

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision: April 7, 1998

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 Laidlaw Environmental Services (Ryley) Ltd. with respect to a Report and Recommendations issued by the Board regarding an appeal filed by Ms. Bernice Kozdrowski.

Cite as: Laidlaw Environmental Services (Ryley) Ltd. 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	4
I. The Board’s Authority to Reconsider Recommendation #1	4
II. Factors Weighing Against Reconsideration	5
III. LES’ Reasons For Reconsideration	8
A. ‘New’ Evidence	8
B. LES’ Other Three Grounds For Reconsideration	14
CONCLUSION	16

BACKGROUND

[1] This appeal concerns an Approval, issued by the Director of Chemicals Assessment and Management, Alberta Environmental Protection [Director], to Laidlaw Environmental Services (Ryley) Ltd. [LES]. The Approval was for the operation and reclamation of a hazardous waste storage and hazardous recyclable storage and processing facility and for the construction, operation and reclamation of a hazardous waste landfill in Ryley, Alberta. The Board held a four-day hearing in March 1997 and received *extensive* pre-hearing and post-hearing written submissions from the parties on the merits of the appeal. On June 12, 1997, the Board issued a decision recommending that the Minister of the Environmental Protection affirm the Director's Approval, with three changes.¹ The first of these changes, listed in "Recommendation #1" of the Report, was that LES should be "required to submit to the Director a final design of the landfill cell with a clay liner at least 1.5 meters in thickness."²

[2] On June 18, 1997, the Minister issued an Order accepting the Board's Report and Recommendations and "order[ing] that they be implemented."³

[3] On January 30, 1998, over seven months after the Minister approved the Board's Report and Recommendations, and approximately one month after the deadline for seeking judicial review of the Board's Report,⁴ LES' counsel wrote a letter to the Board requesting that it "reconsider

¹ *Bernice Kozdrowski v. Director of Chemicals Assessment and Management, Alberta Environmental Protection*, EAB No. 96-059 (June 12, 1997). The Board's decision document was entitled "Report and Recommendations." For brevity, that document is hereinafter referred to as the "Report."

² Report, p. 53.

³ Report, p. 56.

⁴ See February 17, 1998 letter from Stan Rutwind of Alberta Justice, par. 6; and February 18, 1998 A.O. Ackroyd letter, p.7; See also Alberta Rules of Court, Rule 753.11(1) (six month statute of limitations), AR 390/68, as amended.

Recommendation #1...⁵ LES raised essentially four reasons why the Board should reconsider that Recommendation. First, LES argued that the Recommendation would set a precedent for "all future [Alberta] landfills" and thus it was "critical" that it reflect "sound engineering principles . . ."⁶ Second, LES argued that the Director was uncertain how to "interpret" the Recommendation and the "public interest" warranted clarifying this "ambiguity".⁷ Third, LES argued that there was "new" evidence "pertaining to" the Recommendation which was not "available" at the hearing. By not "available," perhaps LES meant that it did not think to introduce the relevant evidence because, according to LES, ". . . at no time was the adequacy of the original specifications for the thickness of the clay liner put into issue nor was the necessity of a 1.5m clay liner debated."⁸ Finally, LES argued that reconsideration was necessary for the Board to "deal with the impact of the Recommendation" on landfill "Cell #2" because that impact was allegedly not "raised with this Board at the Appeal."⁹

[4] LES' reconsideration request did not include any of the "new" evidence referenced in the request, nor did it describe the "new" evidence except to say that it included "direct expert evidence" and a "full technical review"¹⁰ relating to a Wisconsin article referenced in the Board's Report and introduced as an exhibit by one of the parties.¹¹ LES also requested a "full review of new facts and evidence as to the applicability of the [Board's] recommendation in the Province of

⁵ Although dated January 30, 1998, the letter was transmitted to the Board by telefax on February 2, 1998. Hereinafter, the document will be referred to as the "January 30, 1998 McLennan letter".

⁶ January 30, 1998 McLennan letter, p. 2.

⁷ *Ibid.* LES actually combined the first and second of these two grounds for reconsideration but they are treated separately in section III of this Decision for purposes of clarity.

⁸ *Ibid.*

⁹ *Ibid.*, p. 3.

¹⁰ *Ibid.*, pp.2-3.

¹¹ Exhibit 9, M.E. Gordon, P.M. Huebner and G.R. Mitchell, "Regulation, Construction and Performance of Clay-Lined Landfills in Wisconsin".

Alberta."¹² LES' reconsideration request did not indicate how many documentary exhibits it sought to introduce or how long a hearing it expected to need for the presentation of its "direct expert evidence".

[5] Following receipt of letters in opposition to LES' request from all of the parties except the Director,¹³ LES wrote an additional letter further explaining its reasons for requesting reconsideration and providing additional detail on the facts which LES sought to prove with the "new" evidence. But, once again, LES did not identify its actual "new" evidence, except to say that it included a "U.S. study".¹⁴

[6] On March 4, 1998, the Board faxed LES' counsel a letter directing LES to provide "further clarification" as to the "nature" of the "new" evidence that LES sought to introduce. Among other things, the Board requested a "detailed written synopsis" explaining how the "new" evidence "bears on the merits of Recommendation #1" in the Board's June 1997 Report. In response, LES submitted a letter providing additional detail on the matters it intended to prove on reconsideration, but not indicating what its actual evidence was, except to say that it included or was based on "U.S. studies."¹⁵

[7] Given LES' vagueness as to just what "new" evidence it seeks to introduce, it appears that LES is requesting an undefined re-hearing which could consume as much or more time as the initial hearing and related proceedings. The open-ended nature of LES' request is confirmed by its

¹² *Ibid.*, pp. 2-3.

¹³ See February 17, 1998 letter from Stan Rutwind of Alberta Justice. The Director took no formal position on whether the Board should grant LES' reconsideration request (*Ibid.*, par. 3), although the Director agreed with LES that the Board had jurisdiction to grant reconsideration. *Ibid.*, par. 1. The Director did provide several "comments" on the Board's exercise of discretion in deciding whether to grant LES' request. *Ibid.*, pars. 3-10.

¹⁴ February 24, 1998 McLennan letter, p. 6.

¹⁵ March 10, 1998 McLennan letter, p. 2.

description of the matters that it seeks to prove on reconsideration. Although the specific target of LES' reconsideration request is the 1.5 meter clay liner thickness requirement, LES seeks to discredit that requirement based on the effectiveness of the ". . . entire liner system, conditions at the Ryley site, and the technical performance sought to be achieved."¹⁶ These quoted subjects are quite broad and were the focus of the appeal proceedings, including the approximately 39 hours of hearing that the Board conducted in March 1997, and approximately 703 pages of written submissions provided by the parties.

THE BOARD'S ANALYSIS

I. The Board's Authority To Reconsider Recommendation #1

[8] Section 92.1 of the *Alberta Environmental Protection and Enhancement Act*¹⁷ ("the Act") provides that the Board ". . . may reconsider, . . . any decision, . . . report, recommendation or ruling made by it." The Act limits this authority by making it "[s]ubject to principles of natural justice, . . ."¹⁸ but otherwise gives the Board broad authority to reconsider. However, section 92.1 also gives the Board broad authority to decide *whether* to reconsider.¹⁹

[9] To date, the Board has not articulated specific grounds or tests for when it will reconsider a prior decision, preferring instead to decide whether to grant reconsideration requests

¹⁶ February 24, 1998 McLennan letter, p. 6.

¹⁷ S.A. 1992, ch. E-13.3 as amended.

¹⁸ *Ibid.*, s. 92.1.

¹⁹ In a recent decision, the Alberta Court of Queen's Bench held that the Board's authority to reconsider under section 92.1 of the Act, 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*, Action No. 9703-18343 (November 27, 1997).

on the basis of the particular merits of each request.²⁰ However, there is a common underlying question governing all of the Board's reconsideration decisions, which is whether granting reconsideration will promote the "public interest". The Board is not opposed to granting reconsideration requests, but there must be exceptional, compelling circumstances to warrant reconsideration.

II. Factors Weighing Against Reconsideration

[10] Chief among the factors weighing against reconsideration are the delays that will result from postponing a final resolution of this matter and the need for finality.²¹ Those factors seem fully applicable here. As LES has reminded the Board several times, this appeal was preceded by lengthy approval proceedings.²² The appeal of that Approval, alone, has taken approximately 1 year. Given the undefined nature of the evidence which LES seeks to offer on reconsideration, and the need to provide the other parties an opportunity to submit their evidentiary responses, the Board is convinced that a reconsideration proceeding would itself be a lengthy process. The costs of additional delay are borne, not only by LES (who, of course, is willing to incur those costs), but by the parties, the Director, the Board, and the public at large. Continued uncertainty affects everyone.

[11] Of course, the delay has been exacerbated by the over seven month period between the Board's issuance of the Report and LES' filing of its reconsideration request. Moreover, the six

²⁰ See *Alberta Bottle Depot Association request for reconsideration, re: Nurani and Virji-Nurani v. Director of Action on Waste, Alberta Environmental Protection*, Appeal No. 97-026 (January 29, 1998), p. 4, par. 14.

²¹ See R.W. Macaulay, *Practice and Procedure Before Administrative Tribunals*, Looseleaf ed. (Toronto: Carswell, 1988) (hereinafter "Macaulay"), pp. 27A-4, and 27A-9 - 27A-10.

²² See, e.g., LES' "Written Submission", p. 1, par. 3 and p. 3; and LES' "Closing Argument," p. 17, par. 61. In fact, LES raised the policy against delay in specifically opposing a request by the appellant to call an additional witness after the close of her case-in-chief. LES' request to present evidence at this late stage regarding the effectiveness of the overall liner system is ironic, given LES' objection to the appellants' request to call a single additional witness at the hearing.

month period for LES to seek judicial review of the Board's June 1997 Report²³ expired during this seven month period before LES filed its reconsideration request. Reconsidering Recommendation #1, especially on the broad evidentiary basis proposed by LES, would thus provide LES with a new decision on the merits which, even if adverse to LES, might trigger a new limitations period for LES to seek judicial review. That result would contradict the public policies underlying statutes of limitations and would be patently unfair to the parties.

[12] LES argues that its delay in seeking reconsideration was excusable, because the company was "compelled" to wait for the Director's January 1998 "Decision Report" before filing its reconsideration request. According to LES, "[u]ntil the Decision Report was issued, LES simply did not know how to interpret . . ." the Board's Recommendation that the thickness of the clay liner should be 1.5 meters instead of LES' design thickness of 0.6 meters.²⁴

[13] The Board finds this argument unpersuasive, for several reasons. First, the logical, reasonable way to "interpret" the Board's Recommendation is by its plain meaning. The recommendation provided that the thickness of the clay liner should be 1.5 meters; it is hard to imagine how the Board could have been more specific on the required thickness of the liner. LES also claims there is uncertainty regarding whether the Board had intended that Recommendation #1 apply to Cell #2. As discussed in section III below, the Board believes its intent on that issue was clear from the June 1997 Report.²⁵ More importantly, however, even if the Board's Recommendation did create reasonable uncertainty, LES could and should have taken the matter directly up with the

²³ *Supra* note 4.

²⁴ February 24, 1998 McLennan letter, p. 7.

²⁵ In addition, the Department had made its position on this issue clear to LES before the Board issued its June 1997 Report. See January 12, 1998 Decision Report by Director, Chemicals Assessment & Management Division, Regarding Environmental Appeal Board Report 96-059, Laidlaw Environmental Services (Ryley) Ltd. (hereinafter, the "Decision Report"), p.10 (noting that in two site visits conducted prior to June 1997, "Department staff reminded Company officials that the Company was assuming a risk because the results of the EAB appeal hearing were still pending, and that the EAB may recommend that the terms of the approval be varied.").

Board immediately after the Board issued the Report in June 1997.

[14] It seems that rather than seeking clarification on the meaning of Recommendation #1, LES was in effect seeking a *waiver* from the Director of that Recommendation, at least, for Cell #2, on the ground that its liner as-built provided a level of protection from leakage that was "equivalent" to that provided by a 1.5 meter thick clay liner.²⁶ Whether or not that waiver request was appropriate, it did not "compel" LES to forego requesting that the Board reconsider or clarify its Recommendation immediately after the Board issued the Report in June 1997.

[15] To be clear: the Board does not intend the above discussion to establish a rigid rule that reconsideration requests must be filed immediately after the Board issues the decision sought to be reconsidered. The Board simply feels that the delay in this case was inexcusable.

[16] Besides the costs of delay and lack of finality, reconsideration may prejudice other parties by taking advantage of their lack of resources. As Macaulay has stated:

Allowing or permitting an agency to review a decision which it has made, gives unfair assistance to those parties with deep pockets in that they can continue to contest the issue as long as their wallets hold out. The process, in short, would favour those with resources, a fact which ought not to be encouraged.²⁷

[17] This concern is applicable here, given the parties' scarce financial resources relative to LES, and especially given the undefined reconsideration process that LES seems to envision. Meaningful participation in this process will require considerable additional resources which the parties clearly lack.²⁸

²⁶ See *ibid.*, pp. 12-30.

²⁷ Macaulay, p. 27A-3.

²⁸ See the Board's cost decision in *Re: Kozdrowski* (1997), 23 C.E.L.R. (N.S.), 281.

[18] In sum, the factors against reconsideration apply with full force in this case. Given the weight of these factors, LES bears a heavy burden to show that, on a balance of all factors, exceptional circumstances exist to warrant reconsideration. As discussed in the following section, LES has not satisfied this burden.

III. LES' Reasons For Reconsideration

A. "New" Evidence

[19] LES' primary ground for reconsideration is the availability of "new" evidence regarding clay liner thickness. The Board will not routinely grant reconsideration requests whenever any "new" evidence is brought forth. In complex environmental disputes like those typically before the Board, with the passage of time "new" evidence will always arise as more scientific research is conducted. If the Board routinely reconsidered its prior decisions to update them with the latest research results, appeals would never end. The Board need not decide what kind of "new" evidence is sufficient to warrant reconsideration here, however, because the Board does not believe that LES' evidence is in fact "new".

[20] LES' argument for why its evidence is "new" rests entirely on its claim that, "at no time was the adequacy of the original specifications for the thickness of the clay liner put into issue nor was the necessity of a 1.5m clay liner debated."²⁹ The documentary record of this appeal, by itself, contradicts LES' claim. This record shows that LES and the Director indirectly put the adequacy of the clay liner at issue by repeatedly insisting that the overall landfill design was state-of-the-art,³⁰ and by maintaining that the proposed 0.6 meters thick clay liner was an integral part of this

²⁹ January 30, 1998 McLennan letter, p. 2.

³⁰ See, e.g., LES' "Closing Argument", p. 11, par. 41 (landfill design is "best available technology"); Director's March 14, 1997 "Final Argument", p. 7 (comparing LES' landfill design with CCME Guidelines for hazardous waste landfills); and the Board's June 1997 Report, pp. 50-51 text and (continued...)

design.³¹ The validity of these assertions with respect to the 0.6 meters thickness of LES' proposed clay liner was first raised by the Director in the Approval proceeding. In a letter raising questions about the information provided in LES' application, the Director's staff asked: "What was the basis of selecting the thickness of the various liners?"³² LES responded by citing the relevant portion of its application, and with the blanket statement that its liner system is the "corporate standard for hazardous waste landfills and is in use in landfills operated under EPA jurisdiction in all U.S. locations."³³ Thus, in its first opportunity to respond to a question about the clay liner thickness, LES chose not to provide specific evidence supporting 0.6 meters and, instead, referred vaguely to a general "corporate" standard and EPA-approved landfills.

[21] The Director apparently took LES' blanket response at face value, although a quick check of the EPA regulations would have provided a contrary answer or at least raised a question regarding the validity of LES' response. Those regulations require that hazardous waste landfills have a "liner system" which consists of a "top liner" and a "composite bottom liner," the "lower component" of which "must be constructed of *at least* 3 feet (91 cm) of compacted soil material"³⁴

[22] Appellant Bernice Kozdrowski was less accepting than the Department of LES'

³⁰(...continued)

footnote 37 (citing P. Ruffell's testimony in hearing excerpt).

³¹ See, e.g. March 1995, "An Assessment of Environmental and Socio-Economic Impacts Associated with an Amendment of the Licence to Operate for Laidlaw Environmental Services' Hazardous Waste Facility Near Ryley, Alberta," pp. 2-11 (appendix to LES' application, in vol. 1 of administrative record provided by the Director).

³² March 6, 1996 letter from Sadiq Unwala of the Department to Dave McNeil of LES, p. 2 (tab 3 in vol. II of administrative record provided by the Director).

³³ LES' response to the Department's letter of March 6, 1996; par. 12, accompanying the letter of March 27, 1996 from Dave McNeil of LES to Sadiq Unwala of the Department (tab 4 in vol. II of the administrative record provided by the Director).

³⁴ 40 C.F.R. § 264.301(c)(1)(i) (1992) (emphasis added).

assurance that its liner system was state-of-the-art. In his pre-hearing written submission on behalf of the appellant, Mitch Bronaugh compared LES' entire proposed liner system with a "[t]ypical" system which authors Feeney and Maxson derived from their study of 49 landfills. Bronaugh's comparison showed that LES' proposed clay liner was 1 foot thinner than that of the corresponding "typical" clay liner.³⁵

[23] Bronaugh made it clear that the Feeney and Maxson system was "typical" for landfills generally, not for hazardous waste landfills,³⁶ thus implying that the typical hazardous waste landfill would have an even more rigorous liner system than that presented by Feeney and Maxson.

[24] Bronaugh's comparison, by itself, put the adequacy of the thickness of LES' proposed clay liner *squarely in issue*. Of course, the Unwala letter discussed earlier should have sensitized LES to this issue well before Bronaugh's submission.

[25] In his post-hearing submission, Bronaugh expressly challenged the "assertion, often stated or implied in a variety of forms, that the proposed landfill cell will be 'state of the art'." According to Bronaugh, LES' design was not state-of-the-art, "since it is less robust (more flimsy) than normal modern landfill construction, as we pointed out in our 19 February submission."³⁷

³⁵ Written submission of Mitch Bronaugh, February, 1997 entitled "Report to the Environmental Appeal Board Concerning the 1996 Approval Issued By Alberta Environmental Protection Allowing Laidlaw Environmental Services To Bury Hazardous Waste in the Landfill in Ryley, Alberta," pp. 10-11.

³⁶ *Ibid.*

³⁷ March 14, 1997 "Written Final Argument - re: EAB hearing on Appeal of LES Ryley Approval; Prepared by Mitch Bronaugh on behalf of Bernice Kozdrowski," p. 8 (unnumbered). Ironically, LES' engineer, Paul Ruffell, referred to the same Feeney and Maxson report cited by Mitch Bronaugh for purposes of rebutting complaints regarding LES' synthetic liners (see Exhibit 32, Overheads Presented by Paul Ruffell, p. 3), but Mr. Ruffell ignored the significance of the report for Bronaugh's comparison of clay liner thicknesses. LES' post-hearing submission made a similar mistake, or tried to throw the Board off the clay liner track, by claiming that Ms. Kozdrowski's written submission "dealt only" with the appropriateness of the hydrogeology of the site and the adequacy of LES' proposed geosynthetic liners. Closing Argument of Laidlaw Environmental Services (Ryley) Ltd.,

(continued...)

Experts could well debate *ad nauseam* the appropriateness of Bronaugh's comparison of LES' clay liner thickness with that of a "typical" landfill design. The point here is simply that Bronaugh's comparison clearly put LES on notice of its need to address this issue *well before* the Board reached its final decision.

[26] There were other documents in the appeal record relating to LES' claim that its overall design was state-of-the-art. These documents provided LES with further notice of its need to justify the proposed thickness of its clay liner. Section 3.4 of the CCME Guidelines referenced by the Director, and included as a hearing exhibit (#26), listed several examples of hazardous waste landfills with liners thicker than 0.6 meters. The EPA "Guide to Technical Resources for the Design of Land Disposal Facilities", also included as a hearing exhibit, lists thickness as one of several important criteria for the design of the soil liner components of landfills.³⁸

[27] Finally, the Wisconsin article referenced on page 33 of the Board's Report had an approximately two-page discussion of the advantages of a 1.5 meter thick clay liner for landfills, including a discussion of models showing a "considerable reduction in leakage as liner thickness is increased until a point of diminishing return is reached between 1.2 to 1.8 m (4 to 6 feet)."³⁹ LES now refers vaguely to evidence showing a point of diminishing return at 0.6 meters rather than the 1.2 to 1.8 meter range suggested in the Wisconsin article,⁴⁰ and that the conclusions of the Wisconsin

³⁷(...continued)

pp. 2-3, par. 3.

³⁸ Exhibit 38, United States Environmental Protection Agency, "Guide to Technical Resources for the Design of Land Disposal Facilities," p. 23.

³⁹ Exhibit 9, pp. 17-18; see also *ibid.*, pp. 14, 16, and 18 (repeated references to the advantages of "thick" clay liners).

⁴⁰ February 24, 1998 McLennan letter, p. 6 ("... increasing the minimum thickness beyond 60 cm has a negligible additional benefit in terms of reducing the amount of leakage from a facility.").

study are inapplicable generally to LES' facility.⁴¹ But LES had ample notice and opportunity of the need to introduce that evidence at the hearing, or even to request the Board's permission to introduce the evidence after the close of the hearing, to rebut the conclusions of the Wisconsin article. The Board's cite to the Wisconsin article in its discussion of the need for Recommendation #1⁴² is itself evidence that the article put liner thickness at issue.

[28] LES argues that the other parties in effect induced the company to ignore the Wisconsin article's repeated references to clay liner thickness because their focus was on other characteristics of the proposed clay liner, and on other aspects of the overall landfill design.⁴³ Admittedly, the portions of the appeal record discussed above relating to clay liner thickness are not as extensive as those relating to other aspects of LES' landfill design and siting, but they were nevertheless significant enough in their own right because they raised concerns about the reliability of the landfill and that depends upon the integrity of the liner including its thickness. These parties, therefore, put the thickness of the liner at issue. In other words, a matter need not be the primary or sole focus of the parties' attention to be put at issue.

[29] LES' argument based on the supposed "focus" of the parties' presentations must be viewed in light of its desire, as discussed in section I above, to introduce evidence showing that increasing the thickness of its clay liner is unnecessary given the leakage protections provided by other characteristics of its overall landfill system. The parties made clear their view that the landfill system as a whole, including the clay liner, would ultimately leak.⁴⁴ Given the abundance of oral and documentary evidence provided by all parties, including LES, which admitted during the hearing

⁴¹ *Ibid.*

⁴² Report, p. 33.

⁴³ January 30, 1998 and February 24, 1998 McLennan letters, pp. 2 and 5-6 respectively.

⁴⁴ *E.g.*, Mitch Bronaugh's February 1997 "Report to the Environmental Appeal Board Concerning the 1996 Approval Issued By Alberta Environmental Protection Allowing Laidlaw Environmental Services To Bury Hazardous Waste in the Landfill in Ryley, Alberta", p. 15 ("The liners *will* leak . . ." Emphasis in original.).

that the liner will eventually leak, LES can hardly now argue that it lacked sufficient notice of its need to defend the overall landfill design during the hearing.

[30] In sum, the Board finds unconvincing LES' argument that it lacked a sufficient opportunity at the hearing to present evidence to bolster its chosen clay liner thickness, given the documentary record discussed above. Thus, the evidence LES now wishes to present is not sufficiently "new" or exceptional to warrant reconsideration. Evidence on clay liners was available to LES and within its control during the hearing.

[31] One party has suggested that to warrant reconsideration, the requester's evidence must not only qualify as "new," it must also be significant or conclusive.⁴⁵ The Board is unable to determine whether LES' evidence meets this test since LES has not produced or even clearly identified it. Nor is the Board certain that the parties' test is appropriate in this context.⁴⁶ However, the Board need not and will not decide either of these questions given its conclusion that LES' evidence is not even "new" in the sense in which LES uses that term.

[32] Several of the parties responded to LES' reconsideration request by referring to numerous documents which arose after the Board issued the Report. These documents generally address the nature of the bottom liner actually constructed by LES in relation to the "clay liner" design referenced in the Board's Report. The Board will not reconsider the merits of Recommendation #1 based on these comments. The Board evaluated the merits of the Director's approval assuming that the bottom liner was made of clay with the characteristics (e.g. percent clay size fraction; average plasticity index) identified on page 34 of the Report. As far as the Board is concerned, LES has obtained an Approval to operate a hazardous waste landfill if it has cells with

⁴⁵ February 18, 1998 A.O. Ackroyd, Q.C. letter, p. 2.

⁴⁶ See Macaulay, p. 27A-11 (citing *Castro v. Canada (Minister of Employment and Immigration)*, [1945] K.B. 502, for the principle that ". . . the proffered evidence need only be such as to support a conclusion that there is a reasonable possibility as opposed to probability that it could lead the agency to change its original decision.").

a 1.5 meter thick bottom liner made of clay with those specific characteristics. If LES now wants to operate the facility with some other kind of bottom liner, it cannot do so under this Approval.

B. LES' Other Three Grounds For Reconsideration

[33] As discussed in section I of this decision, LES argued that reconsideration was warranted, not only because of the availability of so-called "new" evidence, but because of the need to: ensure that Recommendation #1 is based on "sound engineering principles" due to the precedential effect of Recommendation #1 for other Alberta landfills; the Director's uncertainty in how to interpret Recommendation #1; and the need to address whether Recommendation #1 applies to Cell #2 of LES' landfill. The Board does not find any of these three arguments persuasive grounds for re-opening the appeal proceeding, especially, for the kind of wide-open evidentiary process LES seems to be requesting.

[34] As for the first of these three grounds proffered by LES, the Board agrees that its Recommendation #1 should be based on "sound engineering principles," and the Board believes that the appeal record as a whole supports its Recommendation. However, the Board disagrees with LES' implication that Recommendation #1 will provide a rigid standard for all future Alberta landfills. Those landfills should be evaluated on their own merits of their own designs in light of the nature of the wastes which they propose to store and given their particular site characteristics.⁴⁷ The Board does hope that the concerns its Report expressed, regarding the depth and nature of the Director's review of LES' application,⁴⁸ will set a precedent engendering more detailed Department reviews of future Alberta landfills. But this precedent is consistent with, not contrary to, the "sound engineering principles" with which LES is concerned. It is also consistent with the Act and regulations to provide a margin of safety whenever site-specific factors suggest a significant threat

⁴⁷ See CCME National Guidelines for the Landfilling of Hazardous Waste-April 1991 (Hearing Exhibit 26), p. xiii, pars. (h-j) (precise landfill design should be based on site-specific factors).

⁴⁸ See Executive Summary of the Report and pp. 31, 33, 43-47.

of harm to Alberta's environment. This was such a case.

[35] As for LES' claim that Recommendation #1 is ambiguous, the Board has already indicated in this Decision that the Recommendation's terms could not be more clear: they require a clay liner 1.5 meter thick, with the clay characteristics described on page 34 of the Report. If LES now wishes to use a different kind of bottom liner, the Board does not see how it can do so under the current Approval, as modified by Recommendation #1.

[36] Finally, the Board does not believe there is any reasonable uncertainty regarding whether Recommendation #1 should apply to Cell #2. LES argues that it lawfully constructed Cell #2 under the original Approval and that, absent a formal Stay of the Approval issued by this Board, the appellants' filing of their appeal did not automatically stay the legal effect of that Approval. This argument has two flaws: first, neither this Board nor, presumably, the appellants, believed that it was necessary to issue a Stay given LES' own representations that:

“... the design submitted is a *conceptual* design; hence a *provisional* approval; hence the Director must in the Board's opinion have the full discretion to approve the *final* engineering design.”⁴⁹

[37] The second flaw in LES' "retroactivity" argument is that the Approval applies not only to the construction of Cell #2, but to the long term operation of that Cell for the storage of hazardous wastes. The Board recommended that the Minister uphold the Approval--for construction and operation--only if the landfill used a cell design with a 1.5 meter thick clay liner. That recommendation can hardly be termed retroactive to the operation component of the Approval, since LES does not claim that it had filled Cell #2 with hazardous wastes before the Board issued the Report.

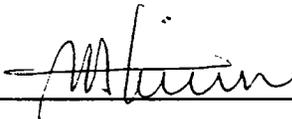
⁴⁹ Report, p. 34 (emphasis added).

CONCLUSION

[38] For the reasons discussed above, the Board believes that "public interest" will not be served by granting LES's reconsideration request. The parties have already made extensive evidentiary presentations to the Board. LES had a reasonable opportunity at the hearing to present additional evidence regarding the adequacy of the thickness of its proposed clay liner, but chose not to do so. There are no other exceptional, compelling circumstances warranting reconsideration.

[39] In refusing LES's request, the Board wishes to make it clear that it has not altered its original decision, or issued a new order or direction.

Dated on April 7, 1998, at Edmonton, Alberta.



Dr. William A. Tilleman, Chair



Dr. John P. Ogilvie



Dr. M. Anne Naeth