

DECISION NO. 2009-EMA-005(a)

In the matter of an appeal under section 100 of the *Environmental Management Act*, S.B.C. 2003, c. 53.

BETWEEN:	Ermes Culos on behalf of himself and Maria R. Martin Alan and Gloria Mertens Dolly Low	APPLICANTS
AND:	Director, <i>Environmental Management Act</i>	RESPONDENT
AND:	Wastech Services Ltd. Village of Cache Creek	THIRD PARTIES
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on November 12, 2009	
APPEARING:	For the Applicants: Ermes Culos For the Respondent: Larry Gardiner For the Third Party, Wastech Services Ltd.: Russ Black	

STAY DECISION

APPLICATION

[1] On August 31, 2009, Larry Gardiner, acting as a Director under the *Environmental Management Act* (the "Director"), Ministry of Environment (the "Ministry"), issued a decision amending operational certificate MR-7577 (the "Certificate"). The Certificate, as amended, authorizes the Village of Cache Creek and Wastech Services Ltd. ("Wastech") to manage municipal solid waste at a sanitary landfill facility located in Cache Creek, BC. Among other things, the August 31, 2009 amendments authorize an expansion of the landfill's footprint to include an additional 6.7 hectare area which is referred to in the Certificate as "Annex A", located on the west side of the existing landfill.

[2] On September 17, 2009, Ermes Culos on behalf of himself and four other individuals filed an appeal of the Director's decision. They also requested a stay of the Director's decision, pending the Board's decision on the merits of the appeal. This decision addresses their application for a stay of the Director's decision.

[3] This application was conducted by way of written submissions.

BACKGROUND

[4] Operation of the Cache Creek landfill was first authorized in 1987 under a permit issued by the then Provincial Ministry of Environment and Parks. Waste discharged to the landfill comes from the Greater Vancouver Regional District, the Village of Cache Creek, and the surrounding Thompson-Nicola Regional District. The landfill is located on Crown land just south of the Village of Cache Creek. Within its pre-existing boundaries, excluding Annex A, the landfill occupied approximately 49 hectares of land. The landfill is bordered by the Trans-Canada Highway to the east. The Bonaparte River is located approximately 400 to 500 metres east of the Trans-Canada Highway.

[5] The Director's August 31, 2009 amendments to the Certificate include:

- administrative revisions;
- authorization to expand the landfill footprint to include Annex A;
- amendments regarding the types of wastes that shall not be discharged to the landfill;
- a requirement to submit to the Director an updated design, operating and closure plan for approval by October 16, 2009; and
- amendments addressing community consultation and reporting.

[6] Mr. Culos has filed several previous appeals concerning this landfill, primarily based on concerns that leachate from the landfill may be contaminating local groundwater.

In the present Notice of Appeal, Mr. Culos states that he is appealing on his own behalf and on behalf of three other individuals: Maria R. Martin; Alan and Gloria Mertens; and, Dolly Low (the "Applicants"). Their grounds for appeal may be summarized as follows:

- the decision to approve Annex A does not constitute an amendment, because Annex A has never been issued a permit, and only a permit can be amended, and therefore the decision is invalid;
- the Director's decision violates the requirements of the *Environmental Management Act* (the "Act") and the Thompson-Nicola Regional District Solid Waste Management Plan; and
- the Director's decision will have an adverse effect on the environment.

[7] The Applicants request that the Board reverse the Director's decision.

[8] In their Notice of Appeal, the Applicants also requested a stay of the Director's amendments, pending the Board's decision on the merits of the appeal.

[9] Both the Director and Wastech oppose the stay application.

[10] The Village of Cache Creek provided no submissions on the stay application.

ISSUE

[11] The sole issue arising from this application is whether the Panel should grant a stay of the decision to amend the Certificate, pending a decision on the merits of the appeal.

RELEVANT LEGISLATION AND CASE LAW

[12] Section 104 of the *Act* empowers the Board to order stays:

Appeal does not operate as stay

104 The commencement of an appeal under this Division does not operate as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.

[13] In *North Fraser Harbor Commission et al. v. Deputy Director of Waste Management* (Environmental Appeal Board, Appeal No. 97-WAS-05(a), June 5, 1997), [1997] B.C.E.A. No. 42 (Q.L.), the Board concluded that the test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.) [*RJR MacDonald*] applies to applications for stays before the Board. That test requires an applicant for a stay to demonstrate the following:

1. there is a serious issue to be tried;
2. irreparable harm will result if the stay is not granted; and
3. the balance of convenience favors granting the stay.

[14] The onus is on the applicant to demonstrate good and sufficient reasons why a stay should be granted.

DISCUSSION AND ANALYSIS

Whether the Panel should grant a stay of the decision to amend the Certificate, pending a decision on the merits of the appeal.

Serious Issue

[15] In *RJR MacDonald*, the Court stated as follows:

What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one.

[16] The Court also stated that, unless the case is frivolous or vexatious, or is a pure question of law, the inquiry generally should proceed onto the next stage of the test.

[17] On behalf of the Applicants, Mr. Culos submits that the appeal raises serious issues to be decided. In particular, he submits that the existing landfill is causing harmful leachate to enter the Bonaparte River and groundwater wells, and the Annex will impact the existing landfill by causing pressure on it and influencing the leachate leaving it. He submits that Wastech acknowledges that the area where Annex A and the existing landfill will overlap consists of 9 percent of the existing landfill's area.

[18] The Director did not address this stage of the test.

[19] Wastech submits that Mr. Culos has failed to identify a serious issue to be tried. In particular, Wastech submits that Mr. Culos' stay application, and most of his appeal, is based on the incorrect premise that Annex A will increase the physical load on waste deposited in the existing landfill. Wastech submits that Mr. Culos has provided no objective evidence that Annex A will have any impact on the existing landfill, but rather, he makes speculations based on a misunderstanding of the engineering of Annex A. In addition, Wastech submits that many of the issues identified by Mr. Culos do not arise from the Director's August 31, 2009 amendments, but rather from what Mr. Culos believes to be flaws in the design, operation and monitoring of the existing landfill, which are not in issue in this appeal.

Panel's findings

[20] The Panel has reviewed the Applicants grounds for appeal. The Panel finds that their grounds for appeal raise serious issues to be decided, which are not frivolous, vexatious, or pure questions of law. Although some of the issues raised by them pertain to matters which were not the subject of the Director's August 31, 2009 decision, and therefore, are not properly before the Board in this appeal, they raise some issues which are relevant to the Director's decision. They raise issues regarding the potential adverse environmental impacts of the Director's decision. In particular, they raise issues regarding whether Annex A will have an adverse impact on the environment, albeit through its potential effects on the existing landfill. The question of whether authorizing Annex A may cause adverse environmental impacts is a serious and arguable issue.

Irreparable Harm

[21] At this stage of the *RJR MacDonald* test, Mr. Culos must demonstrate that his interests will suffer irreparable harm if a stay is not granted. As stated in *RJR MacDonald*, at p. 405:

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the Association's own interest that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

...

'Irreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision...; where one party will suffer permanent market loss or irrevocable damage to its business reputation...; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined...

[22] Mr. Culos submits that denying a stay will cause irreparable harm to the environment and the Applicants' well being. He submits that Annex A will increase the height and mass of the existing landfill, and prolong the existing landfill's life, and as such, Annex A will contribute to or enable the continuation of the environmental harm caused by the landfill.

[23] The Director submits that Mr. Culos has failed to demonstrate any reasonable risk of irreparable harm if the Certificate, as amended, remains in effect pending the outcome of the appeal. He further submits that the amendments enhance the Certificate's monitoring and reporting requirements, which will reduce any risk of harm to persons or the environment. He maintains that, with the exception of the expansion of the footprint to include Annex A, all other amendments to the Certificate are either neutral or afford a higher level of environmental protection than before.

[24] Regarding whether the expansion of the footprint to include Annex A will cause irreparable harm, the Director makes several points, which are summarized as follows:

- construction of the works associated with Annex A is underway, and will not be ready to receive waste until late Spring or early Summer 2010 at the earliest, by which time the Board would likely have heard the appeal and rendered a decision;
- there is no indication that construction of Annex A will confound environmental protection regarding the existing landfill; and
- even if Annex A is utilized before the Board decides the appeal, waste will not reach the area that overlaps with the existing landfill for 12 months, and it is likely that the appeal will be concluded long before then. Also, it is not expected that Annex A will affect the leachate collection system for the existing landfill, and Annex A has added environmental protections compared to the existing landfill.

[25] Wastech submits that Mr. Culos has not demonstrated that the amendments will result in irreparable harm, pending the outcome of the appeal. Wastech submits that his submissions consist of conjecture and personal opinions, rather than expert evidence. Wastech also submits that Mr. Culos relies on information that is taken out of context or was provided by sources that have been discredited.

Panel's findings

[26] Satisfying this branch of the test requires the Applicants to show that their interests will suffer irreparable harm between now and the time when the appeal is decided, unless a stay is granted. This requires that they provide credible evidence in support of the claim for irreparable harm. That evidence need not be so strong as to be irrefutable, but there should be some evidence in support of the harm alleged.

[27] The Panel finds that there is insufficient evidence to conclude that there will be irreparable harm to the Applicants interests in the environment and/or human health if a stay is denied. The Panel agrees with the Director that there is no evidence that allowing continued construction of the Annex will cause irreparable harm to the environment.

[28] The Panel finds that there is conflicting evidence on the question of whether the use of Annex A will cause environmental harm once it overlaps with the existing landfill. It would be inappropriate for the Panel to decide that question in this preliminary application, as it would amount to deciding the merits of the appeal. However, the Panel accepts the Director's projection that the waste deposited in Annex A will not reach the area of overlap until 12 months after operations commence. If operations commence when expected in 2010, the area of overlap would not be reached until late Spring or early Summer 2011. The appeal will likely be decided before that time. Also, the Panel accepts that Annex A will include environmental protections that are not found in the existing landfill, including a composite liner under the entire fill area. In conclusion, the Panel finds that there is no evidence that the use of Annex A before the appeal is decided will cause irreparable harm if a stay is denied.

[29] For all of these reasons, the Panel finds that the Applicants have not established that their interests will suffer irreparable harm between now and the time that the appeal is decided unless a stay is granted.

Balance of Convenience

[30] This branch of the test requires the Panel to determine which party will suffer the greatest harm from the granting or the denial of the stay application.

[31] On behalf of the Applicants, Mr. Culos submits that, if a stay is denied, the risk of harm to the environment and human health outweighs any potential harm to the interests of the Director or Wastech if a stay is denied. He submits that a stay will allow time for evidence to be brought forward that will prove that there is a serious threat to people and the environment. In addition, Mr. Culos submits that the public interest in protecting the environment and human health is best served by granting a stay until it is established that the project will not be a threat to public safety.

[32] The Director did not address this stage of the test.

[33] Wastech submits that there is no reasonable possibility that waste will be deposited above or adjacent to the top of the existing landfill until after the appeal is decided. Wastech also submits that granting a stay would harm Wastech's interests by interfering with its business operations, because operations in Annex A are scheduled to commence when the existing landfill reaches its capacity. A stay would cause delays that could interfere with Wastech's ability to receive waste once the existing landfill reaches capacity.

Panel's findings

[34] The Panel notes that an interlocutory stay is considered an exceptional remedy. The Panel finds that the Applicants have not demonstrated any irreparable harm to the environment or human health if a stay is denied. Further, the Panel finds that they have not demonstrated any harm to the environment or human health if a stay is denied and Annex A is constructed and begins operations before the appeal is decided.

[35] The Panel further finds that denying a stay may interrupt Wastech's business operations, which could affect its financial interests.

[36] Finally, the Panel finds that many of the Director's amendments appear to provide for the protection of the environment and human health, which are the very interests that the Applicants seek to protect. For the limited purpose of deciding this stay application, the Panel finds that the amendments provide greater safeguards to protect the environment and human health, to the extent that the amendments enhance environmental controls, community consultation, and reporting in relation to Annex A and the existing landfill. These findings are made without the benefit of a full hearing of the evidence, and have no bearing on the merits of the appeal.

[37] Under these circumstances, the Panel finds that the balance of convenience weighs in favour of denying a stay of the Director's decision to amend the Certificate.

DECISION

[38] The Panel has considered all the submissions and arguments made, whether or not they have been specifically referenced herein.

[39] For the reasons stated above, the application for a stay is denied.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

November 25, 2009