

2012 ABEAB 35

Appeal Nos. 11-049 etc.

October 17, 2012

Via E-Mail or Mail

To Distribution List:

**Re: Waste Management of Canada Corporation/Water Act Approval No. 00266612-00-00/Our File Nos.: EAB 11-025 etc.; and EPEA Approval No. 236328-00-00/Our File Nos.: EAB 11-049 etc.
Decision: DL-1**

The Board has reviewed the information provided by Mr. Frank and Ms. Donna VanDenBroek in the attached email dated October 9, 2012, regarding their reconsideration request of the Board's decision on their intervenor application. The Board denies the VanDenBroek's reconsideration request and these are the Board's reasons. This decision was made by the Chair, Mr. Delmar W. Perras. A formal decision of the Board's reasons will only be provided if requested by any of the parties.

Under section 101 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), the Board can reconsider a decision made by it. The Board uses its discretion to reconsider a decision with caution. The power to reconsider is the exception to the general rule that decisions of the Board are intended to be final.

The onus is on the party making the request to convince the Board there are exceptional and compelling reasons to reconsider the decision. The Board considers: the public interest, the need for finality, whether there was a substantial error of law that would change the result, and whether there is new evidence not reasonably available at the time of the previous decision.

There is a public interest in the issues to be heard at the hearing, particularly for those living in proximity to the landfill. The number of appeals the Board received is a clear indicator of the public interest in this matter. However, the issues raised in the VanDenBroeks' intervenor request did not indicate how their evidence would differ from the appellants' evidence.

As stated, the Board's decisions are intended to be final, so compelling reasons must be given to grant a reconsideration. Once a decision is made, the parties to the appeal will know what course of action they can take. The VanDenBroeks have not provided any compelling reason for the Board to reconsider its decision.

The VanDenBroeks did not identify any error in law in the Board's previous decision. Although the Board's decision may not have been in the VanDenBroeks' favour, it does not demonstrate there was an error in law.

An applicant for a reconsideration must differentiate between two types of new evidence. Evidence that has been acquired since the decision was made but was available at the time of the hearing, is not relevant for purposes of reconsideration. However, information that was not available at the time the decision was made or was not practically obtainable by the parties would be relevant.

In their reconsideration request, the VanDenBroeks did not provide any new information that was not available at the time of the Board's initial decision regarding their intervenor request. All of the information included in the reconsideration request was available during the initial intervenor process. It is not new information, and they did not provide any reason to explain why the information should be considered as new evidence.

In the additional information provided by the VanDenBroeks, they noted the Notice of Hearing did not indicate they would have to bring forward new information. As stated in the intervenor decision, one of the criteria the Board considers when determining whether intervenor status should be granted is whether the evidence that is anticipated to be brought forward by the intervenor will be duplicative of the parties. If there is no indication the intervenor will bring forward evidence that is different from the parties' evidence, the Board generally does not grant intervenor standing.

In its decision the Board did not state it had to be new information; the information had to be different from what is being brought forward by the parties.

Based on the intervenor application provided by the VanDenBroeks, they did not indicate where they lived in relation to the landfill other than to state they lived within three miles of the site. WMCC explained the VanDenBroeks live northwest of the site. Where the VanDenBroeks lived did not factor into the Board's decision other than to note the VanDenBroeks' concerns with the landfill.

Mr. VanDenBroek explained he has worked in the solid waste industry and, therefore, could be effective in cross-examining witnesses. The appellants represented by the Concerned Citizens of Thorhild County Society have asked for and received interim costs to help offset the costs to retain experts. It is the Board's understanding these experts will provide technical reports and attend at the hearing where they will give direct evidence and be cross-examined. They will also be there to assist in formulating questions for cross-examination of the witnesses presented by WMCC and AESRD. Therefore, the Board believes there will be adequate cross-examination of the witnesses at the hearing without the VanBenBroeks' participation.

In its original decision, the Board dismissed the intervenor request because the VanDenBroeks did not demonstrate they would bring any evidence that was not duplicative of the other parties. In their reconsideration request, they still have not shown they would bring evidence that was different from the parties to the appeals.

The VanDenBroeks considered the intervenor request as a means of allowing those who were refused directly affected status the chance to "democratically defend their homes." In its decision on standing, the Board had to dismiss some of the appeals because the prerequisites for filing a valid Notice of Appeal had not been met.¹ If the appellant did not meet the legislated prerequisites, the Board did not make an assessment on whether they were directly affected. The Board notes that only the VanDenBroeks filed an intervenor request. None of the persons who filed Notices of Appeal that were not accepted by the Board filed an intervenor request, so the Board has made no determination on whether they would have been granted intervenor status.

¹ See: Preliminary Motions: *Cramer et al. v. Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: *Waste Management of Canada Corporation* (09 August 2012), Appeal Nos. 11-025-059, 062-063, 068-071, 075-076, 100-112, 147-150, 156-161, 163-165, and 173-ID2 (A.E.A.B.).

The VanDenBroeks have not presented any exceptional or compelling reasons to allow a reconsideration. They have not presented any new evidence that was not available at the time of the original decision. In this case, certainty in the Board's process requires the reconsideration request be denied.

Please do not hesitate to contact the Board if you have any questions. We can be reached toll-free by first dialing 310-0000 followed by 780-427-6569 for Valerie Myrmo and 780-427-7002 for Denise Black. We can also be contacted via e-mail at valerie.myrmo@gov.ab.ca and denise.black@gov.ab.ca.

Yours truly,

Gilbert Van Nes
General Counsel
and Settlement Officer

Att.

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