

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision: February 9, 1999

IN THE MATTER OF Section 92.1 of the Environmental Protection and Enhancement Act (S.A. 1992, ch. E-13.3 as amended);

-and-

IN THE MATTER OF a request for reconsideration filed by Ms. Bernice Kozdrowski with respect to a Report and Recommendations issued by the Board regarding an appeal filed by Ms. Bernice Kozdrowski regarding Laidlaw Environmental Services (Ryley) Ltd.

Cite as: Kozdrowski request for reconsideration, *re: Bernice Kozdrowski v. Director of Chemicals Assessment and Management, Alberta Environmental Protection.*

TABLE OF CONTENTS

BACKGROUND	1
THE BOARD'S ANALYSIS	2
DECISION	5

BACKGROUND

[1] This matter is the latest round in a long-standing dispute arising from Approval No. 10348-01-00, granted by the Director of Chemicals Assessment and Management (“Director”), Alberta Environmental Protection (“AEP”). The Approval authorized the Approval Holder--Laidlaw Environmental Services (Ryley) Ltd. (“LES”)--to construct and operate a hazardous waste facility in Ryley, Alberta.¹ The history of the Board’s involvement in this dispute is reflected, in part, in the Board’s June 12, 1997 Report and Recommendations.² In that decision, the Board recommended that the Minister of Environmental Protection require the Director to make several changes to the Director’s Approval including, as relevant here, to increase the required thickness of the landfill’s “clay liner” from 0.6 meters to 1.5 meters.³ The Minister accepted each of the Board’s recommendations and “order[ed] that they be implemented.”⁴

[2] LES subsequently requested that the Board reconsider its recommendation regarding the clay liner thickness. The Board denied this request on the overall ground that it did not serve the “public interest.”⁵

[3] On August 24, 1998, the Appellant’s representative Mitch Bronaugh wrote the Board a letter requesting that the Board “reconsider” its June 12, 1997 Report “to determine one question:

¹ The Appellant has raised the issue as to whether LES is still the Approval Holder, given recent correspondence referring to “Safety Kleen” as the operator of the hazardous waste facility. For simplicity, the Board will refer only to LES in this Decision.

² *Bernice Kozdrowski v. Director of Chemicals Assessment and Management, Alberta Environmental Protection*, EAB No. 96-059 (June 12, 1997) (hereinafter, “Report”). See also *Cost Decision re: Bernice Kozdrowski*, EAB No. 96-059 (July 7, 1997); 23 C.E.L.R. (NS) 269.

³ Report, p. 53.

⁴ Report, p. 56.

⁵ Laidlaw Environmental Services (Ryley) Ltd. request for reconsideration, *re: Bernice Kozdrowski v. Director of Chemicals Assessment and Management, Alberta Environmental Protection*, EAB No. 96-059 (April 7, 1998); 27 C.E.L.R. (NS) 63.

whether the 'clay' liner allowed by . . . [the Director] satisfies the conditions of the Board's . . . [Report]." As grounds for this request, Mr. Bronaugh's letter claims that the Director permitted LES to construct a "clay liner" using shale and sandstone, that the latter materials are not the same as "clay" and, by implication, that those materials do not provide as much environmental protection as clay.⁶ The letter also notes the Appellant's apparent frustration in obtaining information about the Director's "implementation" of the Board's Report.

[4] The Director appears to have subsequently provided additional information to the Appellant. But the Appellant still believes either that the Director has not provided all the relevant information, or that the Director lacked sufficient information on which to approve LES' proposed liner material.⁷

THE BOARD'S ANALYSIS

[5] Section 92.1 of the *Alberta Environmental Protection and Enhancement Act*⁸ ("EPEA" or "the Act") provides that the Board "may reconsider . . . any decision . . . report, recommendation or ruling made by it." That section limits the Board's reconsideration authority by making it "[s]ubject to principles of natural justice," but otherwise gives the Board broad authority to reconsider. However, section 92.1 on its face also gives the Board broad authority to decide *whether* to reconsider.⁹ To date, the Board has not articulated specific generic rules for when it will

⁶ In his January 22, 1999 letter, Mr. Bronaugh claims that the Director allowed LES to construct the liner with "till" rather than "shale."

⁷ See the December 17, 1998, and January 22 and 24, 1999 letters from Mitch Bronaugh to the Board.

⁸ S.A. 1992, ch. E-13.3.

⁹ In a recent decision, the Alberta Court of Queen's Bench held that the Board's authority to reconsider under EPEA section 92.1 extended even after the Minister had issued an order based on the Board's Report, and after the Report was lodged with the Court of Queens Bench pursuant to section 93.1 of the Act. *Nurani v. Environmental Appeal Board* (1997), 55 Alta. L.R. (3d) 149

reconsider a prior decision, preferring instead to decide whether to grant reconsideration requests on the basis of the particular merits of each request.¹⁰ The Board notes, however, that the party requesting reconsideration generally has the burden of proving that reconsideration is warranted. And in the *Laidlaw* case, the Board stated that there should be “exceptional, compelling circumstances warranting reconsideration.”¹¹ For the reasons given below, the Board believes that the Appellant has failed to satisfy this burden.

[6] In the Board’s view, the Appellant’s reconsideration request suffers from the fundamental problem that the Appellant really has no qualm with the Board decision which the Appellant asks the Board to reconsider. Specifically, the Appellant questions the wisdom, not of the *Board’s* recommendation regarding the *thickness* of the liner, but of the *Director’s* recent decision with respect to the *type of materials* used to construct the liner.

[7] One might argue that the sufficiency of the Board’s recommendation regarding liner thickness is contingent on LES’ use of a certain type of construction material and, accordingly, that the 1.5 metre liner thickness recommended by the Board is insufficient if the Director has allowed LES to use a less protective material than that required by the Approval reviewed by the Board. A reconsideration request based on this argument would put the Board’s decision squarely at issue. However, whether or not this theoretical argument has any validity, the Board simply does not find it anywhere on the face of the Appellant’s reconsideration request and subsequent letters. Nor does the Board believe that it is appropriate to read that argument into the Appellant’s reconsideration request.

(Alta. Q.B.), 25 C.E.L.R. (N.S.) 272.

¹⁰ See, e.g., *Laidlaw Environmental Services (Ryley) Ltd. request for reconsideration, supra* note 5; *Alberta Bottle Depot Association Request for Reconsideration, re: Nurani, et al. v. Director of Action on Waste, Alberta Environmental Protection, Appeal No. 97-026* (Jan. 29, 1998), p. 4, par. 14.

¹¹ See e.g., *Kozdrowski, supra* note 5, 27 C.E.L.R. (NS) 63, 76.

[8] Similarly, one might argue that the Director's decision regarding the type of liner material is tantamount to an amendment of the Director's original approval and, therefore, that the Board should consider the wisdom of that decision pursuant to the Board's authority, under EPEA section 84(1)(a)(ii) to hear appeals of approval amendments requested by the approval holder. However, the Appellant did not file a new appeal of an approval amendment; the Appellant simply asked the Board to reconsider its decision on review of the original Approval. In fact, the Appellant never even suggested that the Director's decision was a *de facto* amendment of the original Approval, even after the Board requested the Appellant's views on whether the Director had effectively amended the original Approval.¹² Nor can the Board reasonably infer, from the scant explanation provided by the Appellant, whether the Director's decision effectively amended the original Approval or really involved the exercise of discretion on matters which the Approval had left unresolved.¹³

[9] The Board also finds unconvincing the Appellant's primary argument for reconsideration. As the Board understands it, the Appellant contends that the Director erred in approving LES' proposed choice of liner material because the Director made his approval decision within only several days after receiving LES' proposal, and based on only a "single sheet" of supporting documentation.¹⁴ The Board believes that the Appellant's argument places form over substance. The timing of the Director's approval and length of supporting documentation provide little if any guidance as to the actual merits of that approval decision, at least, without an accompanying analysis of the adequacy of the actual *content* of that supporting documentation. In short, the Board finds that the Appellant's observations with respect to timing and page length are insufficient to carry the Appellant's burden of proving that reconsideration is warranted.

¹² See the Board's December 23, 1998 letter to Mitch Bronaugh.

¹³ In another decision dated February 9, 1999, the Board decided that the Board lacks jurisdiction to hear appeals of a Director's decision to vary an approval pursuant to a Minister's Order. *Stelter v. Director, Environmental Sciences Division, Alberta Environmental Protection, re: GMB Property Rentals Ltd.*, Appeal No. 98-243-D (February 9, 1999).

¹⁴ See, e.g., Mitch Bronaugh's January 22, 1999 letter to the Board, at 1.

[10] The Director has opposed the Appellant's reconsideration request on the ground that the request "does not seek a review of the original Board decision, but rather wants a review of the Director's implementation of the Board's decision and the Minister's Order." The Director then argues that the Board lacks jurisdiction to conduct this review.¹⁵ The Board agrees with the first of these two arguments for the reasons given above and dismisses the appeal on that basis; because the Board concludes that the Appellant has failed to meet her burden of proving that reconsideration is warranted, the Board finds it unnecessary to reach the Director's second argument.

DECISION

[11] For the reasons given above, the Board denies the Appellant's reconsideration request.

Dated February 9, 1999, at Edmonton, Alberta.



Dr. William A. Tilleman

¹⁵ Sept. 9, 1998 letter from S.H. Rutwind/Alberta Justice to the Board, at 1.