



Environmental Appeal Board

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DECISION NO. 2016-EMA-126(a)

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

BETWEEN:	Greater Vancouver Sewerage and Drainage District	APPELLANT
AND:	Director, <i>Environmental Management Act</i>	RESPONDENT
AND:	Wastech Services Ltd. Village of Cache Creek	THIRD PARTIES
AND	Ashcroft Indian Band Bonaparte Indian Band	PARTICIPANTS
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on September 9, 2016	
APPEARING:	For the Appellant: Tony Crossman, Counsel For the Respondent: Stephen E. King, Counsel For the Third Parties: Wastech Services Ltd. Stephen M. Fitterman, Counsel Village of Cache Creek Mayor P.A. John Ranta For the Participants: Ashcroft Indian Band Chief Greg Blain Bonaparte Indian Band Kukpi7 Ryan Day	

PRELIMINARY APPLICATION

THE APPLICATION

[1] On July 29, 2016, the Greater Vancouver Sewerage and Drainage District filed an appeal with the Board. In a separate letter to the Board dated July 29, 2016, the Appellant applied to the Board to have the appeal held in abeyance with no action being taken "until further advised". The appeal is against a June 30, 2016 decision of A.J. Downie, for the Director, *Environmental Management Act* (the "Director"), Ministry of Environment (the "Ministry"), approving two plans related to

the closure of the Cache Creek landfill (the "Approval") that was issued to the Village of Cache Creek (the "Village"), and Wastech Services Ltd. ("Wastech").

[2] By letter dated August 3, 2016, the Board advised the Appellant that it would hold the appeal in abeyance, "subject to any objections" from the other parties, and asked for an update from the Appellant on or before October 31, 2016.

[3] In a letter dated August 15, 2016, the Village objected to the appeal being held in abeyance and asked for the appeal to be heard "at the earliest date".

[4] By letter dated August 23, 2016, the Board sought written submissions from the parties on whether it should continue to hold the appeal in abeyance in the circumstances.

BACKGROUND

General

[5] This appeal involves a decision related to the closure of the Cache Creek landfill, located approximately 200 kilometers northeast of Vancouver.

[6] The Cache Creek landfill has been used for the discharge of solid municipal refuse since approximately 1987. The waste discharged to the landfill comes from the Greater Vancouver Regional District (now Metro Vancouver), the Village of Cache Creek, and from the surrounding Thompson Nicola Regional District. The landfill is now being closed.

[7] Wastech and the Village operate the landfill pursuant to Operational Certificate MR-07577 (the "Certificate"). The Certificate sets out the requirements for the design, operation, maintenance and closure of the landfill. It also establishes a post-closure monitoring, maintenance and repair fund.

[8] According to the Appellant, over 90% of the material disposed of at the landfill is municipal waste from the Metro Vancouver area, and is deposited at the landfill by the Appellant. The Appellant pays money into the post-closure fund based upon the amount of waste it deposits at the landfill. Further, under a private, 20-year agreement between the Appellant and Wastech, the Appellant pays Wastech for certain landfill-related costs (the "Agreement").

[9] In 2012, the Ministry amended the Certificate to include a closure activity period prior to closure of the landfill, and required Wastech and the Village to submit closure plans to the Ministry for approval. The decision under appeal is the Director's Approval of the plans submitted; specifically:

"Closure Period Plan, Cache Creek Landfill" dated July 2, 2015 (the "Closure Period Plan"), prepared by Golder Associates Ltd. ("Golder"); and

"Operations and Closure Plan, Cache Creek Landfill, Cache Creek BC" dated February 11, 2016, also prepared by Golder.

[10] The Board was not provided with either of these plans, or the Certificate.

[11] The Director's approval of the plans was subject to eight conditions being met. Of relevance to this application, the first condition states:

1. The following must be submitted to the Director within 90 business days of the date of this letter [June 30, 2016]:
 - a. The name of the Qualified Professional(s) with experience in landfill closure hired to implement the closure activities for the Cache Creek landfill,
 - b. A copy of the current land lease ...
 - c. A detailed design and construction plan outlining further detail of the works associated with the closure of the landfill, including the preferred groundwater treatment and disposal option, in accordance to all applicable legislation and guidance documents, and
 - d. A report determining the contaminating lifespan of the landfill including the field data and rationale behind the calculations and how it relates to closure, the impact on post-closure & maintenance, and the post-closure trust fund.

...

[Appellant's emphasis]

[12] Ninety days from the date of the decision letter is on or about September 28, 2016.

The Appeal

[13] The Appellant appealed the Approval by filing a Notice of Appeal dated July 29, 2016. It appeals the Approval on a number of grounds, but two of its main concerns are with the definition of "closure" in the plans and, more importantly, with the proposal for the collection and treatment of groundwater in the plans.

[14] The Appellant submits that the plans propose the collection and treatment of groundwater due to the presence of chloride in the groundwater near the landfill. It submits that groundwater treatment should not be part of the closure plans required by the Certificate. It submits that there was insufficient evidence for the Director to make a decision in relation to groundwater treatment and/or to require groundwater treatment, and that any groundwater contamination caused by the landfill will be dealt with during post-closure activities, among other things.

[15] In terms of remedy, the Appellant asks for the Approval to be set aside, withdrawn, or for the definition of closure and the groundwater treatment sections to be struck from the closure plans or sent back for reconsideration by the Director.

[16] In its Notice of Appeal, the Appellant also addresses its standing to appeal. It states that it is "a person aggrieved", because the Approval prejudices its "legal and economic interests"; specifically, it is prejudiced by the Approval because Wastech has advised the Appellant that the costs associated with the closure plans must be paid by the Appellant pursuant to the terms of the Agreement.

The Application

[17] In a separate letter sent on the same day as its Notice of Appeal, the Appellant asked the Board to hold its appeal in abeyance. The Appellant subsequently defined "abeyance" as "to refrain from taking procedural steps in a matter, such as in a trial or appeal", citing *Brian W. Conway Professional Corp. v. River Rock Lodge Corp.*, 215 ABQB 359 at paragraph 45.

[18] The Board granted the abeyance, subject to any objections that it might receive.

[19] In separate letters, the Village, Wastech and the Director all object to the appeal being held in abeyance as the landfill is in the final stages leading to its closure in December of 2016, and any delay resulting from an abeyance may adversely affect the timely completion of closure activities which are designed to protect human health and the environment.

[20] The Ashcroft Indian Band and the Bonaparte Indian Band separately sought to participate in the appeal in relation to one of the issues raised; i.e., groundwater mitigation and treatment within the closure plans. The Board granted them limited participant status in the appeal. The Ashcroft Indian Band did not address the requested abeyance in its letter requesting "observer" status in the appeal. The Bonaparte Indian Band opposes the requested abeyance.

[21] There has been no stay of the Approval sought, or ordered, to date.

THE PARTIES' SUBMISSIONS*The Appellant's submissions*

[22] The Appellant describes the background to the plans and the Approval, in part, as follows:

- The Approval relates to a complicated, technical closure period plan that was the subject of negotiation and discussions with the Ministry over four years, as well as conflicting technical reports and recommendations. None of the technical reports identified an imminent risk to the environment or human health as a result of the landfill.
- The Director provided no reasons or technical rationale for the Approval, despite the history of conflicting technical reports. He simply states that the plans met the general intentions set out in the Ministry's *Landfill Criteria for Municipal Solid Waste, Draft Second Edition* and, if implemented "should ensure protection of the environment and human health."

[23] The Appellant states that it filed its appeal in order to preserve its rights, fully consider the implications of the Approval, and ensure that it has sufficient time to obtain, review and consider the final groundwater mitigation option with the assistance of its technical and legal advisors. It submits that this further review, and the additional time during which the appeal is held in abeyance, may lead to a resolution of the appeal, or reduce the arguable issues.

[24] The Appellant submits that these are “good reasons” for an abeyance, consistent with the Board’s previous decision in *Boliden Ltd. v. British Columbia (Assistant Regional Water Manager)*, [2010] B.C.W.L.D. 5430 [*Boliden*]. In *Boliden*, the Board found that deciding whether to grant an abeyance required a balancing of interests and prejudices, and that an appeal would be held in abeyance with the parties consent, or if there was a “good reason to do so” (pages 5-6).

[25] In *Boliden*, the Board’s authority to grant an abeyance was not provided by statute; it came from the Board’s common law power to control its own processes. However, since that decision, the Board’s legislation has changed. The powers and procedures set out in the *Administrative Tribunals Act* now apply to the Board. The Appellant submits that the Board’s authority to issue an abeyance may now fall within the power to grant an adjournment under section 39 of the *Administrative Tribunals Act*. It submits that an abeyance functions as a temporary adjournment.

[26] The Village and Wastech agree.

[27] Section 39 of the *Administrative Tribunals Act* states:

- 39(1)** An application may be adjourned by the tribunal on its own motion or if it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held.
- (2) In considering whether an application should be adjourned, the tribunal must have regard to the following factors:
- (a) the reason for the adjournment;
 - (b) whether the adjournment would cause unreasonable delay;
 - (c) the impact of refusing the adjournment on the parties;
 - (d) the impact of granting the adjournment on the parties;
 - (e) the impact of the adjournment on the public interest.

[28] The Appellant maintains that holding the appeal in abeyance will not result in an unreasonable delay given the number of years that the plans have been in the works (since 2012), the fact that there have been no previous adjournments or delays, and, since there is no stay of the Approval, the Village and Watech can carry on any work deemed necessary.

[29] The Appellant further notes that the Closure Period Plan states that three groundwater mitigation options are possible at the landfill; however, the plan does not contain complete information or final recommendations, including the preferred groundwater treatment and disposal option. According to condition 1(c) of the Approval, this information will not be available for up to three months (90 days) following the decision (i.e., the end of September). Therefore, there is information yet to come.

[30] In terms of the potential impacts of an abeyance, the Appellant submits that there are no deadlines for the work contemplated by the Closure Period Plan to be carried out, so there is no regulatory obligation on Wastech to proceed with the work by the end of this year. It submits that the Certificate holders’ focus on

completion by year-end appears to be a goal related to the termination of the Agreement between Wastech and the Appellant, not one imposed by the Ministry.

[31] The Appellant further submits that there is no evidence that an abeyance will result in any adverse effects to human health or the environment.

[32] In the circumstances, the Appellant submits that there is no evidence that an abeyance will prejudice Wastech or the Village, or that an abeyance will negatively impact the environment or human health. Conversely, an abeyance will provide the Appellant with a fair opportunity to be heard. Further, the Appellant submits that an abeyance is in the public interest because it will ensure the more efficient use of the Board's scarce resources. The Appellant asks the Board to confirm the abeyance, which requires the Appellant to provide the Board with an update on the status of the appeal on or before October 31, 2016.

The Village

[33] The Village argues that the Appellant's submissions contain inaccurate or misleading information that is intended to give the impression that, since it took Wastech and the Village until July of 2015 to submit the final plans, there is no urgency to having its appeal heard.

[34] The Village notes that the Certificate has always had specific requirements for design, operations, closure and post-closure plans. The closure plans were to be completed prior to the closing of the landfill. It states that, when the Ministry amended the Certificate in 2012 to require the closure period plans at issue, Golder prepared a draft closure period plan. That plan was submitted to the Ministry in September of 2012. In 2013, Ministry staff directed that further investigations be undertaken to support Golder's recommendation for groundwater mitigation of landfill leachate. Golder provided technical back-up in support of its recommendation later that year. The Village submits that this recommendation is, in effect, no different than the one now approved by the Director.

[35] In July 2015, a revised version of the Closure Period Plan was provided, supplemented by data that Golder had collected. That data had been collected at the request of Wastech and the Appellant regarding the migration of landfill-impacted leachate off the landfill site. The Village states that this data was reviewed by an independent third party expert.

[36] In addition to these reports, the Appellant commissioned reports from SCS Engineers ("SCS"). The Village states that those reports conflicted with the groundwater recommendations of Golder, in that SCS suggests that the Closure Period Plan is not consistent with industry standards. The Village "believes it is instructive to note" that the majority of SCS's offices are located in the United States, where the industry standards are set by the U.S. Environmental Protection Agency. In contrast, Golder has been involved with the landfill since its inception and is the professional-of-record for the landfill. The Village notes that Golder refutes SCS's contention that groundwater mitigation is not currently required at the landfill, and advised that groundwater mitigation measures are justified. The Village states that Golder reviewed SCS's reports, and the Director had the benefit

of Golder's comments regarding the SCS reports, as well as Golder's data and analysis before he approved the closure plans, including the Closure Period Plan.

[37] The Village also disagrees with the Appellants suggestion that no prejudice will result to the other parties because a decision has not been made regarding the type of groundwater mitigation measure that will be implemented at the landfill, and because complete information for the selected mitigation system will not be available for up to three months (90 days) following the Approval. The Village submits that, in fact, the only option being considered by the Ministry is the installation of a groundwater collection and treatment system. That system has been designed by Keystone Environmental Ltd. ("Keystone"), a draft of which was submitted to the Ministry in late June 2016, prior to the issuance of the Approval. The Village further states that the final plan will be delivered to the Ministry "in the next few weeks", and that its absence has not delayed the commencement of the installation work.

[38] The Village states that Wastech has kept the Appellant informed of what is going on pursuant to the Agreement. Consequently, the Village submits that the Appellant does not require "time to obtain, review and consider the final groundwater mitigation option" with its advisors. The Village states that the Appellant is "already well aware of the plan". Further, it notes that the Appellant does not "have a say in the design of the plan", as it is not a named party on the Certificate.

[39] Finally, the Village states that the plans require the approved groundwater mitigation measure to be carried out by a specific date. The approved plans set out the timelines for landfill closure activities. For most of the required activities, the end date is December 2016. It states that this includes the construction of the groundwater mitigation system. While there are other closure activities that extend beyond 2016, the groundwater system is not one of them.

[40] Further, the Village states that the "long-standing obligation" of the Appellant under the Agreement is that the Appellant will "honour closure responsibilities, especially since the Post Closure Fund was not set out for this purpose." The Village also notes that, early this year, the Appellant advised that it would not honour that obligation beyond the expiry of the Agreement (i.e., year-end 2016). This came as a surprise to Wastech and the Village. The Village states: "As a result, Wastech ceased waste flows to the landfill in July and sought MOE [Ministry] sign off on the closure plans in order for the work to be undertaken and completed by end of 2016. That deadline is truly one of ...[the Appellant's] own making."

[41] Despite the Appellant's stated reasons in support of an abeyance, the Village submits that:

- based upon any technical assessment of the requirement of groundwater mitigation (i.e., the reports the Appellant commissioned from SCS that the Ministry received and considered), there are no "reasonable and defensible" reasons for the abeyance;
- there have not been any discussions with the Appellant towards a "resolution" of its objection to the installation of a groundwater mitigation

system. The suggestion that an abeyance may result in a resolution or a narrowing of appeal issues has no basis in what is, in fact, happening;

- the length of time that it has taken to “fine tune” the plans, is not a reason to delay hearing the appeal; and
- the Director concluded in the Approval that a groundwater mitigation system was needed to “protect the environment and human health”.

[42] The Village submits that the only reason the Appellant sought an abeyance on the same date that it filed its appeal was to delay the Board’s consideration of the appeal long enough for its Agreement with Wastech to expire, and turn the debate surrounding the Approval into a contractual obligation debate.

Wastech’s submissions

[43] Wastech submits that the approved closure plans “had the immediate effect of obliging Wastech to proceed with the installation of an extensive groundwater mitigation and treatment infrastructure.” It submits that its obligation to proceed with the groundwater mitigation and treatment infrastructure cannot be practicably delayed since Wastech is “aiming to complete all in-ground closure activities” at the landfill by the year-end, coincident with the termination of its Agreement with the Appellant.

[44] Wastech submits that it is prejudiced by an abeyance of the appeal until October 31, 2016, because it is incurring, and will continue to incur, installation costs through that period. It also notes that the Appellant’s objection is already the subject of a separate and private dispute between Wastech and the Appellant regarding the proper application of the terms of the Agreement.

The Director’s submissions

[45] The Director supports the Village’s objection. He submits that the closure plans acceptance is time sensitive, and that the appropriate procedural step is for the Appellant to apply for a stay of the decision.

The Appellant’s sur-reply

[46] The Appellant takes issue with the assertion that there are timelines for landfill closure activities set out in the Closure Period Plan, which must be met by reason of the Approval. The Appellant submits that the landfill closure has been ongoing for a number of years and, according to the Closure Period Plan, will continue for years to come. The timelines in the plan for closure activities were presented as an estimate only, and tied to the end date of the Agreement (December 2016). Further, the Approval does not confirm or vary the estimates, and has not imposed “a hard deadline on any closure activities”.

[47] Regarding the Village’s reference to the groundwater treatment system in the Keystone plan, the Appellant states that it has not been provided with a copy of this plan, and will request a copy so that it may review and consider it with the

assistance of its technical advisors. In accordance with past practice, it also expects the Ministry to consult with the Appellant on the Keystone plan.

[48] Regarding the Village's suggestion that SCS is not qualified to opine on the regulatory requirements and standards in British Columbia, the Appellant disagrees. It sets out the company's experience in the Province with landfills, including the Cache Creek landfill, and points out that the other parties to the appeal are aware of this experience. It further states, "SCS's concerns with the CPP [closure period plan] are primarily based on the CPP's inconsistency with the Ministry's own regulations, landfill policies and guidance documents."

[49] The Appellant submits that if Wastech is constructing the groundwater treatment system prior to the submission of the final design under condition 1(c), and while the appeal is ongoing, it is doing so at its own peril. It submits that, whether an abeyance is granted or not, any prejudice suffered by Wastech in relation to its installation of the treatment system will be of its own making, and should not be a factor in this abeyance decision. It further submits that any contractual issues that it has with Wastech are outside of the scope of this appeal, and not relevant to the abeyance request, although it confirms that it will meet its contractual, and other, obligations.

[50] Finally, the Appellant submits that it is a large public body that serves the interests of the residents of Metro Vancouver. The Appellant states that it simply requires time to review the implications of the Approval in accordance with its internal processes and procedures.

The Panel's findings

[51] It is apparent from the Appellant's Notice of Appeal and submissions on this application that it is concerned with the groundwater treatment and disposal system identified in the Closure Period Plan, which the Director approved subject to the provision of the final plans. The Appellant is concerned that its economic interests will be prejudiced by the approval of the plans because Wastech has advised that the costs associated with the closure plans must be paid by the Appellant pursuant to the Agreement. Further, in its view, such treatment is not required, a conclusion that it says is supported by SCS.

[52] The Appellant maintains that it requires the appeal to be held in abeyance in order to fully consider the implications of the Approval decision, and ensure that it has sufficient time to obtain, review and consider the final groundwater mitigation option with assistance of its technical and legal advisors before the appeal is heard.

[53] The Panel finds that the concerns underlying the Appellant's request may be accommodated without the entire appeal being held in abeyance. Assuming that section 39 of the *Administrative Tribunals Act* applies to this application, the Panel finds that an adjournment (abeyance) is not required to "permit an adequate hearing to be held."

[54] The Panel finds that the Appellant's capacity to review and consider the Approval, and the implications of that decision, may be met even if a hearing is scheduled. The Panel is satisfied that the Board's usual pre-hearing processes,

such as exchange of documents and provision of pre-hearing submissions (Statements of Points), will assist the Appellant in its review of the implications of the Approval. Further, the timing of these pre-hearing processes will give the Appellant a reasonable opportunity to review the materials and consult with its technical advisors.

[55] Further, even if the Appellant has not yet been provided with the June draft of the Keystone plan, the final design and construction plan is required shortly, in accordance with condition 1(c) of the Approval. The Panel is satisfied that the usual pre-hearing timelines will provide sufficient time for the Appellant to review the final plans.

[56] The Panel also notes that, despite the Appellant's lack of familiarity with the specifics of the groundwater plan, it is not completely "in the dark." The Appellant has been involved, to some degree, in the plan development process since 2012, and is certainly familiar with many of the landfill closure issues given its historical involvement with the landfill. Although the Panel recognizes that it will need some time to review the new information in order to prepare its case, and or decide whether to pursue all or part of its appeal, it will not require as much time as an uninformed party would. Moreover, it certainly does not require an unlimited amount of time as it requested in its abeyance application (i.e., "until further advised").

[57] The Panel has also considered the relative impacts that an abeyance, or denial of an abeyance, may have on the parties. It finds that the Certificate holders, Wastech and the Village, are more prejudiced by the delay caused by an abeyance, than the Appellant is by moving the appeal process forward.

[58] The appeal of a decision, in and of itself, creates uncertainty respecting the rights and obligations of the parties that are subject to the decision. The Panel finds that this is the case for the Village and Wastech, and possibly those in the community that may be affected by the activities at the landfill. Regardless of whether there are "hard" deadlines to be met by the Certificate holders, which is in dispute, there is no dispute that they have obligations under the Certificate and the Approval which must, ultimately, be met. The Panel finds that the longer that the issues raised by the Appellant regarding a groundwater treatment and disposal system are left unresolved, the more uncertainty there is for the Certificate holders, and the potentially impacted public. Whether a groundwater treatment and disposal system is required as part of this Closure Period Plan, and whether there was sufficient evidence for the Director to make a decision in relation to groundwater treatment in the Approval, are important grounds for appeal that need to be decided for the Certificate holders, and the local community.

[59] Given that the Appellant is not a named party to the Certificate and simply seeks some time to review and consult on the plans and the Approval, there is no compelling reason to refrain from scheduling the pre-hearing processes and moving the appeal towards a hearing on the merits. Although the Board no longer has the legislative deadlines for scheduling a hearing that were present in *Boliden*, the Board, nevertheless, strives to hear appeals, and bring matters to a final conclusion, in a timely manner.

[60] Having carefully considered the parties submissions, the Panel finds that:

- an abeyance is not required for an adequate hearing to be held;
- an abeyance is not warranted on the facts and will, therefore, cause an unreasonably delay; and
- the prejudice to the Village and Wastech from an abeyance outweighs the benefits to the Appellant of a continued abeyance.

[61] Further, there may well be a public interest in this appeal that warrants moving the appeal forward to a hearing on the merits.

DECISION

[62] In making this decision, the Panel of the Environmental Appeal Board has carefully considered all relevant documents and evidence before it, whether or not specifically reiterated here.

[63] For the reasons stated above, the Panel finds that the Appellant's request for this appeal to be held in abeyance until further advised by the Appellant should be denied in the circumstances.

[64] The Board will now proceed to set this matter down for a hearing on the merits.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board
September 26, 2016