

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – July 2, 2010

IN THE MATTER OF sections 91, 92, 95, and 101 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: Reconsideration Decision: *Shapka v. Director, Northern Region, Environmental Management, Alberta Environment*, re: *Evergreen Regional Waste Management Services Commission* (02 July 2010), Appeal No. 08-037-RD (A.E.A.B.).

BEFORE:

Mr. Alex MacWilliam, Panel Chair;
Dr. Alan Kennedy, Board Member; and
Dr. Dan Johnson, Board Member.

SUBMISSIONS FROM:

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 under the *Environmental Protection and Enhancement Act* 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 Approval replaced the Registration under which the landfill was previously authorized.

The Board received an appeal from Dr. Amil Shapka, and a hearing was held. The Board provided its Report and Recommendations to the Minister of Environment, who issued an order amending the Approval.

After the order was issued, the Board received a reconsideration request from the intervenor, Mr. Robert Tomlinson.

The Board set a schedule to receive submissions on the following questions:

1. Should the Board grant Mr. Tomlinson's request to reconsider the Board's February 18, 2010 Report and Recommendations?
2. Does Mr. Tomlinson, as an intervenor, have the ability to request a reconsideration?
3. If a person goes through the FOIP process to obtain information or a document, does this mean the information or document was not available to the person at the time of the hearing?

After reviewing the submissions, the Board determined Mr. Tomlinson's limited intervenor rights in this case did not afford him the right to apply for a reconsideration of the Board's Report and Recommendations.

TABLE OF CONTENTS

I.	BACKGROUND	1
II.	SUBMISSIONS	2
	A. Appellant.....	2
	B. Intervenor.....	2
	C. Approval Holder	4
	D. Director	5
III.	ANALYSIS.....	7
IV.	DECISION.....	8

I. BACKGROUND

[1] On December 30, 2008, the Director, Northern Region, Environmental Management, Alberta Environment (the “Director”), issued Approval No. 248406-00-00 (the “Approval”) to the Evergreen Regional Waste Management Services Commission (the “Approval Holder” or the “Commission”) authorizing the construction, operation, and reclamation of the Evergreen Regional Landfill (Class II)¹ (the “Landfill”) where more than 10,000 tonnes per year of non-hazardous waste is disposed of at W-15-56-10-W4M in the County of St. Paul, Alberta. The Approval was issued under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”). The Landfill previously operated under Registration No. 189305-00-00.

[2] On January 30 and February 2 and 4, 2009, the Environmental Appeals Board (the “Board”) received Notices of Appeal from Mr. Robert and Ms. Yvonne Tomlinson² and Dr. Amil Shapka (the “Appellant”) appealing the Approval.

[3] In response to the Notice of Hearing, the Board received an intervenor application from Mr. Robert Tomlinson. On December 1, 2009, the Board notified the Parties and Mr. Tomlinson that intervenor standing would be given to Mr. Tomlinson (the “Intervenor”).

[4] The Hearing was held on January 18 and 19, 2010, in St. Paul, Alberta. The Intervenor appeared at the Hearing and provided evidence. The Board recommended the Approval be varied, and the Minister issued a Ministerial Order on March 1, 2010.³

[5] On March 3, 2010, the Intervenor filed an application to have the Board reconsider its decision.

¹ A Class II landfill is defined in the *Waste Control Regulation*, Alta. Reg. 192/96, as “...a landfill for the disposal of waste, not including hazardous waste.”

² On October 23, 2009, the Board notified Dr. Amil Shapka, the Approval Holder, and the Director (the “Parties”) and Mr. and Ms. Tomlinson that the appeal of Ms. Tomlinson was dismissed for failing to file a Statement of Concern. Mr. Tomlinson was found to be not directly affected, and therefore his appeal was also dismissed. See: *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.).

³ See: *Shapka v. Director, Northern Region, Environmental Management, Alberta Environment*, re: *Evergreen Regional Waste Management Services Commission* (18 February 2010), Appeal No. 08-037-R (A.E.A.B.).

[6] On March 8, 2010, the Intervenor notified the Board that he had requested documents from the Approval Holder under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (“FOIP”). The Intervenor requested the reconsideration request be placed on hold pending the FOIP Commissioner’s response. The Board received comments from the Parties and the Intervenor regarding the adjournment request, and on March 29, 2010, the Board notified the Parties and Intervenor that the adjournment request was denied. The Board set a schedule to receive submissions on the following questions:

1. Should the Board grant Mr. Tomlinson’s request to reconsider the Board’s February 18, 2010 Report and Recommendations?
2. Does Mr. Tomlinson, as an intervenor, have the ability to request a reconsideration?
3. If a person goes through the FOIP process to obtain information or a document, does this mean the information or document was not available to the person at the time of the hearing?

[7] The Board received submissions from the Intervenor, Approval Holder, and Director between April 7 and 29, 2010.

II. SUBMISSIONS

A. Appellant

[8] The Appellant did not take any position on the reconsideration request.

B. Intervenor

[9] In support of his request for a reconsideration, the Intervenor submitted that the quality assurance and quality control (“QA/QC”) data demonstrated the Landfill cells were not constructed as designed. The Intervenor argued the Board must be able to convince him that the Board can envision the cell construction based on the information provided by the Approval Holder in its application. The Intervenor stated he expressed his concerns in his Statement of Concern regarding the lack of QA/QC and as-built drawings, but his concerns were not addressed. The Intervenor argued the Approval Holder and the Director did not provide any

evidence to confirm the cells were constructed as designed. He stated he could only provide evidence the cell construction was unknown because of the lack of QA/QC and as-built drawings. The Intervenor argued the Board must provide evidence that, within the Approval application and evidence from the Hearing, the cells are constructed as designed or require the Approval Holder to provide the evidence.

[10] The Intervenor stated that everyone involved in the appeal were aware of his concerns. He noted he has limited rights as an intervenor, but that does not give the Approval Holder the right to construct Landfill cells and not properly record the construction.

[11] The Intervenor argued the Approval Holder provided misleading information at the Hearing regarding the cell construction. The Intervenor discussed concerns regarding the flow of leachate within the Landfill and possible groundwater infiltration.

[12] The Intervenor noted that participation in the Board's process can be as an appellant or an intervenor. He questioned why an intervenor cannot request a reconsideration if an appellant can. The Intervenor argued that, to deny an intervenor the right to a reconsideration, would be an injustice.

[13] The Intervenor questioned how an intervenor can hold the Board accountable if there is a concern that not all of the information was considered and the intervenor has no right to ask for a reconsideration. The Intervenor argued the Board's Report and Recommendations should clearly state whether the information presented was considered and not leave a decision open ended.

[14] The Intervenor noted one of the purposes of EPEA is to provide citizens an opportunity to provide advice on decisions affecting the environment.

[15] The Intervenor explained a FOIP request was submitted to the Approval Holder on November 18, 2009, but the material he received was edited or incomplete, and some information was withheld. He stated he attempted repeatedly to obtain the documents. The Intervenor explained he had to make a decision, either go to the Hearing without the documents or request the Hearing be delayed until he received the information under FOIP.

[16] The Intervenor argued the Board must consider the principles of natural justice when determining whether a reconsideration should be granted. The Intervenor argued the

Board did not follow the principles of natural justice because it based its analysis on the assumption the Landfill cells were constructed as designed, but there was no evidence of the construction other than the information included in the QA/QC documents. The Intervenor explained there was not enough information in the QA/QC documents, and there were three different designs for the cells, but the design used was not identified.

[17] The Intervenor highlighted the following issues he had with the Report and Recommendations:

1. the Board did not have any evidence that a continuous clay liner was installed, so the Board could not rely on the liner as sufficient protection of the aquifer;
2. the Board suggested the Director completed a site investigation, but there was no evidence of any investigation to determine the cause of the increased leachate levels; and
3. the Board stated it did not receive evidence to indicate the Director's conclusions regarding the leachate were incorrect, but the Board was provided leachate graphs showing increases in leachate after drawdowns.

[18] The Intervenor argued that inaccuracies in the Board's Report and Recommendations will not bring finality to its decision or its process, and it will not ensure natural justice is maintained.

C. Approval Holder

[19] The Approval Holder submitted the reconsideration application should be dismissed with costs.

[20] The Approval Holder noted the Intervenor indicated the QA/QC documents must demonstrate the cells were constructed as designed to adequately protect the environment. The Approval Holder stated the Intervenor has made his concerns well known and had raised the same issues related to the QA/QC, including as-built drawings, in his Statement of Concern and at the Hearing. The Approval Holder argued it is inappropriate to seek reconsideration on issues already raised.

[21] The Approval Holder argued the principle of finality should be recognized unless there are compelling reasons to the contrary.

[22] The Approval Holder noted that none of the Parties applied for a reconsideration. The Approval Holder stated the Board identified the issues, the Intervenor had the opportunity to speak to the issues, and the Board addressed the issues extensively in its Report and Recommendations.

[23] The Approval Holder submitted the Intervenor's limited status is a relevant factor in deciding whether he has automatic standing to request a reconsideration.

[24] The Approval Holder argued the Intervenor is seeking to reargue his case. The Approval Holder stated the Intervenor was given the opportunity to address the issues identified by the Board by providing written and oral submissions. The Approval Holder argued that the Intervenor's reconsideration request did not demonstrate an issue of law, a flaw in the process, or raise any new evidence. The Approval Holder noted the documents requested under FOIP were provided to the Intervenor, and none of the documents were relevant to the appeal.

[25] The Approval Holder stated the Intervenor raised concerns about the Landfill construction and QA/QC documentation and requirements in his Statement of Concern, his Stay applications, and his submissions for the Hearing. The Approval Holder argued the Intervenor included excerpts from the design report, design and as-built drawings, and QA/QC information in his submissions. The Approval Holder stated it responded to the Intervenor's issues on previous occasions and at the Hearing.

[26] The Approval Holder submitted the Intervenor had the opportunity and did raise the same issues at the Hearing. The Approval Holder argued that neither the issues nor the evidence raised by the Intervenor are new, and the Intervenor intends to reargue the issues. The Approval Holder submitted the Intervenor did not meet his onus of proving a reconsideration is justified.

D. Director

[27] The Director submitted the reconsideration request is founded on the Intervenor's dissatisfaction with the outcome of the Hearing and the way his issues were addressed by the

Board. The Director noted the Intervenor acknowledged he raised the issue of cell design at the Hearing and alleged the Board failed to address this and other concerns.

[28] The Director stated the Intervenor was permitted to file a written submission and provide a 10 minute oral submission at the Hearing that was subject to cross-examination, but he was not granted the right to cross-examine any other party or provide opening and closing comments. The Director stated the Intervenor was granted intervenor status because of his knowledge of the area and his interest in the Landfill, but it was not because he was a technical expert in the area of cell design and construction.

[29] The Director argued the power to reconsider is not to be used to reargue the same issues a second time, and a rehearing should not be held if it would result in a breach of natural justice. The Director noted the legislation does not state the Board must grant a reconsideration when requested. The Director submitted that, only in exceptional circumstances, would an intervenor's request for a reconsideration be entertained.

[30] The Director explained there is no common law right to be an intervenor; if it exists, it is by statute. The Director stated a party's rights are given through natural justice and fairness, but an intervenor's participation is fixed by the decision maker.

[31] The Director submitted the Intervenor in this case does not have the ability to ask for a reconsideration because:

1. the Intervenor seeks an opportunity to reargue an issue that was clearly before the Board in the Hearing;
2. the Intervenor's request is not to seek a remedy for a breach of natural justice of the limited rights he was granted; and
3. if a reconsideration was granted, the Intervenor would be granted rights of cross-examination that he was not awarded as an Intervenor.

[32] The Director argued an intervenor with limited rights to provide evidence and cross-examine others cannot be granted a reconsideration unless it is to remedy a breach of natural justice suffered by him personally, such as a failure to be given notice of the hearing.

[33] The Director argued the information being sought by the Intervenor under the FOIP request would be practically obtainable at the time of the Hearing if the person made the request in time. The Director stated this is not the situation that triggers the reconsideration process.

[34] The Director requested the reconsideration request be dismissed.

III. ANALYSIS

[35] Under section 101 of EPEA, the Board can reconsider a report and recommendation. Section 101 states: “Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it.”

[36] The Board has stated in previous decisions that its power to reconsider “...is an extraordinary power to be used in situations where there are exceptional and compelling reasons to reconsider.”⁴ The Board uses its discretion to reconsider with caution, as the power to reconsider is the exception to the general rule that decisions of the Board are intended to be final. The Board does realize there are specific circumstances that warrant reconsideration, but this power is not intended as a tool for participants to reargue the same issues a second time. The onus is on the participant making the request to convince the Board there are exceptional and compelling reasons to reconsider the decision.⁵

[37] It is the Intervenor in this case, not a Party, who is seeking a reconsideration of the Board’s Report and Recommendations. The Intervenor is basing his request on the grounds the Board did not deal with his evidence.

⁴ *Whitefish Lake First Nation Request for Reconsideration re: Whitefish Lake First Nation v. Director, Northwest Boreal Region, Alberta Environment re: Tri Link Resources Ltd.* (28 September 2000), Appeal No. 99-009-RD.

⁵ Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment re: TransAlta Utilities Corporation* (17 April 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID.

[38] Although Mr. Tomlinson had filed an appeal, the Board determined he was not directly affected.⁶ Mr. Tomlinson filed for intervenor standing, and the Board granted him limited intervenor status because he had first-hand knowledge of the area and a genuine interest in the operation of the Landfill and the potential impact of the expanded Landfill on surface and ground water.

[39] Section 101 of EPEA does not specify what status a person must have in order to make a reconsideration request. The Board must examine the status when considering a reconsideration request as the level of participation can vary.

[40] The role of the Intervenor in this case was to assist the Board by providing additional information that was relevant to the issues identified by the Board. The Board summarized the Intervenor's submissions in its Report and Recommendations. The Board considered this information, as well as the evidence and arguments provided by the Parties and the information in the Director's record, in preparing its Report and Recommendations for the Minister.

[41] Under these circumstances, the Board denies the Intervenor's request for a reconsideration of the Board's February 18, 2010 Report and Recommendations.

IV. DECISION

[42] For the foregoing reasons and pursuant to section 101 of the *Environmental Protection and Enhancement Act*, the Board denies the reconsideration request.

Dated on July 2, 2010, at Edmonton, Alberta.

“original signed by”

Alex G. MacWilliam
Board Member and Panel Chair

⁶ See: *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.).

“original signed by”

Alan J. Kennedy
Board Member

“original signed by”

Dan L. Johnson
Board Member