout the Province, and placed on the Board's website. In response to the notice, the Board received an intervenor application from Mr. Robert Tomlinson.

[4] On October 29, 2009, the Appellant requested the Board establish a process for information requests, order the Approval Holder to allow the Appellant's hydrogeological consultant access to the Landfill, and award interim costs in respect of fees associated with his consultant's preparation for and attendance at the hearing. On October 30, 2009, the Board notified the Appellant, Approval Holder and the Director (collectively "the Parties") and Mr. Tomlinson that the Board does not have a discovery process involving interrogatories, and therefore denied the interrogatory request. The Board set a schedule to receive submissions on the intervenor request and the other requests filed by the Appellant. Submissions were received from the Parties between November 6, 2009 and November 23, 2009.

II. INTERVENOR APPLICATION

A. Summary of Submissions

1. Robert Tomlinson

[5] Mr. Tomlinson submitted that the Director failed to recognize the impacts the Landfill would have on groundwater, local wells, and surface water run-off. He stated that if he was granted intervenor status, his evidence would address the following issues:

(a) The siting of the Landfill, because the Director failed to recognize the rising water table and the impacts of the Landfill on groundwater. The Approval Holder provided the Director with a justification for constructing the cells below the water table with a conceptual model of a hydraulically contained landfill, but it is not the same design provided with the Approval application.

(b) The Approval Holder did not provide the Director a complete quality assurance and quality control package. Therefore, the Approval Holder must convincingly demonstrate the Landfill is constructed to meet all the requirements set in the application to protect groundwater, public health, the environment, and the interests of those in the area of the Landfill.

(c) Proper construction of the Landfill is key to mitigating impacts to groundwater, local water wells, and the surrounding watershed, but the Landfill was not constructed as designed in the application.

(d) The day-to-day operations allowed leachate to be above allowable limits and, in 2005 and 2007, leachate levels were not contained by the cell design.

(e) His evidence will be based on his past as a skilled tradesman, visits he has made to the site, and his review of documents and photographs. He was a contractor involved in the construction of the regional landfill in the County of Two Hills, which included run-on and run-off controls. His work experience included interpreting design drawings and instructing the fabrication and installation of pipe similar to the leachate collection system at the Landfill.

(f) With no leachate level limit, he will probably change his consumption of fish and wildlife from the area, and any release will impact his property.

2. Appellant

[6] The Appellant supported Mr. Tomlinson's application based on his view that Mr. Tomlinson is an area resident with extensive knowledge of the surrounding environment and his evidence would assist the Board.

3. Approval Holder

[7] The Approval Holder opposed Mr. Tomlinson's application for the following reasons:

(a) Mr. Tomlinson is attempting to circumvent the Board's previous decision on the preliminary matters by raising additional issues and issues not directly relevant to the appeal.

(b) The Approval is not for a new landfill but for a landfill previously existing under a registration. Issues such as sitting, design, construction, and operations relate to past events and are more properly categorized as enforcement issues.

(c) The Board does not have jurisdiction to order an environmental assessment.

(d) Mr. Tomlinson's experience outlined is not directly relevant to the issues in this appeal. The Two Hills landfill is relatively small with no leachate control system. Preliminary inquiries with the Two Hills landfill had no knowledge of any involvement of Mr. Tomlinson. If he was involved at all, his involvement could not have been extensive.

(e) Mr. Tomlinson's participation will not materially assist the Board, he does not have a tangible interest in the subject matter, and his intervention will unnecessarily delay the proceedings.

(f) If Mr. Tomlinson is allowed to participate in the oral portion of the hearing, his evidence will likely take an extensive amount of time. Depending on his

evidence, the Approval Holder may be required to call a number of witnesses and seek additional time to do so. This would be required if Mr. Tomlinson embarked on a general inquiry regarding operational issues.

(g) Mr. Tomlinson's submission will repeat or duplicate the evidence that could be provided by the Appellant.

[8] In the alternative, the Approval Holder submitted that Mr. Tomlinson should be limited to written statements directly related to the two issues identified by the Board.

4. Director

[9] The Director argued that Mr. Tomlinson did not meet the requirements to be granted full interenor status because:

(a) he was deemed not to be directly affected by the Approval, and there was no evidence to explain how he has a tangible interest in the subject matter;

(b) his evidence will duplicate the Appellant's evidence and cause unnecessary delay; and

(c) there is insufficient evidence to show he has expertise in landfill design, construction, and operations. An educational background as an engineer with related experience is required to be of assistance to the Board.

B. Analysis

[10] Under section 95 of EPEA, the Board can determine who can make representations before it. Section 95(6) states:

> "Subject to subsection (4) and (5), the Board shall, consistent with the principles of natural justice, give the opportunity to make representations on the matter before the Board to any persons who the Board considers should be allowed to make representations."

[11] Section 9 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the "Regulation"), requires the Board to determine whether a person submitting a request to make

representation should be allowed to do so at the hearing. Sections 9(2) and (3) of the Regulation provide:

> "(2) Where the Board receives a request in writing in accordance with section 7(2)(c) and subsection (1), the Board shall determine whether the person submitting the request should be allowed to make representations in respect of the subject of the notice of appeal and shall give the person written notice of that decision.
>
> (3) In a notice under subsection (2) the Board shall specify whether the person submitting the request may make the representations orally or by means of a written submission."

[12] The test for determining intervenor status is stated in the Board's Rules of Practice. Rule 14 states:

> "As a general rule, those persons or groups wishing to intervene must meet the following tests:
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> - their participation will materially assist the Board in deciding the appeal by providing testimony, cross-examining witnesses, or offering argument or other evidence directly relevant to the appeal; the intervenor has a tangible interest in the subject matter of the appeal; the intervention will not unnecessarily delay the appeal;
> - the intervenor in the appeal is substantially supporting or opposing the appeal so that the Board may know the designation of the intervenor as a proposed appellant or respondent;
> - the intervention will not repeat or duplicate evidence presented by other parties…."

[13] Although Mr. Tomlinson's appeal was dismissed, it does not preclude him from appearing as an intervenor and providing evidence on the issues. The submissions establish that Mr. Tomlinson resides in the area and is knowledgeable about the area. It is apparent to the Board that he has a genuine interest in the operation of the Landfill and the potential effect an expanded Landfill will have on the environment and surface water and groundwater surrounding the Landfill.

[14] Although Mr. Tomlinson may not be accepted as a technical expert, this does not preclude him from providing evidence to the Board. The Board values the evidence and submissions that local residents can provide regarding the issues because, as residents, they have

first-hand knowledge on the area. In hearing and determining an appeal, the Board has a responsibility to provide its best recommendations to the Minister of Environment. This is facilitated when the most relevant information on the defined issues is presented to the Board. This information, in certain circumstances, may include evidence from local residents who are not technical experts.

[15] Therefore, the Board grants Mr. Tomlinson intervenor status for the hearing. He will be allowed to provide a written submission addressing the issues set by the Board which will have to be filed with the Board on the same date as the Parties are required to provide their submissions. Mr. Tomlinson will be allowed 10 minutes at the hearing to provide an oral submission regarding the issues set by the Board. The Approval Holder and Director will be allowed to cross-examine Mr. Tomlinson.

[16] Given the time limits established above, the Approval Holder should not be concerned about Mr. Tomlinson taking an extensive amount of time to present oral evidence. As is its usual practice, the Board will use a timer to ensure Mr. Tomlinson and all Parties adhere to the time limits that will be set by the Board and provided prior to the hearing. Because of the limited time available to Mr. Tomlinson to present his oral evidence, the Board urges him and all the Parties to focus their submissions and presentations on the two issues identified by the Board. Pursuant to section 95(4) of EPEA, the Parties and Mr. Tomlinson cannot make representations on other matters at the hearing.[1] Submissions on other matters will not be considered by the Board.

III. DOCUMENT PRODUCTION

A. Summary of Submissions

1. Appellant

[17] The Appellant submitted an information request and response process be established prior to the filing of submissions for the hearing. However, in his initial submission,

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[1] Section 95(4) of EPEA provides:

"Where the Board determines that a matter will not be included in the hearing of an appeal, no

he stated he did not have any specific documents to request but reserved the opportunity to request documents after the site visit.

2. Approval Holder

[18] The Approval Holder acknowledged the Appellant was not seeking document production at this time.

B. Analysis

[19] In the Board's letter of October 30, 2009, the Board stated it does not have a discovery process involving interrogatories and, therefore, the interrogatory request was denied.

[20] The Board can compel the production of documents, but the person requesting the documents must identify the documents to the best of their ability and explain why the documents are relevant to the issues to be heard. The Board notes the Appellant is not requesting any specific documents at this time, so no decision is required at this time.

IV. SITE VISIT

A. Summary of Submissions

1. Appellant

[21] The Appellant explained the purpose of the site visit would be to allow his hydrogeological consultant, Mr. Roger Clissold, Hydrogeological Consultants Ltd., to:

(a) walk the area to understand the physiography of the site;
(b) observe monitoring well locations and the area of stagnation moraine;
(c) verify location of the scale house water well; and
(d) observe outflow and monitoring features of the storm water pond.

[22] The Appellant submitted that a site visit is a necessary and reasonable part of preparing his submission.

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representations may be made on that matter at the hearing."

2. Approval Holder

[23] The Approval Holder submitted the following:

(a) A separate site visit by Mr. Clissold is unnecessary given the information being sought is available in the Director's record and supplementary information filed with the Board.

(b) The location of all monitoring wells and the scale house well are documented with scientific certainty and shown on detailed plans of the Landfill that have been submitted.

(c) The physiography of the site is well known and documented. An extensive hydrogeological site investigation was conducted. The Approval application contains a full description of the topography and geology of the site, including contour maps and pictures and diagrams depicting the storm water pond and site conditions.

[24] Having said that, the Approval Holder went on to state that, if the Board considered a site visit would be beneficial, it would be willing to make the necessary arrangements.

3. Rebuttal Submission

[25] The Appellant argued the Approval Holder's decision to deny Mr. Clissold access to the Landfill is unreasonable and unjustified. He stated that:

(a) Not all of the information is available in the Director's record and supplemental information.

(b) The Approval Holder has had an opportunity to work with the Appellant, his consultant, and legal counsel to allow a site visit and to understand the Landfill operation, but the Approval Holder chose not to. The Approval Holder's unwillingness to work together has caused all the Parties to expend additional time and resources to argue a preliminary matter that could have been resolved consensually.

(c) He tried to schedule a site visit in August 2009 to coincide with a trip Mr. Clissold was making on other business in the area to save costs, but the Approval Holder denied access at that time. Mr. Clissold stopped at the scale house and tried to get clarification from the staff regarding water well casings. He was advised that approval from the scale house supervisor was required before they could talk to Mr. Clissold, but the supervisor was away that day.

(d) The purpose of the site visit was detailed in his previous submission.

(e) Mr. Clissold should have an opportunity to attend the site to confirm his findings based on the Director's record. It is difficult to appreciate the physiography and hydrogeology of the Landfill that is three-dimensional from the Director's record.

(f) The map showing the area of stagnation moraine did not agree with aerial photographs provided in the Director's record. A site visit to confirm locations of monitoring wells and the scale house is necessary and reasonable. To deny a request for a site visit would prejudice the Appellant.

(g) Mr. Clissold will present evidence showing the aerial photographs in the Director's record show there was significant change in the landscape due to the construction of the Landfill and there is inconsistency in the elevation provided for some piezometers. These matters relate to the issues for the hearing. Mr. Clissold must attend the site to observe its present condition.

A. Analysis

[26] Pursuant to section 95(1) of EPEA, the Board has all of the powers of a commissioner under the *Public Inquiries Act*, R.S.A. 2000, c. P-39. However, these powers do not allow the Board to order a party to grant access to private lands. In the past, the Board has assisted in arranging a site visit for the parties to an appeal if the landowner has consented and, on occasion, the Board has arranged for a site visit for the panel members of an appeal.

[27] The Board is concerned with the approach the Approval Holder has taken in this matter. The Approval Holder has been aware since at least August 2009 that the Appellant's consultant was seeking access to the Landfill. The Approval Holder's unwillingness to allow

access could limit the ability of the Appellant to provide complete and meaningful evidence and could interfere with the Board's ability to provide the best possible report and recommendations to the Minister.

[28] As the Board has no jurisdiction to order the Approval Holder to grant access to its lands, the Board denies the application for a site visit. The Board strongly encourages the Appellant and Approval Holder to work cooperatively to find a suitable time to allow Mr. Clissold to access the site.

V. INTERIM COSTS

A. Summary of Submissions

1. Appellant

[29] The Appellant made the following submissions:

(a) The Board has the power to award interim costs which accords with the purposes of EPEA to increase public participation and to assist parties to prepare useful and relevant evidence, thereby participating in a meaningful way in the appeal process.

(b) The estimated budget for his consultant, Mr. Clissold of Hydrogeological Consultants Ltd. is $35,500, comprising of $25,000 for processing and synthesizing data, $3,000 for a field visit, $4,500 for preparation for the hearing, and $3,000 for attendance at the hearing.

(c) The estimated budget for legal costs is $27,250, comprising of $8,000 for written preliminary motions submissions, $9,250 for a written hearing submission and rebuttal, and $10,000 for preparation and attendance at the hearing.

(d) Mr. Clissold will speak directly to the issues identified by the Board.

(e) It is unreasonable to expect a private citizen to bear the costs for a project that a proponent is benefiting from.

2. Approval Holder

[30] The Approval Holder made the following submissions:

(a) The Regulation requires an application for interim costs to contain sufficient information to demonstrate the interim costs are necessary to assist the party in effectively preparing and presenting its submission.

(b) The Appellant's submission lacks the detail required to know whether the Appellant's submissions will materially contribute to the hearing of the appeal.

(c) No detail was provided by the Appellant regarding the work proposed by Mr. Clissold. Simply stating "processing and synthesizing data" is so general as to be meaningless. An amount of $3,000 is included for a site visit which the Approval Holder considered unnecessary and excessive given the data already available and the time considered necessary for a site visit (three hours). It is inappropriate to include travel time.

(d) No details were provided related to the hourly or other rates purported to be charged.

(e) Details should be provided prior to determining whether costs being sought are appropriate.

(f) The Appellant did not submit evidence that he lacks resources, that he made efforts to obtain alternate funding, or that interim costs are necessary.

(g) It is unclear if some of the costs sought relate to prior costs incurred.

[31] The Approval Holder argued the Appellant's submission is insufficient to warrant an award of interim costs. Any costs application should be dealt with at the conclusion of the proceedings when the Board will be in a better position to know whether the evidence materially assisted the Board.

3. Rebuttal Submission

[32] In response to the submissions made by the Approval Holder, the Appellant made the following submissions:

(a) His costs have increased significantly due to the Approval Holder's approach, including questioning his standing and opposition to a site visit, both requiring arguments be submitted to the Board.

(b) There is no other appellant to bring forward the concerns and issues identified. Therefore, his submission is necessary to the hearing of the appeal.

(c) Mr. Clissold has been retained to: review the material provided by the Approval Holder and Director; attend at the Landfill to do an assessment of the potential impact of the Landfill on groundwater and local water wells; assess potential impacts on surface water run-off and surrounding watersheds; and identify mitigation measures that may be required with respect to impacts.

(d) The total proposed budget for legal and expert costs is $62,750, and it is unreasonable for a private citizen to incur such costs. Interim costs are necessary and reasonable to assist in preparation and effective presentation of his submission.

(e) There are no other funding sources available and, as he is the only appellant, he cannot share common issues or resources with other parties. It is reasonable for the Approval Holder to provide interim costs rather than requiring appellants to seek alternate sources of funding.

(f) Mr. Clissold's hourly rate is $210, and his proposed budget includes 120 hours for processing and synthesizing data, 14 hours for a site visit including travel time, 21 hours preparation for the hearing, and 14 hours for attending the hearing (including travel time). Travel time is included for the site visit and attendance at the hearing because Mr. Clissold is located in Edmonton and the Landfill and the hearing venue are located at St. Paul.

(g) The rate for his legal counsel is $150 per hour, and the breakdown of time included 53 hours for preparing the preliminary motions submission and response, 61 hours for preparing written submissions for the hearing, and 67 hours for preparation for and attendance at the hearing.

(h) The budgets do not include costs incurred before the hearing submission process.

(i) The Board has awarded costs for a site visit in previous decisions.[2]

(j) The Approval Holder will be given an opportunity at the end of the hearing to argue whether the Appellant's submissions contributed to the hearing.

(k) Mr. Clissold has appeared before the Board on prior occasions on behalf of both appellants and approval holders, and he has appeared as an expert before the Energy Resources Conservation Board.

(l) He retained expert assistance and legal counsel to effectively present evidence that will assist the Board.

B. Analysis

[33] 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."

[34] 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.*:[3]

> "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."

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[2] See: *Penson* (2000), 32 C.E.L.R. (N.S.) 15 (Alta. Env. App. Bd.), (*sub nom. Reconsideration of costs decision re: Penson and Talisman Energy Inc.*) (1 December 1999), Appeal No. 98-005 (A.E.A.B.).

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

[35] 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….'"

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

[37] 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.
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> (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
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> (b) the preparations and presentation of the party's submission.
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> 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:
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> (a) whether the submission of the party will contribute to the meeting or hearing of the appeal;
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> (b) whether the party has a clear proposal for the interim costs;
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> (c) whether the party has demonstrated a need for the interim costs;
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> (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."

[38] 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."

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

[40] 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.

[41] 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 for a hearing.

[42] The Appellant requested costs of $62,750, which included $27,250 for legal expenses and $35,500 to retain an expert.

[43] The Board does not readily award interim costs, because the Board considers an award of costs is recognition of the assistance a party has provided to the Board in determining the best recommendations to make to the Minister. 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.

[44] The Board accepts the Appellant has limited, if any, alternate sources of funding available to him and, as the only appellant, he cannot work with other appellants to minimize duplication of evidence to reduce costs.

[45] To determine whether interim costs should be awarded, the Board looks at whether the party has a specific plan to show where it anticipates 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 his costs application, the Appellant broke down the costs as to legal costs and costs associated with retaining an expert.

[46] Interim costs are awarded for the preparation and attendance at a hearing. Interim costs are prospective in nature as they are awarded prior to the start of the hearing and in anticipation of the value of the evidence that will be provided. Interim costs are provided to give assistance to a party to prepare its submissions for the hearing. In the legal costs claimed, the Appellant included time that was spent preparing submissions for the preliminary motions as well as for the hearing. The Board does not consider the costs associated with the preliminary motions as part of an interim costs application, because these are costs unrelated to the preparation for the hearing and are costs associated with work already completed.

[47] The Appellant did not discuss his need for financial assistance. The Board realizes the technical nature of the arguments that need to be provided. The number of hours claimed for preparation and attendance at the hearing are reasonable given that it will be more than a one-day hearing. However, the Board does not know how much assistance legal counsel will provide at the hearing. As a result, the Board will not award interim costs for legal services.

[48] The Board is, however, interested in having the Appellant's consultant present evidence at the hearing. The value of the consultant's evidence cannot be determined until after the hearing is held, but his evidence could provide a more complete picture of the site and issues. Therefore, the Board will allow interim costs for the Appellant's consultant to attend at the hearing and for some of the preparation time that will be required to provide a concise and organized presentation.

[49] The costs claimed for the Appellant's consultant totaled $35,500, to cover estimated costs of $25,000 for processing and synthesizing data, $3,000 for a field visit, $4,500 for preparation for the hearing, and $3,000 for attendance at the hearing. This was based on a rate of $210 per hour.

[50] The hearing is scheduled to last two days, or approximately 14 hours. It is reasonable to expect 1.5 hours preparation time for every hour at the hearing, thereby totaling 21 hours of preparation time in this case. As stated above, the Board expects arguments will be technical in nature, so it will allow, for the purposes of determining interim costs, 21 hours for data review. This results in 56 hours for preparation time and attendance at the hearing. The Board accepts the stated rate of $210 per hour for a senior hydrogeologist. Therefore, the total interim costs granted are $11,760.

C. Who Should Pay the Costs?

[51] The Appellant submitted that the Approval Holder should bear the costs.

[52] In previous decisions in which an appellant's costs have been assessed against a project 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…."[4] 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

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[4] 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.).

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."[5]

[53] 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 when an application is made for an approval.

[54] Therefore, in the circumstances of this appeal, interim costs will be paid by the Approval Holder.

D. Final Costs

[55] 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 Appellant is 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 Appellant 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."

VI. DECISION

[56] The Board allows the intervenor request of Mr. Robert Tomlinson. Mr. Tomlinson will be allowed to provide a written submission and will be allotted time at the hearing to present evidence and be cross-examined by the Approval Holder and the Director.

[57] The Board made no decision on the issue of document production because no specific documents were requested at this time.

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[5] 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.

[58] The Board does not have the jurisdiction to order the Approval Holder to provide the Appellant's consultant access to the Landfill. Accordingly, the Appellant's application for an order to this effect is denied. The Board encourages the Approval Holder and Appellant to work cooperatively to determine if access can be arranged.

[59] The Board awards the Appellant interim costs totaling $11,760, to be paid by the Approval Holder, to cover some of the costs associated with the Appellant's consultant's preparation for and attendance at the hearing.

Dated on February 10, 2010, at Edmonton, Alberta.

"*original signed by*"
Alex G. MacWilliam
Board Member & Panel Chair

"*original signed by*"
Alan J. Kennedy
Board Member

"*original signed by*"
Dan L. Johnson
Board Member