REGIONAL DISTRICT OF NANAIMO

REGIONAL DISTRICT OF NANAIMO
SOLID WASTE MANAGEMENT SELECT COMMITTEE
ADDENDUM

Wednesday, June 14, 2017

1:30 P.M.

Committee Room

This meeting will be recorded

Pages

9. REPORTS

***9.2 Comox Valley Regional District Disposal Request for Asbestos Waste Disposal Bylaw No. 1531 Revision** *2*

That "Regional District of Nanaimo Solid Waste Management Regulation Amendment Bylaw No. 1531.08, 2017" be introduced and read three times; and

That "Regional District of Nanaimo Solid Waste Management Regulation Amendment Bylaw No. 1531.08, 2017" be adopted

***9.3 Curbside Collection Contractor - Amalgamation and Name Change** *13*

That this report be received for information purposes only.

***9.4 Solid Waste Management Plan Dispute Resolution Process** *15*

That Board receives this report for information.

REGIONAL DISTRICT OF NANAIMO

STAFF REPORT

TO: Solid Waste Select Committee **MEETING:** June 14, 2017

FROM: Maggie Warren
Superintendent Scale & Transfer Service **FILE:** 2240-20 CVRD

SUBJECT: **Comox Valley Regional District Disposal Request for Asbestos Waste Disposal Bylaw No. 1531 Revision**

RECOMMENDATIONS

1. That "Regional District of Nanaimo Solid Waste Management Regulation Amendment Bylaw No. 1531.08, 2017" be introduced and read three times; and
2. That "Regional District of Nanaimo Solid Waste Management Regulation Amendment Bylaw No. 1531.08, 2017" be adopted

SUMMARY

In May 2016, the Regional Board approved the request from Comox Valley Regional District to accept asbestos and asbestos-containing materials from the Comox Strathcona Waste Management (CSWM) service area at the Regional District of Nanaimo landfill starting on completion of the North Berm project and continuing until December 31, 2017 with provision to extend the agreement for one year.

The North Berm project is complete and the Regional Landfill is ready to receive asbestos and asbestos-containing materials from CSWM. Regional District of Nanaimo Solid Waste Management Regulation Amendment Bylaw No 1531.08 establishes acceptance of CSWM asbestos waste at a tipping fee rate $600 metric tonne which offsets RDN cost for managing the material.

BACKGROUND

The Chair of the Comox Valley Regional District (CVRD) requested, on behalf of the Comox Strathcona Waste Management (CSWM) service, that the RDN consider accepting asbestos and asbestos-containing materials from the CSWM for disposal at the Nanaimo regional landfill through to December 31, 2017 with provision to extend the arrangement for one year (Appendix 2).

The reason for the CVRD request can be broadly summarized as:

1. There is no local disposal for this type of waste in the area and residents and commercial haulers have to travel to the Victoria Hartland landfill where out-of-region waste is accepted for disposal. There is dissatisfaction with having to transport the waste the substantial distance for disposal in Victoria.
2. Due to the complexity of managing this material, CVRD is looking for an interim solution that will allow time to develop a long term strategy. Complexities cited are landfill airspace

consumption, health and safety requirements and additional facility staff and equipment needs. As of May 2017, the CVRD is continuing to work towards a long term strategy

The RDN currently has the capability to manage asbestos waste from CSWM. The North Berm is completed and a new asbestos cell is operational at the RDN landfill. The Bylaw amendment implements the previous Board decision to accept the waste and establishes the tipping rate. Appendix 3 is the May 12, 2016 staff report to the Board.

ALTERNATIVES

1. That "Regional District of Nanaimo Solid Waste Management Regulation Amendment Bylaw No. 1531.08, 2017" be introduced and read three times; and
2. That "Regional District of Nanaimo Solid Waste Management Regulation Amendment Bylaw No 1531.08, 2017" be adopted.
3. That staff be provided with alternate direction.

FINANCIAL IMPLICATIONS

The current tip rates for asbestos waste are $500 per tonne for in-region asbestos waste and $600 per tonne for out-of-region asbestos waste. Based on the estimated quantity of asbestos waste that is expected to be received from the CVRD, this would generate approximately $120,000 to $180,000 in tip fees over a one year period.

STRATEGIC PLAN IMPLICATIONS

A key priority of the Strategic Plan is the focus on relationships and more specifically looking for opportunities to partner with other branches of government and community groups to advance our region. This request possibly serves as a catalyst to broaden discussion on cooperation for future residual waste disposal that might benefit the RDN over the long term.

_____

Maggie Warren
mwarren@rdn.bc.ca
May 12, 2017

Reviewed by:

- L. Gardner, Manager, Solid Waste Services
- R. Alexander, General Manager, RCU
- P. Carlyle, Chief Administrative Officer

Attachments
Appendix 1: RDN Bylaw No. 1531.08
Appendix 2: RDN Board Minutes, May 24, 2016
Appendix 3: Comox Valley Regional District Request to Dispose of Asbestos Waste Staff Report

APPENDIX 1

REGIONAL DISTRICT OF NANAIMO
BYLAW NO. 1531.08
A BYLAW TO AMEND REGIONAL DISTRICT OF NANAIMO
SOLID WASTE MANAGEMENT REGULATION BYLAW 1531

WHEREAS the "Regional District of Nanaimo Solid Waste Management Regulation Bylaw No. 1531, 2007" provided for the regulation of Solid Waste Management Facilities within the Regional District of Nanaimo;

AND WHEREAS the Board of the Regional District of Nanaimo wishes to amend schedule 'D' established by Bylaw No. 1531;

NOW THEREFORE the Board of the Regional District of Nanaimo, in open meeting assembled, enacts as follows:

1. "Regional District of Nanaimo Solid Waste Management Regulation Bylaw No. 1531, 2007" is amended as follows:

   Schedule 'D' is hereby repealed and replaced with Schedule 'D' attached to and forming part of this bylaw.

2. This bylaw may be cited as "Regional District of Nanaimo Solid Waste Management Regulation Amendment Bylaw No. 1531.08, 2017."

Introduced and read three times this ___ day of ____, 2017.

Adopted this this ___ day of ____, 2017.

CHAIRPERSON

CORPORATE OFFICER

Schedule 'D' to accompany "Regional District of Nanaimo
Solid Waste Management Regulation Amendment
Bylaw No. 1531.08, 2017"

Chairperson

Corporate Officer

Schedule 'D'

Charges and procedures for use of Regional Landfill for disposing of Controlled Waste and Municipal Solid Waste which originates from the Cowichan Valley Regional District and the Comox Valley Regional District, effective July 1, 2017, are:

1.	**Controlled waste originating Cowichan Valley RD**	**Flat rate**	**51 kg or greater**
a.	Waste asbestos	$30.00/0-50 kg	$600.00/tonne
b.	Large dead animals	$20.00/0-50 kg	$300.00/tonne
c.	Invasive plant species	$20.00/0-50 kg	$300.00/tonne

2.	**Solid waste under the direct control of the Cowichan Valley Regional District ***	**Tonne Rate**
a.	Municipal solid waste	Tonne rate includes a 20% premium over the current Schedule 'A' rates

*Solid waste acceptance is contingent upon:

1) Prior written notice from Cowichan Valley Regional District to the General Manager explaining the reasons for, and the anticipated duration, of contingency landfilling;
2) The General Manager's acknowledgement of acceptance; and,
3) Any conditions the General Manager may specify with respect to the duration, requirements regarding acceptance or reporting.

3.	**Controlled waste originating Comox Valley RD****	**Flat rate**	**51 kg or greater**
a.	Waste asbestos	$30.00/0-50 kg	$600.00/tonne

**Asbestos waste acceptance is approved until December 31, 2017 with provision to extend the agreement for one year.

Solid Waste Management Select Committee.

16-375 MOVED Director Lefebvre, SECONDED Director Westbroek, that the minutes of the Solid Waste Management Select Committee meeting held Tuesday, May 17, 2016 be received for information.

CARRIED

Contract Award – Regional Landfill North Berm Construction.

16-376 MOVED Director McPherson, SECONDED Director Lefebvre, that the Board approve the budget for the North Berm project as set out in Table 2 and to direct staff to proceed with tender award to Wacor Holdings Ltd. for the project construction utilizing the gravel option.

CARRIED

Comox Valley Regional District Request to Dispose of Asbestos Waste.

16-377 MOVED Director McPherson, SECONDED Director Lefebvre, that the Board grant the request to accept asbestos and asbestos-containing materials from the Comox Strathcona Waste Management service area starting on completion of the North Berm project and continuing until December 31, 2017 with provision to extend the agreement for one year.

A recorded vote was requested.

The motion was CARRIED with Directors Fell, Haime, Hong, Houle, Kipp, Lefebvre, McKay, McPherson, Pratt, Rogers, Stanhope, Thorpe, Veenhof and Westbroek, voting in the affirmative, and Directors Bestwick, Yoachim and Young voting in the negative.

Recorded Vote Weighted: In-Favour – 51, Opposed – 12

ADMINISTRATOR'S REPORTS

Witness Blanket Transportation Expense.

16-378 MOVED Director Houle, SECONDED Director Pratt, that up to $14,050 for transportation costs associated with bringing the Witness Blanket to the region be borrowed from the existing Grants-In-Aid reserve account associated with the Island Corridor Foundation agreement and that the fund be repaid, if required, through the 2017 Grants-In-Aid tax requisition.

CARRIED

Regional District of Nanaimo Land Use and Subdivision Amendment Bylaw No. 500.402, 2016 and Regional District of Nanaimo Electoral Area 'F' Zoning and Subdivision Amendment Bylaw No. 1285.26, 2016 - Consideration for Third Reading.

16-379 MOVED Director Rogers, SECONDED Director Fell, that the report of the Public Hearing held on April 25, 2016, for "Regional District of Nanaimo Land Use and Subdivision Amendment Bylaw No. 500.402, 2016", be received.

CARRIED

REGIONAL DISTRICT OF NANAIMO

MEMORANDUM

TO:	Randy Alexander General Manager, Regional & Community Utilities	**DATE:**	May 12, 2016
		MEETING:	SWMSC – May 17, 2016
FROM:	Larry Gardner Manager, Solid Waste Services	**FILE:**	5370-01

SUBJECT: Comox Valley Regional District Request to Dispose of Asbestos Waste

RECOMMENDATION

That the Solid Waste Management Select Committee (SWMSC) recommend that the Regional Board grant the request to accept asbestos and asbestos-containing materials from the Comox Strathcona Waste Management (CSWM) service area starting on completion of the North Berm project and continuing until December 31, 2017 with provision to extend the agreement for one year.

PURPOSE

At the Regional Board's regular meeting of April 26, 2016, staff were directed to bring a report to the SWMSC with recommendations on a response to the Comox Valley Regional District (CVRD) request.

BACKGROUND

The CSWM service is a function of the CVRD. The CSWM service is responsible for two regional waste management centres that serve the Comox Valley and Campbell River, as well as a range of transfer stations and smaller waste-handling and recycling facilities for the electoral areas of the both the Comox Valley and the Strathcona Regional Districts.

Bruce Jolliffe, Chair of the Board for the CVRD sent a letter dated March 22, 2016 addressed to the RDN Board requesting the establishment of an agreement whereby asbestos and asbestos-containing materials from the CSMW service area be accepted for disposal at the Nanaimo regional landfill. Further, they asked that such an agreement be until December 31, 2017 with provision to extend the agreement for one year.

The reasons for the request is outlined in a CVRD staff report that was attached to the letter and can be broadly summarized as:

1. There is no local disposal for this type of waste in the area and residents and commercial haulers have to travel to the Victoria Hartland landfill where out-of-region waste is accepted for disposal. There is dissatisfaction with having to transport the waste the substantial distance for disposal in Victoria.

2. Due to the complexity of managing this material, CVRD is looking for an interim solution that will allow time to develop a long term strategy. Complexities cited are landfill airspace consumption, health and safety requirements and additional facility staff and equipment needs.

Follow up conversations between RDN and CVRD provided additional insights to the request which are presented in the following sections.

Comox Strathcona Waste Landfilling

The CSMW operates two area landfills; one servicing the Comox Valley located near Cumberland, and one serving the Campbell River area.

Comox Valley

- Staff at this facility do not have the necessary training for the handling and disposal of the material.
- The active portion of the landfill has a remaining lifespan of 1½ - 2 years. Due to the limited remaining airspace in the landfill and the large volume of airspace required for asbestos disposal, there is insufficient space to accept asbestos for disposal.

Campbell River

- The estimated remaining lifespan at this facility is approximately 5-6 years. Due to the limited remaining airspace there is inadequate space available for the asbestos waste.
- Construction activities in 2013 and 2014 resulted in a complex filling plan and active face configuration at the landfill, making it difficult to establish a designated asbestos disposal area.
- Hauling of waste materials to the active face of the landfill is carried out through the use of a large walking floor trailer. Due to this material handling procedure, the separation of asbestos for disposal in a designated area of the landfill and/or the access to the active face of the landfill is logistically complicated and requires further consideration.
- Staff have appropriate training and it may be possible to designate a small portion of the active area for asbestos disposal.
- Construction of a new engineered landfill cell is expected to be complete in early 2017 and application has been made to the Ministry of Environment to allow asbestos disposal in this cell.

Upland Landfill

- There is also a privately run landfill in the area, the Upland Landfill. However, this facility does not accept asbestos or asbestos-containing waste for disposal.
- There may be potential to establish an agreement with this facility for asbestos disposal in the future.

RDN Landfilling Capability

Asbestos waste is specifically referenced in the *Hazardous Waste Regulation* due to the risk of serious health injury as a result of inhalation of the airborne fibers that can be released through handling of the material. The RDN has a rigorous exposure control plan to ensure workers are not at risk. Special handling includes:

- scheduling disposal appointments,
- completing manifests,
- preparing the disposal area with sufficient cover material,
- staff for monitoring disposal, and
- staff and heavy equipment for the burial of this hazardous waste.

The CVRD was not able to provide an estimate of the amount of asbestos material that might be directed to the RDN should their request be granted. Extrapolating amounts of asbestos waste generated in 2015 from the RDN, as well as out of district asbestos received from the CVRD suggest the amount would be in the order of 200 to 300 tonnes annually.

The RDN does have the capability to manage this waste; however, at the current time the active landfilling area on the top deck of the landfill is becoming very constrained. With the specialized handling required of asbestos waste, the receipt of additional material at this time will only serve to exacerbate current operational challenges. The North Berm is scheduled for construction this summer and includes the development of a new landfilling cell. Landfilling will commence in the new cell in the fall of 2016 at which time additional asbestos waste could readily be accommodated. In the event there is any delay in the North Berm construction, the ability to manage the RDN's own waste at the landfill will become extremely challenged.

Staff at the CVRD are aware of this operational constraint and in their staff report noted that if the RDN supported the request, asbestos disposal would not begin until completion of the North Berm project.

Impact on Landfill Capacity

The RDN saw a 40% increase in the amount of asbestos waste requiring landfilling between 2014 and 2015. There are several factors related to the increase in volume. There is greater community awareness that certain home renovation wastes may contain asbestos; demolition work requires a hazardous materials survey which will identify asbestos and require proper handling and disposal. Recently, the greatest influence has been the WorkSafe concerns with the potential for asbestos in drywall mud and, consequently, drywall recyclers being more stringent on their acceptance procedures. Unless the drywall is post 1990 or tested and confirmed to be asbestos free, the material is handled as asbestos waste.

The CVRD does not currently accept asbestos waste at least in part because of the landfill airspace the material consumes. Due to the hazardous nature and bulky packaging of the asbestos, the compaction rate is very low for this waste. The disposal area for asbestos waste requires approximately 4 to 6 times greater volume of airspace than garbage.

Based on the estimate of 200 to 300 tonnes of asbestos waste being received from the CVRD, this would consume the equivalent of 1½ week's worth of landfill airspace at current RDN landfilling rates. The landfill life projection was adjusted in 2016 to reflect current landfilling rates and the current projection remains at 25 years.

ALTERNATIVES

Alternatives to respond to the CVRD requests are as follows:

1. Grant the request to accept asbestos and asbestos-containing materials from the CSWM service area starting on completion of the North Berm project and continuing until December 31, 2017 with provision to extend the agreement for one year.
2. Refuse the request.
3. Alternate direction as provided by the RDN Board.

FINANCIAL IMPLICATIONS

The operational cost for managing asbestos waste is about 3 times that of managing garbage. Based on an equivalent value of the airspace consumed as compared to garbage, and the additional cost to manage the asbestos, asbestos landfilling cost is approximately $475/tonne. The current tip rates for asbestos waste are $500 per tonne for in-region asbestos waste and $600 per tonne for out-of-region asbestos waste. Currently the RDN only authorizes out-of-region asbestos waste from the Cowichan Valley Regional District. Based on the estimated quantity of asbestos waste that is expected to be received from the CVRD, this would generate approximately $120,000 to $180,000 in tip fees over a one year period.

STRATEGIC PLAN IMPLICATIONS

A key priority of the Strategic Plan is the focus on relationships and more specifically looking for opportunities to partner with other branches of government/community groups to advance our region.

The CVRD staff report that accompanied the request noted that, *"This collaborative approach between CSWM and the RDN is in keeping with the Association of Vancouver Island and Coastal Communities' (AVICC) goal of working towards a cooperative long term sustainable strategy for solid waste management on Vancouver Island."*

The CVRD has stated their two landfills have capacities in the order of 2 and 6 years respectively. They are working on the development of a new cell at the Campbell River facility which will provide about 22 years of capacity. The site has additional land that has the potential for siting other waste management facilities and even potential future landfilling that could extend this period by an estimated 15 years.

This request possibly serves as a catalyst to broaden discussion on cooperation for future residual waste disposal that might benefit the RDN over the long term.

SUMMARY/CONCLUSIONS

The Chair of the CVRD has requested, on behalf of the CSWM service, that the RDN consider establishing an agreement whereby asbestos and asbestos-containing materials from the CSWM service area be accepted for disposal at the Nanaimo regional landfill through to December 31, 2017 with provision to extend the agreement for one year.

The RDN has the capability to manage asbestos waste from CSWM, however, if would be prudent to wait until the North Berm and new cell is constructed at the RDN landfill which is expected to be completed in the fall of 2016. Accepting the additional out-of-district waste prior to the new cell will exacerbate the existing operational challenges working in a constrained area.

The out-of-region tip fee of $600 per tonne for asbestos waste offsets the air space value and cost to manage this waste. A one year contribution of asbestos waste is expected to consume approximately 1.5 week's worth of airspace based on current landfilling rates.

Staff considers this request may serve to broaden the discussion on cooperation for future residual waste disposal beyond the life of the existing landfill.

Report Writer

General Manager Concurrence

CAO Concurrence

REGIONAL DISTRICT OF NANAIMO

STAFF REPORT

TO:	Solid Waste Management Select Committee	**MEETING:**	June 14, 2017
FROM:	Ben Routledge Zero Waste Coordinator	**FILE:**	5360-01
SUBJECT:	Curbside Collection Contractor - Amalgamation and Name Change		

RECOMMENDATION

That this report be received for information purposes only.

SUMMARY

In April 2017, an amalgamation occurred between the Regional District of Nanaimo (RDN) curbside collection contractor Progressive Waste Services Canada Inc. and Waste Connections (US) Inc. This amalgamation does not affect the RDN Curbside Collection Contract.

BACKGROUND

In 2010, the RDN and BFI Canada Inc. entered into a contract to provide for the collection of household municipal solid waste and recycling, later to include the collection of household food waste. In May 2015, BFI Canada Inc. amalgamated with other solid waste collectors to form Progressive Waste Services Canada Inc.

In April 2017, Progressive Waste Services Canada Inc. amalgamated with Waste Connections (US) Inc. to form Waste Connections of Canada Inc.

Legal counsel has advised that the amalgamation of Progressive Waste Services Canada Inc. and Waste Connections (US) Inc. does not trigger the assignment provision (Section 15.5) of the Curbside Contract. As confirmed by counsel, when companies amalgamate they continue as a single successor corporation. Therefore the rights, liabilities and obligations of BFI Canada Inc. were amalgamated first into Progressive Waste Services Canada Inc., in 2015, and then Waste Connections of Canada Inc., in 2017.

Expected service performance, the contractor staff and infrastructure have remained the same and all obligations under the contract are being fulfilled.

ALTERNATIVES

That this report be received for information purposes only.

FINANCIAL IMPLICATIONS

There are no financial implications.

STRATEGIC PLAN IMPLICATIONS

By reviewing contracts and seeking third party legal advice, this report is consistent with the Strategic Plans Governing Principal of transparency and accountability to the residents of the RDN.

_____

Ben Routledge
broutledge@rdn.bc.ca
May 23, 2017

Reviewed by:

- L. Gardner, Manager, Solid Waste Services
- R. Alexander, General Manager, Regional and Community Utilities
- P. Carlyle, Chief Administrative Officer

REGIONAL DISTRICT OF NANAIMO

STAFF REPORT

TO: Solid Waste Management Select Committee **MEETING:** May 30, 2017

FROM: Larry Gardner, AScT, Eng.L Manager, Solid Waste Services **FILE:** Click here to enter text.

SUBJECT: Solid Waste Management Plan Dispute Resolution Process

RECOMMENDATION

1. That Board receives this report for information.

SUMMARY

The Ministry of Environment requires that a Solid Waste Management Plan (SWMP) include a dispute resolution process and that it be reviewed by advisory committees during the development process. This topic was discussed by the Regional Solid Waste Advisory Committee and the Solid Waste Management Select Committee on April 20, 2017 and May 30, 2017 respectively with both committees passing the following motion:

> *SWMP disputes be directed to the Board for decision; and that the Board consider mediation for non-regulatory or legislative decisions.*

Metro Vancouver is currently undertaking a comprehensive review of their dispute resolution process (Attachment 1). Therefore, the Regional Solid Waste Advisory Committee also recommended that the Regional District of Nanaimo's (RDN) procedure be revisited once Metro Vancouver has completed their review.

Directing disputes to the Board provides the simplest, most practical, and most efficient and cost effective means of resolving disputes. Alternative approaches such as mediation and arbitration add a significant degree of complexity and challenges as discussed in the body of this report.

BACKGROUND

The Ministry of Environment's *Guide to Solid Waste Management Planning,* September 2016, states:

> *"Every regional district should establish and consult on a dispute resolution procedure for dealing with disputes arising during implementation of the plan.*
>
> *The procedure should address disputes involving an administrative decision made by the regional district in the issuance of a license, interpretation of a statement or provision in the plan, or any*

other matter not related to a proposed change to the actual wording of the plan or an operational certificate."

The types of disputes that might arise under a SWMP can be grouped under 3 categories as follows: 1) administrative decisions related to a license or regulatory provision; 2) interpretation of a provision in the SWMP; or, 3) any other matter not related to a proposed change to the actual wording of the plan or an operational certificate. Furthermore, in developing a dispute resolution process it should be contemplated who might dispute. Specific examples of disputes under each of the categories and who might dispute are listed as follows:

Administrative Decisions Related to a License or Regulatory Provision:

1. Issuance, refusal or cancelation of a license (e.g. Waste Stream Management License) to a private facility under a bylaw.
2. Imposition of conditions on a license related to:
    a. the types, quality or quantities of municipal solid waste or recyclable material that may be brought onto or removed from a site;
    b. the burning of any class or quantity of municipal solid waste or recyclable material;
    c. the operation, closure or post-closure of sites;
    d. the installation and maintenance of works; or,
    e. the amount of security required.
3. Disputes regarding enforcement of a regulatory provisions under a bylaw.

Interpretation of Provision in the SWMP:

1. The adoption of bylaws including tipping fees, licensing and bans.
2. The construction of facilities and infrastructure.
3. The issuance of Operational Certificates by the Ministry of Environment.
4. The development of policies and work plans.

Any Other Matter:

This appears to be a "catch all" and implies that a dispute resolution process should be able to accommodate any difference or disagreement.

Who Might Dispute:

1. Members of the public.
2. Neighbours of a facility licensed by the RDN or issued a permit or certificate by a Director.
3. Advocacy groups.
4. Industry groups.
5. Individual licensees and their competitors.
6. Member municipalities.
7. Neighbouring local governments.

Dispute Resolution Procedures Under SMWPs in BC

Regional District	Current SWMP	SWMP Dispute Provisions	Related Dispute Provisions	Comments
Regional District of Nanaimo	2004	No dispute resolution in current SWMP	Appeals to the Board under Waste Stream Licensing Bylaw.	
Fraser Valley Regional District	2015	Step 1: refer to mediation. Step 2: arbitration	Arbitration in accordance with BC Commercial Arbitration Act.	• Costs apportioned by arbitrator. • No Waste Stream Licensing bylaw.
Capital Regional District	1995	No dispute resolution process in current SWMP	Hartland landfill operations – appeals to the General Manager. Composting Facility Bylaw – appeals to the General Manager; decisions subject to judicial review.	
Thompson Nicola Regional District	2007	Step 1: Disputes can be considered by an arbitrator. Step 2: Arbitrator decisions may be reviewed whit Plan Monitoring or Implementation Committees Step 3: Committee's may make recommendation the Regional Board.		
Metro Vancouver	2011	Appeals to Commissioner under licensing bylaw. Other disputes to non-binding mediation.	Commissioner decisions subject to judicial review.	Currently reviewing options: 1) Keep the current process of an appeal to the Commissioner. 2) Move to an appeal panel made up of Directors appointed by the Board. 3) Move to an appeal panel made up of experts appointed by the Board 4) Move to a binding arbitration process for some types of disputes

Ministry of Environment Example Dispute Resolution

The Ministry's *Guide to Solid Waste Management Planning* provides an example dispute resolution process sequentially working through the 5 following steps:

1. Negotiation
2. Plan Monitoring Advisory Committee (if appropriate)
3. Regional Board
4. Mediation
5. Independent Arbitrator

DISCUSSION

There are a number of challenges with the Ministry of Environment's example dispute resolution process which are: 1) standing; 2) proportionality and 3) further delegation of authority. Each of these items are discussed below:

Standing

"Standing" is a term used in judicial processes to describe someone who is either a party to the proceedings or is directly affected by the action or decision. A person who is not affected or only indirectly affected does not have standing. The Ministry's example sets no constraints around "standing". Adopting a process in a SWMP sets up a legal obligation that the regional district is bound to follow. It is critical that any dispute resolution process include consideration of standing to ensure proper application of the process and avoid any abuse.

Proportionality

The Ministry example is a generic process that would apply to any dispute and is not considered a "proportionate" process for very minor disputes. Again, by establishing a dispute resolution process in a SWMP, it sets up a legal obligation that the regional district is bound to follow. It is critical that any dispute resolution process be proportionate to the issue that needs to be resolved.

Further Delegation

The Ministry example proposes that disputes not solved at the Regional Board level be directed to mediation followed by an independent arbitrator. It is possible that this process could work for some types of disputes. However, this process cannot be applied to decisions associated with a license or regularity provision. Regulatory authorities are provided to local government though provincial statutes. Decisions related to these authorities cannot be delegated external to the local government.

Where disputes are directed to the Regional Board, the Board has the ability to address standing and proportionality as well as consider the issue of further delegation in resolving any dispute. Furthermore, nothing would prevent the Board from directing mediation or non-binding arbitration in an effort to resolve a dispute.

There is a well-defined appeal process should a party be aggrieved by a Regional Board directed or concluded dispute resolution. This is the judicial review process which has been established to ensure judicial supervision of local government authority. In addition to bylaws, Board resolutions are also subject to judicial review because they are also grounded in a statutory power.

The RDN has not experienced a dispute under the SWMP since it was first approved in 1988. Stating in the SWMP that disputes will be directed to the Regional Board for resolution provides the simplest process to address the challenges highlighted in this report, is consistent with the existing workflow and procedures of the RDN and takes advantage of the existing well established appeal process (i.e. judicial review) should the dispute not be resolved by the regional district.

Metro Vancouver has put considerable effort into understanding the complexities of dispute resolution under a SWMP (See Attachment 1). They are considering potential future options which include:

1) Keep the current process of an appeal to the Commissioner.
2) Move to an appeal panel made up of Directors appointed by the Board.
3) Move to an appeal panel made up of experts appointed by the Board.
4) Move to a binding arbitration process for some types of disputes.

The Regional Solid Waste Advisory Committee recommends that the RDN procedure be revisited once Metro Vancouver has completed their review of the dispute resolution process.

ALTERNATIVES

Alternatives include:

1) Disputes be directed to the Regional Board for resolution.
2) Develop a dispute resolution process following Ministry of Environment Guidelines of sequential steps of: 1) Negotiation 2) Plan Monitoring Advisory Committee advice (if appropriate); 3) Regional Board decision; 4) Mediation; 5) Independent Arbitrator. Development of such a process should include consideration of standing, proportionality and further delegation of authority.
3) Alternate direction as provided by the Board.

FINANCIAL IMPLICATIONS

A dispute resolution process is a mandatory component of a Solid Waste Management Plan. The recommendation by the Advisory and Select Committees are that disputes be directed to the Regional Board for resolution. This is the most efficient and least process way of hearing and resolving disputes and, therefore, expected to be the lowest cost option.

STRATEGIC PLAN IMPLICATIONS

The recommendation is consistent with the strategic plan focus on service and organization excellence such as “ensuring our processes are as easy to work with as possible”.

_____

Larry Gardner, AScT, Eng.L
lgardner@rdn.bc.ca
May 19, 2017

Reviewed by:

- R. Alexander, General Manager, RCU
- P. Carlyle, Chief Administrative Officer

Attachments

1. Metro Vancouver Letter of October 28, 2016, *Integrated Solid Waste and Resource Management Plan Dispute Resolution Procedure*

Solid Waste Services
Tel. 604 432-6442 Fax 604 451-6180

File: CR-19-02

October 28, 2016

Mr. A.J. Downie
Regional Director- Coast Region
Ministry of Environment
2080-A Labieux Road
Nanaimo, BC V9T 6J9
VIA EMAIL: AJ.Downie@gov.bc.ca

Dear Mr. Downie:

Re: Integrated Solid Waste and Resource Management Plan Dispute Resolution Procedure

On September 29, 2016, Carol Mason and I met with Ministry of Environment staff. As part of the meeting we discussed Metro Vancouver's *Integrated Solid Waste and Resource Management Plan* (ISWRMP) implementation Dispute Resolution Procedure. The procedure was approved by the GVS&DD Board on September 23, 2016. I subsequently forwarded the approved procedure to your attention.

The purpose of this letter is to provide some background to the adopted procedure, as well as some of the legal and other constraints that have informed the development of the current Dispute Resolution Procedure. I am also writing to reassure the Ministry that the GVS&DD is open to, and indeed exploring, alternate dispute resolution procedure options, within the constraints of the *Environmental Management Act* (EMA) and the existing and approved ISWRMP and the *GVS&DD Municipal Solid Waste and Recyclable Material Regulatory Bylaw No. 181, 1996* (Bylaw 181).

The GVS&DD Board report recommending approval of a Dispute Resolution Procedure noted that consultation on a review of Bylaw 181 is expected to be initiated in 2017, and as part of that review the Dispute Resolution Procedure would be updated with the goal of aligning the Bylaw 181 appeal process and the process for resolving other disputes related to implementation of the ISWRMP.

This letter therefore sets out some of our considerations in this regard, and explores in a preliminary way what we see as some of the constraints and available options.

CURRENT BYLAWS, PLANS and POLICY

Prior to the adoption of the ISWRMP in 2011, the GVS&DD had a solid waste management plan dating back to 1995. Bylaw 181 was adopted pursuant to that plan, and approved by the Minister in 1996.

In accordance with s. 35 of the EMA, Bylaw 181 delegates a number of licensing related decisions to the Manager, but allows for an appeal of the Manager's delegated decisions to the Commissioner of the GVS&DD pursuant to s. 16 of the Bylaw.

Under Bylaw 181 (and the EMA) no other body is granted the authority to consider and issue private facility licenses in the GVS&DD. However, reviews for fairness and reasonableness of decisions of the Commissioner under Bylaw 181 may be conducted by the BC Supreme Court, whose judges have the inherent authority under the *Constitution Act 1867* and pursuant to the *Judicial Review Procedure Act*, to review, reject or replace their own decision for that of the Commissioner in relation to her regulatory authority under the EMA and Bylaw 181.

In addition to the required appeal procedure in Bylaw 181, the GVS&DD was also required pursuant to the Minister of Environment's July 2011 approval of the ISWRMP to develop a dispute resolution procedure for disputes arising from the implementation of the ISWRMP. In keeping with the above, the GVS&DD Board approved a new Dispute Resolution Procedure at its meeting of September 23, 2016.

With respect to disputes arising from delegated facility licensing decisions of the Manager under Bylaw 181, the adopted Dispute Resolution Procedure works within the existing appeal process in Bylaw 181 by providing for a suspension of the appeal process to allow for an opportunity for mediation of the license dispute. With respect to disputes that arise outside of the appeal process, the current Dispute Resolution Procedure provides for non-binding mediation, but all final regulatory or legislative decisions regarding implementation of the ISWRMP remain with the Board or a panel of the Board.

LEGAL CONTEXT OF GVS&DD DISPUTE RESOLUTION PROCEDURE

The consideration of the GVS&DD's options for developing a new appeal and dispute resolution process must take into account the legal context and authority of the GVS&DD. It must also consider the range of ISWRMP implementation decisions that may be the subject of a dispute, the types of disputes that may arise, and the standing of various affected parties to initiate a dispute resolution process or appeal.

The EMA sets out the regulatory context of the GVS&DD's authority to implement the ISWRMP. Critical provisions of the EMA in this regard include the following:

> **Authority to manage municipal solid waste and recyclable material in regional districts**
>
> **25** (1) In this section and sections 26 *[municipal solid waste disposal fees]*, 31 *[control of air contaminants in Greater Vancouver]* and 32 *[disposal of municipal solid waste in Greater Vancouver]*:
>
> **"regional district"** means
>
> (b) the Greater Vancouver Sewerage and Drainage District constituted under the *Greater Vancouver Sewerage and Drainage District Act*;
>
> **"waste stream management licence"** means a licence issued by a regional district, under the authority of a bylaw made under subsection (3) (h) (i), to the owner or operator of a site that accepts and manages municipal solid waste.
>
> (2) Despite any other Act, a person must manage municipal solid waste and recyclable material at a site in accordance with

(a) any applicable approved waste management plan for the site,

(b) any requirements or conditions that a director includes in an operational certificate or permit issued for the site, and

(c) any applicable bylaw made under subsection (3) of this section or section 31 *[control of air contaminants in Greater Vancouver]* or 32 *[disposal of municipal solid waste in Greater Vancouver]*.

(3) For the purpose of implementing an approved waste management plan, a regional district may make bylaws to regulate the management of municipal solid waste or recyclable material including, without limitation, bylaws regulating, prohibiting or respecting one or more of the following:

(a) the types, quality or quantities of municipal solid waste or recyclable material that may be brought onto or removed from a site;

(b) the discarding or abandonment of municipal solid waste or recyclable material;

(c) the burning of any class or quantity of municipal solid waste or recyclable material;

(d) the delivery, deposit, storage or abandonment of municipal solid waste or recyclable material at authorized or unauthorized sites;

(e) the transport of municipal solid waste or recyclable material within or through the area covered by the waste management plan;

(f) the operation, closure or post-closure of sites, including requirements for

(i) the recording and submission of information,

(ii) audited statements respecting the municipal solid waste or recyclable material received at and shipped from a site, and

(iii) the installation and maintenance of works;

(g) respecting fees, including

(i) setting fees and charges that may vary according to

(A) the quantity, volume, composition or type of municipal solid waste or recyclable material, or

(B) the class of persons, sites, operations, activities, municipal solid wastes or recyclable materials, and

(ii) specifying the manner and timing of the payment of those fees and charges;

(h) requiring the owner or operator of a site or a hauler to

(i) hold a recycler licence, a waste stream management licence or a hauler licence, or

(ii) comply with a code of practice;

(i) setting the terms and conditions for issuing, suspending, amending or cancelling a licence referred to in paragraph (h);

(j) requiring an owner or operator of a site or a licence holder to obtain insurance or provide security satisfactory to the regional district to ensure

(i) compliance with the bylaws, and

(ii) that sufficient funding is available for site operations, remediation, closure and post-closure monitoring;

(k) requiring the owner or operator of a site to contain municipal solid waste or recyclable material within specified height and area limits, and specify requirements and terms for confirming compliance with those limits;

(l) prohibiting unauthorized persons from handling or removing municipal solid waste or recyclable material that is deposited at a site or set out for collection;

(m) establishing different prohibitions, conditions, requirements and exemptions for different classes of persons, sites, operations, activities, municipal solid wastes or recyclable materials;

(n) requiring an owner of municipal solid waste or recyclable material, the deposit of which has been prohibited by bylaw, to pay the cost of its disposal in a manner specified in the bylaw;

....

Delegation of powers

35 (1) For the purposes of sections 25 *[authority to manage municipal solid waste and recyclable material in regional districts]*, 26 *[municipal solid waste disposal fees]*, 32 *[disposal of municipal solid waste in Greater Vancouver]* and 33 *[disposal of municipal solid waste in other regional districts]*, a regional district may, by bylaw, delegate to an officer or employee of the regional district the power to perform the functions and duties of the regional district in bylaws made under those sections.

(2) For the purpose of sections 25 *[authority to manage municipal solid waste and recyclable material in regional district]*, 26 *[municipal solid waste disposal fees]* and 32 *[disposal of municipal solid waste in Greater Vancouver]*, the Administration Board of the Greater Vancouver Sewerage and Drainage District may, by bylaw, delegate to an officer or employee of the Greater Vancouver Regional District the power to perform the functions and duties of the Greater Vancouver Sewerage and Drainage District in bylaws made under those sections.

(3) A bylaw referred to in subsection (1) or (2) must include an appeal mechanism from a decision of the officer or employee.

Bylaw 181 was adopted by the GVS&DD pursuant to its authority under s. 25, primarily subsections (h) and (i).

More generally, implementation of the ISWRMP involves the enactment of bylaws and the making of decisions pursuant to all of the subsections of s. 25 or s. 26 of the EMA. The other main grant of authority under the EMA for the purposes of implementing the ISWRMP is granted to the Director in the issuance of operational certificates under s. 28 of the EMA. This, of course, is not an exhaustive list of the ways that the ISWRMP may be implemented, but the main sections of the EMA that provide for this implementation.

It is in this legal context that the Ministry *Guide to Solid Waste Management Planning* published on September 22, 2016, and its predecessor guides, must be read. In its most current iteration, the *Guide*

recommends that every regional district establish and consult "on a dispute resolution procedure for dealing with disputes arising during implementation of the plan," and directs that the procedure address a broad range of disputes that might arise, including:

> ... an administrative decision made by the regional district in the issuance of a license, interpretation of a statement or provision in the plan, or any other matter not related to a proposed change to the actual wording of the plan or an operational certificate.

The types of decisions in which a dispute might arise under the *Guide* therefore include:

Administrative Decision in the Issuance of a License

a. Decisions to issue or refuse a private facility license under a bylaw;
b. Decisions to impose conditions on a license relating to any of the matters listed in s. 25 of the EMA and incorporated into a bylaw including:
    i. the types, quality or quantities of municipal solid waste or recyclable material that may be brought onto or removed from a site;
    ii. the burning of any class or quantity of municipal solid waste or recyclable material;
    iii. the operation, closure or post-closure of sites,
    iv. the installation and maintenance of works;
    v. the amount of security required;
    vi. requirements related to having a license as stipulated under a bylaw;
    vii. requirements related to complying with a code of practice; and
c. Decisions to suspend or cancel a license for breach of a bylaw or license conditions.

Interpretation of a statement or provision in the Plan

It is hard to imagine any type of implementation of the ISWRMP that could not be said to include the interpretation of a statement or provision of the ISWRMP. Obvious actions that involve the interpretation of a statement or provision of the Plan in the implementation of the Plan include:

a. The adoption of bylaws pursuant to the EMA, including tipping, licensing, recycling and waste bans;
b. The construction of GVS&DD facilities and infrastructure;
c. The issuance of an operational certificate by the Director; and
d. The development of policies and work plans based on the ISWRMP.

Any other matter not related to a proposed change to the actual wording of the plan or an operational certificate

It is not clear if this section is meant to exclude operational certificates from the scope of decisions subject to a dispute resolution process, although such decisions appear to be included in the previous category of disputes to be resolved in this way. Other than that, this section seems to emphasize that there are almost no legislative, regulatory or operational decisions, other than changing the wording of the ISWRMP itself, that are intended to be excluded from the recommended dispute resolution process.

The types of decision making that may give rise to a dispute captured by the *Guide* therefore range from legislative and regulatory, to purely operational decisions regarding the use of resources.

For each of the above types of decisions that may be disputed, the types of bodies and persons who may wish to bring such disputes include:

- Members of the public
- Neighbours of a facility licensed by the GVS&DD or issued a permit or certificate by a Director
- Advocacy groups
- Industry groups
- Individual licensees and their competitors
- Member municipalities
- Neighbouring local governments

In many cases, these groups would not have standing to legally challenge a regulatory or legislative decision made by the GVS&DD or the Ministry.

While it may be the intention of the *Guide* to give all such persons standing to require the GVS&DD to resolve their grievances with any of the above decisions that may be made in the implementation of the ISWRMP, any final dispute resolution procedure will need to be tailored to the type of decision being made, and the standing of the parties wishing to challenge it. It must also consider what other persons, in addition to the one seeking to dispute the decision, should be included in such a dispute resolution. For example, disputes regarding the issuance of a license by members of the public with a direct impact on an existing licensee should certainly include the participation of that licensee. Disputes that have far ranging legislative or regulatory impacts should likely include members of the public, member municipalities, and industry and advocacy groups, in their resolution.

Dispute resolution procedures should also be proportionate to the type and extent of the dispute, and the remedies that may be legally available.

Finally, any dispute resolution process must ultimately comply with the law, and the fundamental principle that the elected body that is authorized to legislate or regulate cannot be fettered in the exercise of their statutory discretion. Furthermore, legislative and regulatory decision making authority granted to local governments generally cannot be further delegated without specific authorization in the statute.

For example, while a licensee may not wish to pay a fee set by bylaw, and may wish to dispute the reasonableness of the amount of the enacted fee in terms of how it contributes to the goals of the ISWRMP, no private arbitrator would have the authority to resolve that dispute by directing a change in the bylaw, waiving the enacted fee, or imposing a fee that was different from that stated in the bylaw. Similarly, where an advocacy or industry group disputed whether an adopted or proposed bylaw best implemented the ISWRMP, no private arbitrator could direct or order that the bylaw be amended or changed. Legislative and regulatory powers are uniquely granted by the *Constitution* and by statute, and no entity other than those granted the authority may exercise it.

As a result, one of the key legal considerations in the development of any dispute resolution process is that the GVS&DD must ultimately be accountable for the decisions that it makes. In the absence of another body being granted the authority to make these legislative and regulatory decisions by law, the GVS&DD cannot delegate the authority granted to it under s. 25 and 26 of the EMA with respect to the content of bylaws or setting the terms and conditions of licenses to another body, and certainly not to one that is entirely independent from its Board. The one exception is provided by s. 35 of the EMA, which expressly allows the GVS&DD to delegate decision making to its staff, provided that there is an appeal mechanism provided back to the GVS&DD to make the final decision.

This does not mean that dispute resolution must always be through the courts, and many matters are successfully mediated with the involvement of trained mediators engaging with authorized decision makers. Indeed, many disputes can be resolved in this way. The key is to use the appropriate dispute resolution tools for each type of case.

BYLAW 181 and HISTORY OF APPEALS

Bylaw 181 supports the implementation of the ISWRMP through the regulation and licencing of private facilities. Bylaw 181 was originally approved by the Minister of Environment in 1996 and amended that same year. The appeal process at s. 16 of Bylaw 181 has been in place since the Bylaw was originally approved.

Under Bylaw 181, the Manager of Solid Waste is delegated the authority to issue, amend, suspend, refuse, cancel and impose conditions on private facility licenses that are subject to licensing approval pursuant to the Bylaw. These and other decisions of the Solid Waste Manager or the Deputy Solid Waste Manager may be appealed to the Commissioner pursuant to s. 16 of the Bylaw and in accordance with s. 35 of the *Act*.

A person who considers himself aggrieved by a decision can appeal to the Metro Vancouver Commissioner. The Commissioner can confirm, reverse or vary the decision appealed or refer the decision back to the Solid Waste Manager.

In the event a party to an appeal is not satisfied with the Commissioner's decision, the party can seek further review of the decision through a judicial review in the BC Supreme Court. A judicial review of the Commissioner's decision would determine if the party received a fair hearing of their appeal and if the decision was reasonable. Pursuant to their inherent jurisdiction and the *Judicial Review Procedure Act*, judges of the BC Supreme Court have the authority to make orders with respect to any such application, including to remit the decision back to the Commissioner with directions, or to order the issuance or refusal of a license with or without terms.

Since the approval of Bylaw 181 in 1996, 4 licensing decisions made pursuant to the Bylaw by the Manager have been appealed by the applicant to the Commissioner. The following is a brief summary of these appeals of Bylaw 181 decisions.

In 1998, Owl Terminals Ltd. appealed the suspension of their licence to the Commissioner on the grounds that it was not provided adequate notice prior to the suspension, and then later appealed

the willingness by GVS&DD to stay the suspension while the initial appeal was heard. The licence was suspended for exceeding the authorized quantities permitted at the facility. On appeal to the Commissioner, Owl Terminals' licence was reinstated, although it was later cancelled for continued non-compliance.

In 2008, Enviro-Smart Composting appealed the Manager's decision not to issue a licence to the Commissioner. The Commissioner denied the appeal on the basis that the precondition of municipal approval was not in place as required by Bylaw 181. Enviro-Smart applied for, and later obtained, a licence after upgrades were made to the facility.

In 2013, Northwest Properties Group appealed the issuance of a licence restricting or limiting the acceptable materials allowed to be received at the facility on East Kent Ave South, Vancouver. Northwest applied for material recovery facility licence, later appealing the acceptable material limitations prohibiting the receipt of mixed waste. The conclusion of the Deputy Commissioner was that the licence should be amended to permit Northwest to receive up to 20% mixed municipal solid waste in accordance with the applicant's operating plan. An updated draft license was issued, but Northwest subsequently chose to operate under license provisions that did not include the receipt of mixed municipal solid waste.

NextUse appealed the terms and conditions of a material recovery facility licence issued January 21, 2016. Specifically, NextUse appealed the licence expiry date of 15 years, the formula relating to the quantity and quality of the recyclables recovered, the limit on the facility to only accept waste from generators with a recycling program, and two other issues. The Commissioner's decision on October 7, 2016 made some of the changes sought by NextUse, but not all. The 15 year term did not change, the recovery rate formula was removed and replaced with the recovery rates consistent with the expected recovery rates indicated in NextUse's application, and the requirement to receive only waste from generators with recycling programs was removed. A copy of that decision is included in Attachment 1 for your reference to this letter.

In addition, there have been two legal challenges to Bylaw 181 in the Courts. One involved an operator refusing to pay the disposal fees required pursuant to Bylaw 181, and the other was a challenge to two private facilities licensed by the GVS&DD and brought by an industry competitor. In both cases the Bylaw was upheld.

DISPUTE RESOLUTION MECHANISMS IN PLACE ACROSS BC

Dispute resolution procedures related to solid waste management plan implementation are in place in a number of regional districts across the province. The approaches vary in design, use and applicability.

Fraser Valley Regional District

The Fraser Valley Regional District (FVRD) has a dispute resolution procedure in its SWMP as follows: First, the dispute is referred to mediation. If the dispute cannot be resolved by a mediator, the SWMP states that the matter will be referred to arbitration and the dispute will be arbitrated in accordance

with the *BC Commercial Arbitration Act*, with costs for the arbitration to be apportioned at the discretion of the arbitrator.

The process in the SWMP does not state what types of disputes will be treated in this manner, nor does it limit who may invoke this process.

However, the FVRD does not have a private facilities licensing bylaw, so the stated process has no application to regulatory decisions made under such a bylaw. Presumably, disputes regarding the content of any bylaw passed to implement the SWMP, which cannot be fettered or delegated to an adjudicator to determine, would not be subject to the dispute resolution procedure.

Therefore, the stated process would appear to apply primarily to unspecified operational decisions made by the FVRD, and implementation decisions involving the Province, to the extent the Province was prepared to accept such a process. Overall, the potential for plan implementation disputes is much lower in the FVRD than Metro Vancouver because the FVRD do not have bylaws or a licensing scheme by which they implement the SWMP.

http://www.fvrd.ca/assets/Services/Documents/Garbage/SWMP.pdf

Capital Regional District

The Capital Regional District (CRD) has no general dispute resolution process stated in its SWMP. The existing 1995 Plan, Amendment #5, 1995 (see link below) stipulates a conflict resolution mechanism for their Hartland landfill. The landfill is owned and operated by the CRD so the conflicts aren't licensing-related but related to operational decisions. Decisions can be appealed to the General Manager of Environmental Services Department, and then the Environment Committee.

https://www.crd.bc.ca/docs/default-source/recycling-waste-pdf/amendments-1-5.pdf?sfvrsn=0

The Capital Regional District also has a Composting Facility Regulation Bylaw: Bylaw 2736 https://www.crd.bc.ca/docs/default-source/crd-document-library/bylaws/solidwastehartlandlandfillssitransferstationscompostingfacilities/2736---capital-regional-district-composting-facilities-regulation-bylaw-no-1-2004B.pdf?sfvrsn=0

Under Bylaw 2736, any appeals of the solid waste manager's delegated decisions are considered by the CRD General Manager of Environmental Services Department. Final decisions of the CRD are then subject to judicial review (see most recently *Foundation Organics v Capital Regional District*, 2014 BCSC 85).

https://www.canlii.org/en/bc/bcsc/doc/2014/2014bcsc85/2014bcsc85.html?resultIndex=1

Thompson Nicola Regional District (TNRD)
The TNRD Solid Waste Management Plan includes a dispute resolution procedure. Under the procedure, disputes can be considered by an independent arbitrator.

Under the procedure, decisions of the arbitrator may be reviewed by the Plan Monitoring or Plan Implementation Committees. These committees may make recommendations to the TNRD Board. Similar to the FVRD, the TNRD does not have a private facilities licensing bylaw.

Nanaimo Regional District
The Regional District of Nanaimo has no stated dispute resolution process in its SWMP. It does have a private facilities licensing bylaw, Bylaw 1386. Under Bylaw 1386, decisions can be appealed to the Board.

http://www.google.ca/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiZ0OavsNvPAhVLrlQKHY_wDkMQFggcMAA&url=http%3A%2F%2Fwww.rdn.bc.ca%2Fcms%2Fwpattachments%2FwpID224atID652.pdf&usg=AFQjCNEPi5z799yXp_SgswdjGfemOqVWtQ&sig2=J_tolu4Lj8TvQmsIemcVZw&bvm=bv.135974163,d.cGw.

OPTIONS FOR A NEW DISPUTE RESOLUTION and BYLAW 181 APPEAL PROCESS
The GVS&DD is considering a number of possible options for replacement of the Bylaw 181 appeal process. Options that are being explored include:

a) Keep the current process of an appeal to the Commissioner
b) Move to an appeal panel made up of GVS&DD Directors appointed by the Board
c) Move to an appeal panel made up of experts appointed by the Board
d) Move to a binding arbitration process for some types of disputes

At this point, the review of these options is at an early stage. Attachment 2 provides a summary of some of the preliminary issues identified with respect to each of the above options.

CONCLUSION
The current Bylaw 181 appeal process is similar to processes in place in other regional districts with private facility licensing bylaws. In each regional district appeals are made to the Board or a delegated staff member. It is also consistent with the requirements of the *Environmental Management Act*, which requires that where a decision is sub-delegated, there must be an appeal back to the final decision maker authorized to make those decisions (the GVS&DD). Bylaw 181 has been in place for

more than 20 years, and the Bylaw 181 process has helped ensure that Metro Vancouver is one of the most successful regions in North America with respect to waste reduction and recycling.

Any new dispute resolution process in addition to or instead of the Bylaw 181 process must be responsive to the needs of those affected, and contribute to the region's ongoing success in achieving its waste diversion goals.

Metro Vancouver is planning to initiate consultation on a review of Bylaw 181 in 2017. As part of the Bylaw 181 review, the GVS&DD is committed to reviewing both its appeal process in Bylaw 181, and how that process might work within a broader dispute resolution process for the various types of disputes that may arise out of the implementation of the ISWRMP, whether they are intra-governmental, with the public, with the industry broadly, or with individual licensees.

Any such process will have to consider both the legal constraints on the GVS&DD regarding the delegation or fettering of legislative and regulatory authority, as well as the appropriateness of various dispute resolution processes to the substantially different types of dispute that may arise as a result of implementation of the ISWRMP. Ultimately, even the implementation of a dispute resolution process must also be measured in terms of its effectiveness at serving the goals of the ISWRMP.

Any new process will require consultation with stakeholders, approval by the GVS&DD Board and approval by the Minister of Environment. We look forward to working closely with you in that regard.

Yours truly,

Paul Henderson, P.Eng.
General Manager, Solid Waste Services

PH/ah

cc: Avtar Sundher, Ministry of Environment

Attachments:
1. NextUse Decision (Doc #19616305) http://orbit.gvrd.bc.ca/orbit/llisapi.dll/properties/19616305
2. Summary of Preliminary Considerations Regarding Appeal Process Options in Bylaw 181 (Doc # 19829768) http://orbit.gvrd.bc.ca/orbit/llisapi.dll/properties/19829768

19826305

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SERVICES AND SOLUTIONS FOR A LIVABLE REGION

Office of the Commissioner/Chief Administrative Officer
Tel. 604 432-6210 Fax 604 451-6614

File: CR-07-09

OCT 0 7 2016

Russ S. Black
NextUse Recycling Ltd.
328-1508 West Broadway
Vancouver, BC V6J 1W8
VIA EMAIL: RBlack@belkorp.com

Dear Mr. Black:

Re: Appeal of Material Facility Licence T-045 (the "Licence")

I have now had an opportunity to review the substantial submissions and evidence submitted by NextUse Recycling Ltd and the Solid Waste Manager in relation to this appeal.

I have made my decision and provided directions to the Manager accordingly. The reasons for my decision in this appeal and my directions to the Manager are set out in the attached appeal decision.

Yours truly,

Carol Mason
Commissioner/ Chief Administrative Officer

cc: Ray Robb, Division Manager, Environmental Regulation and Enforcement, Legal and Legislative Services

Encl: Licence T-045 Appeal Decision

19616305

LICENCE T-045 APPEAL DECISION

NATURE OF APPEAL

In this appeal pursuant to s. 16.2 of *GVS&DD Municipal Solid Waste and Recyclable Material Regulatory Bylaw No. 181, 1996* (Bylaw 181), NextUse Recycling Ltd (the Applicant) appeals the conditions of Material Recovery Facility Licence T045 (the Licence) issued to it by the Solid Waste Manager (the Manager) on January 21, 2016.

Specifically, the Applicant appeals the following conditions of the Licence:

1. The imposition of an expiry date of 15 years;
2. The imposition of a formula relating to the quantity and quality of recyclables to be recovered from the Material Recovery Facility (MRF);
3. The inclusion of certain terms in the Licence as "acceptable to the Solid Waste Manager";
4. The requirement that the MRF only accept waste from waste generators with a recycling program; and
5. The absence of a specific condition relating to the inadvertent receipt of banned or restricted materials at the MRF.

The Applicant brings this appeal on the basis that the above conditions (a) go beyond the scope of the Manager's jurisdiction under Bylaw 181, (b) are unprecedented and unjustifiable, (c) are inconsistent with and undermine the goals of the Integrated Solid Waste Management Plan (ISWRMP), and (d) conflict with the *Environmental Management Act* (EMA) and the *Organic Matter Recycling Regulation* (OMRR) under that *Act*. In addition, throughout its appeal submissions, the Applicant argues that the contested Licence conditions were motivated by improper considerations on the part of the Manager, such as the desire to prevent competition with a proposed new Greater Vancouver Sewerage and Drainage District (GVS&DD) waste to energy facility, and raises issues regarding the fairness of the Manager's consideration of the Licence application.

The Manager argues that the imposed conditions are all reasonable, and to some extent necessary, to ensure that the proposed MRF functions in a manner consistent with Bylaw 181, the ISWRMP, GVS&DD policy, and the related legislation (with the exception of a few terms which he concedes may be removed). The Manager asserts that all of the conditions of the Licence at issue are within the Manager's jurisdiction to impose, that the process was procedurally fair, and that he was not motivated by outside or improper purposes. The Manager argues that his Licence decision is entitled to deference, and that I should largely uphold the Licence as issued.

PROCEDURAL ISSUES

This appeal was commenced by way of a notice dated February 11, 2016, pursuant to s. 16 of Bylaw 181, which provides as follows:

> **16.1 Definition of "Decision".** For the purpose of this Article 16 "decision" means:
>
> (c) the issuance, amendment, suspension, refusal or cancellation of a Licence; and
>
> (d) the inclusion in any Licence of any term or condition.
>
> **16.2 Appeal to Commissioner.** A person who considers himself aggrieved by a decision of the Solid Waste Manager or the Deputy Solid Waste Manager may appeal to the Commissioner.
>
> **16.3 Appeal Procedure.** An appeal under section 16.2 shall be commenced by giving written notice of intention to appeal to the Solid Waste Manager within 21 days after the decision appealed from is made.
>
> **16.5 Decision of Commissioner.** On considering an appeal, the Commissioner may:
>
> (a) confirm, reverse or vary the decision appealed from;
>
> (b) refer the matter back to the Solid Waste Manager or Deputy Solid Waste Manager for reconsideration, as the case may be, with or without directions; or
>
> (c) make any decision that the Solid Waste Manager or the Deputy Solid Waste Manager could have made and that the Commissioner considers appropriate in the circumstances.

While the Applicant later inquired about the availability of alternative review mechanisms under the ISWRMP, it did not withdraw its appeal under the Bylaw. I determined that it would be preferable not to stay the appeal process while the Applicant explored alternative dispute mechanisms in this case, and the appeal proceeded by way of written submissions. The Applicant submitted its initial appeal submissions and materials on April 14, 2016, the Manager submitted his response submissions and materials on June 3, 2016, and the Applicant submitted its reply submissions on June 24, 2016. During this period both parties requested extensions of time, which I granted.

Having reviewed the submissions and materials of both parties, I am content that I can resolve this appeal on these materials, and that an oral hearing will not be required.

I am also of the view that my role in this appeal is not simply to review the Manager's decision for fairness and reasonableness, and to uphold the Licence as issued in the absence of a breach in this regard. Rather, I have approached this appeal as a fresh hearing, and have accepted submissions and extensive materials from both the Applicant and the Manager on that basis. As the Commissioner of the GVS&DD, I will decide this appeal on the merits of the submissions and materials put before me, with regard to the

rationale for the current Licence terms and the Applicant's stated appeal of them. On that basis I will exercise my authority pursuant to s. 16.5 of Bylaw 181 to:

- confirm, reverse or vary the Licence,
- refer the Licence back to the Manager with or without directions, or
- make another Licence decision that the Manager could have made under the Bylaw.

RELEVANT BYLAWS AND ENACTMENTS

I have already set out the provisions of Bylaw 181 above, as they relate to my role in this appeal.

While the bylaws and other enactments engaged in this appeal must be considered in their entire legislative context, I find it helpful to also set out a number of the specific provisions raised in this appeal by the parties that I may reference in this decision.

The *GVS&DD Municipal Solid Waste and Recyclable Material Regulatory Bylaw No. 181, 1996* (Bylaw 181) governs the Licence application and this appeal. Bylaw 181 includes the following provisions relevant to this appeal:

> 1.1 Definitions
>
> "**Brokering Facility**" means any land or buildings and related improvements used for receiving, cleaning, sorting, baling or packaging Recyclable Material for the purpose of recycling, where the residue does not exceed 10% by weight or volume of the material received.
>
> "**Commercial/Institutional Waste**" means Municipal Solid Waste originating from commercial and institutional sources where a Recycling Program is in place, but does not include DLC Waste,
>
> "**Material Recovery Facility**" means any land or buildings and related improvements used for receiving municipal solid waste or Recyclable Material and at which materials are separated manually or mechanically for the purpose of recycling;
>
> **"Multi-Family Residential Waste"** means Residential Waste consisting of Municipal Solid Waste from residential buildings containing more than four dwelling units, where a Recycling Program is in place,
>
> "**Recyclable Material**" means a product or substance no longer usable in its current state that can be diverted or recovered from municipal solid waste and used in the processing or manufacture of a new product;
>
> "**Recycling Program**" means a system that provides a generator of waste the means to separate the Recyclable Material from Municipal Solid Waste at the point of generation for the purpose of recycling,
>
> **"Single Family Residential Waste"** means Residential Waste consisting of Municipal Solid Waste from residential buildings containing four dwelling units or less, where a municipal curbside Recycling Program is in place,

"**Transfer Station**" means any land or buildings and related improvements at which municipal solid waste from collection vehicles is received, compacted or rearranged for subsequent transport;

1.4 No Conflict with *Waste Management Act*. Nothing in this Bylaw is intended to conflict with the *Waste Management Act*, but this Bylaw may impose further restrictions or require further conditions than those imposed under the *Waste Management Act*.

3.7 Evaluation of Licence Application. The Solid Waste Manager, as a result of an application to issue a Licence, may consider the following matters with respect to the Facility proposed in the application:

(f) any other matter which the Solid Waste Manager considers relevant.

4.1. Terms and Conditions for Licences. The Solid Waste Manager, as a result of an application, may issue a Licence to a person for a Facility on such terms and conditions and specifying such requirements as the Solid Waste Manager considers necessary and without limiting in any way the generality of the foregoing, the Solid Waste Manager, with respect to the Facility, may in the Licence:

(a) provide that specified municipal solid waste or Recyclable Material be handled at the Facility in the manner, with the frequency, in the quantity or volume and during the period of time specified by the Solid Waste Manager;

(c) require the Licensee to recover for the purpose of recycling certain Recyclable Material in accordance with the District's region-wide policies

(d) provide specified operating procedures and requirements;

(f) require the Licensee to monitor in the way specified by the Solid Waste Manager the municipal solid waste and Recyclable Material, the method of handling the municipal solid waste and Recyclable Material and the places and things that the Solid Waste Manager considers will be affected by the handling of the municipal solid waste or Recyclable Material;

(h) require a Licensee to keep records of volumes, weights, types, amounts, quantities and composition and the geographic area of origin of municipal solid waste or Recyclable Material brought onto or removed from the Facility and to submit the records to the Solid Waste Manager or an Officer;

(i) require a Licensee to prepare and comply with an operating plan approved by the Solid Waste Manager which will contain such matters as may be prescribed by the Solid Waste Manager;

(k) provide for implementing terms and conditions in phases or varying dates for compliance with terms and conditions.

5.1 Acceptable Material

For the purpose of recovering Recyclable Material, the Facility may accept the following types of Municipal Solid Waste:

(1) Single Family Residential Waste,
(2) Multi-Family Residential Waste,
(3) Commercial/Institutional Waste,

...

6.1 Amendment of Licence. The Solid Waste Manager may:

(a) on his own initiative where he considers it necessary; or

(b) on application by a Licensee;

amend the terms and conditions of a Licence, either in whole or in part.

12.8 Receipts for Separated Material. A Licensee who operates a Disposal Facility, Transfer Station, Material Recovery Facility or Storage Facility may deliver to the District receipts from a recycling broker or other person acceptable to the Solid Waste Manager evidencing the quantity in metric tonnes of items recovered from municipal solid waste and Recyclable Material received at the Facility subsequent to July 1, 1996 for the purpose of recycling and the delivery of those items to such recycling broker or other person acceptable to the Solid Waste Manager.

12.9 Credit for Separated Material. The quantity set out in any receipts delivered under and in accordance with section 12.8 shall be multiplied by the per tonne disposal fee set out in Column 6 of Schedule "A" to this Bylaw and the result thereof shall be credited against the amount payable by the Licensee's monthly invoice under section 12.4.

15.1 Suspension and Cancellation of Licences. Without limiting any other provision of this Bylaw, the Solid Waste Manager, after giving reasonable written notice to a Licensee, may suspend or cancel a Licence where:

(a) the Licensee fails to comply with the terms, conditions or requirements of the Licence;

(b) the Licensee has made a material misstatement or misrepresentation in the application for the Licence; or

(c) the Licensee has failed to

(i) make payment of fees under Article 12, or

(ii) comply with any other provision of this Bylaw.

Bylaw 181 also incorporates definitions from the *Waste Management Act,* unless otherwise defined in the Bylaw. The *Environmental Management Act (EMA)* is the successor to the *Waste Management Act*.

The *EMA* defines "recyclable material" as follows:

"Recyclable material" means a product or substance that has been diverted from disposal, and satisfies at least one of the following criteria:

(a) is organic material from residential, commercial or institutional sources and is capable of being composted, or is being composted, at a site;

(b) is managed as a marketable commodity with an established market by the owner or operator of a site;

(c) is being used in the manufacture of a new product that has an established market or is being processed as an intermediate stage of an existing manufacturing process;

(d) has been identified as a recyclable material in a waste management plan;

(e) is any other material prescribed by the Lieutenant Governor in Council, or the minister under section 22 *[minister's regulations — codes of practice]*;

The *EMA* defines "waste" as follows:

"**waste**" includes

...

(d) refuse,

...

whether or not the type of waste referred to in paragraphs (a) to (f) or prescribed under paragraph (g) has any commercial value or is capable of being used for a useful purpose;

The *EMA* authorizes waste management plans and bylaws. It also sets out the fundamental prohibition against the introduction of waste material into the environment without permission. One key exception to that prohibition is organic matter that is composted in accordance with the requirements of the *Organic Matter Recycling Regulation* (*OMRR*). Essentially, *OMRR* allows the introduction of organic materials into the environment in the form of various regulated substances, including Class A and B composts, under prescribed conditions, as an exception to the prohibition of introduction of wastes under the *EMA*. Relevant provisions of *OMRR* include:

"**Class A compost**" means compost that meets the requirements of section 12;

"**Class B compost**" means compost that meets the requirements of section 14;

General application

2 (1) For the purposes of the *Act*, compostable materials and recyclable materials continue to be a waste until dealt with in accordance with this regulation.

(3) This regulation applies in British Columbia to

(a) the construction and operation of composting facilities, and

(b) the production, distribution, storage, sale and use or land application of biosolids and compost.

(5) Any discharge of waste into the environment, not otherwise authorized by this regulation, must be in compliance with the Act.

I understand that the difference between Class A and Class B compost pursuant to *OMRR* is related to the level of contaminants and pathogens in the compost produced, with Class B compost permitted to have much higher, but still limited, levels of substances such as arsenic, cadmium, mercury, lead, and fecal coliform. Furthermore Class B composts are not required to go through as extensive a pathogen reduction, vector reduction, or reporting process as Class A composts.

Both must be derived only from the types of organic matter set out in Schedule 12 of the *Regulation*, which does not include municipal solid waste (MSW), but does include many types of organic material that might be found in such waste, such as food waste.

A key distinction between the Class A and B is that Class B composts have limited permitted land applications that are highly regulated under *OMRR*, whereas Class A compost can be applied to land, and is a marketable (retail) commodity.

I would also note that since the Manager issued the Licence, the Province has made amendments to *OMRR* that require large Class A and B composting facilities to obtain permits from the Province.

DESCRIPTION OF THE APPLICATION

The Licence at issue arises from an application submitted by the Applicant in March 2014, and attached as Tab 1 to the Applicant's initial submissions. In that application, the Applicant sought a Licence under Bylaw 181 to build and operate a Material Recovery Facility (MRF), to be located at 1050 United Blvd, Coquitlam, BC. The proposed MRF would accept Municipal Solid Waste (MSW) originating from single family; multi-family; and Institutional and Commercial and Light Industrial (ICI) sectors, brought to the facility from curbside haulers under contract to municipalities or from commercial accounts.

As stated in the application, the quantity of waste to be handled by the MRF is 260,000 tonnes annually, with a maximum daily capacity of 1100 tonnes. The percentage of recyclable material in the waste is stated to be in accordance with GVS&DD's own data for Single Family, Multi-Family and ICI compositions. I take from this that the waste is expected to be mixed waste containing organics, plastics, glass, metals, paper, etc.

Of the 260,000 annual tonnes of MSW to be handled annually, the application states that:

- 12,000-24,000 tonnes will be recovered and recycled as paper products;
- 5,400-10,200 tonnes will be recovered and recycled as plastics;
- 3,600-7,200 tonnes will be recovered and recycled as ferrous metals and electronic waste;
- 1,800-3,600 tonnes will be recovered and recycled as non-ferrous metals;
- 6-18 tonnes will be recovered and recycled as glass;
- 2,400-4,800 tonnes will be recovered and recycled as bulky items; and
- 65,400-121,800 tonnes will be recovered and recycled as organics.

In terms of recovery percentages, the application therefore indicates that approximately 25,000-50,000 tonnes of non-organic (or "dry") recyclables (paper, plastics, ferrous metals and electronic waste, non-ferrous metals, glass and bulky items) will be recovered annually. This amounts to between almost 10% and up to as much as 20% of the 260,000 tonnes of materials handled at the proposed MRF annually.

The recovery rate for organics is estimated at 65,400-121,800 tonnes, or approximately 25-50% of the material received. Organics is therefore the largest recovery aspect of the proposed material recovery facility.

The Operations Plan prepared and submitted in support of the application (Tab 2 of the Applicant's Initial Submissions) contains the following additional information for the proposed MRF:

- The MRF will operate 24 hours per day, seven days a week, excluding statutory holidays;
- The MRF will receive and separate mixed waste for the purposes of recovering the following recyclable commodities:
    - Paper & cardboard
    - Plastics
    - Organics
    - Wood
    - Metals
    - Non-Ferrous Metal
    - Glass
    - Electronic Waste
    - Bulky Items
    - Other recyclable material
- All materials will be received, handled and stored within an enclosed building. Collection vehicles with MSW will be weighed before and after unloading, and tipped within the building;
- Unacceptable loads not meeting the definition of MSW under the EMA will be rejected and removed by the hauler;
- Facility staff will perform an initial manual "floor sort" after the unloading of each collection/hauler vehicle is unloaded, and any additional unacceptable material will be identified, stored, contained, and removed in accordance with regulations;
- The MSW will be loaded into the front-end of a processing line where it will undergo various operations including:
    - Manual pre-sort
    - Shredding/size reduction

    - Magnetic separation
    - Screening
    - Air Drum separation
    - Dimensional sorting
    - Optical sorting
    - Manual and/or automated quality assurance
    - Bailing

- The loading of outgoing organics for composting, alternate daily cover, and residual materials will also occur inside the building;
- Loading of other recyclable materials may occur outside the building;
- Vehicles taking material off-site will be weighed both in-bound and out-bound;
- Records of both incoming and outgoing materials will be compiled and maintained for reporting purposes, and provided on a monthly basis to the Solid Waste Manager;
- The end destination of the paper products, plastics, and metals shall be unspecified end users, subject to market conditions;
- The end destination of "clean organics" shall be an unspecified off-site composting operation, that will be operated in accordance with *OMRR*;
- The end destination of "other organics and inerts" is an off-site compost operation for stabilization prior to use as alternate daily cover at a landfill that authorizes alternate daily cover;
- All residual (non-recyclable) materials will be shipped to Licenced GVS&DD facilities.

The Operations Plan introduces a distinction between "clean organics", which shall be recovered and sent to a composting facility, and "other organics and inerts", which may be used as alternate daily cover at a landfill where use of this material is authorized.

The Operations Plan does not specify whether or how much of the recovered "clean organics" could be composted into Class A compost, and how much may be composted as Class B. This question is answered in the Applicant's correspondence with the Manager (see its letter of April 9, 2015 attached as Tab 9 to its initial submissions) where the Applicant clarifies that the "main stream" of the recovered organics will be composted as Class A compost, but there will also be some organic material used for alternate daily cover.

Overall, the Licence application as submitted and clarified in correspondence provided on this appeal includes recovery rates of 10-20% of dry recyclables, and 25-50% of organic recyclables. With respect to the organic recyclables, these may be Class A or Class B compostables, but the recovered organics are stated to be primarily composted as Class A compost.

THE LICENCE

After considerable correspondence, discussion, and research, the Manager issued Licence T-045 to the Applicant on January 21, 2016. Key terms of the Licence relevant to this appeal are as follows:

1.1 Expiry

The term of this Licence shall be fifteen (15) years from the date of issuance. To amend the term of this Licence, the Licensee must submit an application to amend the Licence, along with the applicable Licence amendment fee.

2. Definitions and Interpretation

In this Licence terms defined in the Bylaw shall have the same meaning for the purpose of this Licence unless otherwise defined in this Licence and,

"**Beneficial Disposal**" means a method of disposal where some resource recovery value is achieved, including but not limited to:

(1) the application of waste materials as alternative daily cover for a landfill,

(2) road building, other than permanent road building on top of finished areas, in a landfill or

(3) any other method of waste disposal determined by the Solid Waste Manager to have some measurable value in terms of resource conservation or recovery,

"**Beneficial Waste (DB)**" means waste separated from Municipal Solid Waste that has some beneficial use when disposed, including, but not limited to:

(1) waste materials transformed into alternative daily cover for a landfill, where the alternative daily cover is acceptable to the Solid Waste Manager,

(2) waste materials used in road building, other than permanent road building on top of finished areas, acceptable to the Solid Waste Manager, or

(3) any other type of waste material determined by the Solid Waste Manager to have some beneficial value in terms of resource conservation or recovery,

"**High Value Resource (RH)**" (singular or plural) means a resource recovered from Municipal Solid Waste that is diverted from disposal and has a high beneficial value, including but not limited to:

(1) Recyclable Material delivered to a recycling facility to be used in the manufacture of a new product that has established market or processed as intermediate stage of an existing manufacturing process

(2) metal sent to metal recyclers

(3) Recyclable Material delivered to a recycling broker or other person, acceptable to the Solid Waste Manager, for the purpose of recycling,

(4) plastic sent to plastic recyclers,

(5) wood sent to wood recyclers,

(6) paper fibre sent to paper product recyclers

(7) Mixed Waste Organics that:

(a) are used to produce Class A compost as prescribed by OMRR,

(b) are digested to produce biogas, with the resulting digestate used to produce Class A compost as prescribed by OMMR, and

(c) are recycled by any other means acceptable to the Solid Waste Manager,

"**High Value Resource Recovery**" means:

(1) Recyclable Material diverted from disposal to become a High Value Resource, and

(2) for the purposes of Mixed Waste Organics, includes:

(a) delivery to a Primary Receiving Facility for processing, but does not include delivery to a Secondary Receiving Facility, or

(b) delivery to any other recycling facility acceptable to the Solid Waste Manager, and

(3) receipts evidencing the Quantity in metric tonnes of materials from (1) and (2) that have been diverted from disposal to become a High Value Resource or delivered to a Primary Receiving Facility or other recycling facility acceptable to the Solid Waste Manager, have been submitted to the Solid Waste Manager,

"**Low Value Resource (RL)**" (singular or plural) means a resource recovered from Municipal Solid Waste that is diverted from disposal but has a lower beneficial value than a High Value Resource, including but not limited to:

(1) Recyclable Material diverted from disposal to become a Low Value Resource, and

(2) receipts evidencing the Quantity in metric tonnes of material from (1) that have been recycled, have been submitted to the Solid Waste Manager.

Low Value Resource Recovery does not include Beneficial Disposal,

"**Mixed Waste Organics**" means organic matter that has been removed from the Acceptable Material received at the Facility,

"**Primary Receiving Facility**" means any facility or location to which Mixed Waste Organics is delivered or is to be delivered from the Facility for:

(1) producing Class A compost a prescribed by OMRR,

(2) digesting to produce biogas, the resulting digestate used to produce Class A compost as prescribed by OMRR, or

(3) recycling by any other means acceptable to the Solid Waste Manager,

"**Recyclable Material**" shall have the same meaning as defined in the Bylaw,

"**Residual Waste**" means solid waste produced as a result of reduction, reuse, recycling, recovery, or other activities conducted at the Facility, for which disposal is required, but does not include Mixed Waste Organics delivered to a secondary Receiving Facility, solid waste meeting the criteria specified for High Value Resource Recovery or solid waste meeting the criteria specified for Low Value Resource Recovery,

"**Secondary Receiving Facility**" means any facility or location to which Mixed Waste Organics is delivered or is to be delivered from the Facility for:

(4) the production of alternative daily cover for a landfill,

(5) any use requiring a land application plan or permit as prescribed by OMRR, or

(6) any purpose other than those specified in "Primary Receiving Facility".

5.3 Resource Recovery Rate

For each of the first seven (7) Years of operation, the Facility shall meet the following resource recovery rate: $R_H + 50\% R_L + 15\% W_B > 30\%T$

For each subsequent Year of operation, the Facility shall meet the following resource recovery rate: $R_H + 50\% R_L + 15\% W_B > 40\%T$

Where, in tonnes/report period:

R_H = the total Quantity of High Value Resource recovered from Municipal Solid Waste accepted at the Facility,

R_L = the total Quantity of Low Value Resource recovered from Municipal Solid Waste accepted at the Facility,

W_B = the total Quantity and Beneficial Waste recovered from Municipal Solid Waste accepted at the Facility, and

T = the total quantity of all Municipal Solid Waste received and processed at the Facility.

The total Quantity of all materials received at the Facility (T) does not include the Quantity of material refused by the Licensee or the Quantity of material reloaded and removed by the hauler.

5.4 Recovery of Mixed Waste Organics

All reasonable effort shall be made to remove Foreign Matter from Mixed Waste Organics recovered from the Municipal Solid Waste received. All Mixed Waste Organics that do not meet the criteria specified for High Value Resource Recovery or Low Value Resource Recovery, shall be considered to be disposed.

5.8 Material Handling and Storage

(4) Mixed Waste Organics recovered from the waste received, shall be loaded into suitable containers inside an enclosed building for delivery to appropriately authorized Primary Receiving Facilities or Secondary Receiving

Facilities. Mixed Waste Organics shall be delivered to a Primary Receiving Facility or Secondary Receiving Facility within two (2) days of receipt.

(9) Unacceptable Materials entering the facility or observed upon receipt of the Facility shall be refused and removed by the hauler. Unacceptable materials discovered at a later time, shall be segregated from other waste materials and removed within seven (7) days of its discovery, unless a separate legislative regime applies with respect to removal, such as that applicable to Hazardous Waste.

(11) The Licensee shall deliver Mixed Waste Organics only to a Primary or Secondary Receiving Facility that has a weigh scale and weights all loads of Mixed Waste Organics delivered from the Facility.

7. Reporting

7.1 Monthly Reporting of Quantities

On or before seven (7) days after the last day of each month, the Licensee shall provide to the GVS&DD a monthly report containing the geographic area, by municipality of origin of materials received and the type and Quantity in metric tonnes of:

(1) Municipal Solid Waste received at the Facility by Acceptable Material type,

(2) All other waste received at the Facility by type,

(3) Mixed Waste Organics removed from the Facility and delivered to:

  (a) a Primary Receiving Facility
  (b) a Secondary Receiving Facility
  (c) any other type of facility or person,

(4) Recyclable Material, by each type of Recyclable Material, removed from the Facility and delivered to a recycling broker or other person for the purpose of recycling,

(5) Residual Waste removed from the Facility and delivered to a Regional Facility for disposal,

(6) all material removed from the Facility for the purpose of:

  (a) High Value Resource Recovery,
  (b) Low Value Resource Recovery,
  (c) Beneficial Disposal, and
  (d) any other form of disposal.

Receipts evidencing the Quantity in metric tonnes of the materials in (3)-(6) above that have been removed from the Facility to be recycled or disposed shall be submitted to the Solid Waste Manager as part of the report.

In addition, the Licensee shall calculate and provide, as part of the monthly report, the resource recovery rate using the formula is section 5.3, for the previous month.

ISSUES

Having read the submissions and materials, I have identified the following issues on this appeal for my consideration:

1. To what extent are the issues of delay, fettering, bias, unfairness or improper purpose as alleged by the Applicant against the Manager relevant to my decision on this appeal?
2. Is it reasonable or lawful to impose an expiry term on the Licence, and, if so is 15 years a reasonable term?
3. Is it reasonable or lawful to impose conditions in an MRF Licence regarding the quantity and quality of waste or recyclables that may be received, processed and/or discharged from the facility?
4. If it is reasonable and lawful to impose the above conditions, is the formula imposed by the Manager in this Licence appropriate?
5. Is it reasonable or lawful to impose conditions in an MRF Licence requiring generators or haulers whose waste is received at the facility to have a recycling program in place?
6. Is it appropriate for the MRF Licence to reserve discretion to the Manager to provide additional approvals "acceptable to the Solid Waste Manager" in relation to three defined terms in the Licence?
7. Does the Licence adequately address the problem of receipt of banned or unacceptable waste?

I will address each in turn.

DECISION

1. *To what extent are the issues of delay, fettering, bias, unfairness or improper purpose as alleged by the Applicant against the Manager relevant to my decision on this appeal?*

A substantial portion of the Applicant's materials focus on the process leading up to the issuance of the Licence and the *bona fides* of the Manager. The Applicant alleges delay, fettering, bias, and improper purpose. The Manager denies that the delay was undue, or that there was any improper fettering, bias or improper purpose on his part.

I have already determined that I will be considering this appeal on its merits and specifically the materials and arguments put before me with respect to the conditions imposed in the Licence. This is not merely a review of the reasonableness of the Manager's decision making processes. Any complaints the parties have with the other's conduct leading up to the decision to issue the Licence is not critical to the decision I have to make now.

Nevertheless, I will address the Applicant's arguments and evidence of bias and improper purpose. The evidence that the Applicant relies on for this allegation is speculative and does not rise to the standard required to establish the type of bad faith and *mala fides* alleged by the Applicant. I accept the Manager's explanation of his goals and objectives, which ultimately relate to accomplishing the goals set out in the ISWRMP and related GVS&DD policies, and not any improper purpose or bias.

This does not mean that the Manager's interpretation of these objectives, and the conditions he has set out in order to achieve them, are necessarily the ones I adopt. However, I have no doubts as to the *bona fides* of the Manager's objectives and motivations in this licensing process.

I also note that the complications that arose from the introduction and consideration of a new waste management bylaw by the GVS&DD board (Bylaw 280), a proposal for a new waste to energy plant, and the ultimate rejection of both, have since been resolved and are not a factor in my considerations. To be clear, I have not included the terms of Bylaw 280, which ultimately was not adopted, as part of my considerations on this appeal.

I recognize that one of the purposes of Bylaw 181 is to facilitate the participation of the private sector in waste collection, resource recovery, and disposal services, and to set conditions on those facilities to achieve the goals of the EMA and ISWRMP. While I am guided by the principles and objectives of the ISWRMP, I will be relying on the application itself as it relates to requirements of Bylaw 181.

I also accept that this MRF application engaged new and difficult questions for the Manager regarding the viability of new technology that has not been used in this jurisdiction before, but is asserted by the Applicant to result in the successful separation of mixed waste and diversion of recyclables.

I consider that the delay in the processing of the Licence has been significant. I hope that any future applications of a similar nature could be addressed more quickly.

2. *Is it reasonable or lawful to impose an expiry term on the Licence, and, if so is 15 years a reasonable term?*

The Licence Term

The Licence term at issue with respect to this ground of appeal is at paragraph 1.1 of the Licence, which provides as follows:

> **1.1 Expiry**
>
> The term of this Licence shall be fifteen (15) years from the date of issuance. To amend the term of this Licence, the Licensee must submit an application to amend the Licence, along with the applicable Licence amendment fee.

Applicant's position

The Applicant argues that the above expiry date is invalid, and that the Licence should have no expiry short of the Manager exercising his authority to cancel, suspend or amend the Licence where authorized to do so under Bylaw 181. The Applicant argues that Bylaw 181 already provides for necessary amendments or termination of a Licence if the Licence ceases to comply with new or existing regulatory conditions, and that the imposition of a term on the Licence is effectively an end-run around the requirement that the Manager use his powers in the bylaw to require unilateral amendments to Licences only where "necessary" pursuant to s. 6.1 of the Bylaw.

The Applicant also argues that the imposition of the expiry date operates as an effective barrier to private sector investment in material recovery. Specifically, the Applicant argues that a 15 year licence term provides no assurance that the facility will be able to continue to operate beyond that term, and places the Applicant in a position where it must develop a business model on a fixed term, as it is not able to rely on being able to continue its business beyond the expiry date. The Applicant argues the investment it must make in the facility could not be recoverable within 15 years, and so the 15 year term is a bar to its ability to build and operate the proposed MRF.

In response to the Manager's argument that it has provided no evidence to support the submission that the proposed MRF is not economically viable if it only operates for 15 years, the applicant states that the investment it will be required to make is in the range of $30 million. No evidence or arguments regarding the projected revenues of the Applicant were provided, though the Applicant has indicated that its revenues will depend on its success in diverting incoming waste from outgoing waste, as it will still have to pay tipping fees on all residual waste that it does not divert.

Manager's position

The Manager argues that the 15 year term of the licence is valid and reasonable. The Manager claims the practice of imposing expiry dates is common in licences and permits generally, even if not always imposed on MRF's in the GVS&DD. The practice of imposing an expiry date on a licence is to recognize that authorization of an activity in perpetuity may not be sensible, logical, or in the best interests of the region, especially in a changing regulatory and technological context.

The Manager also notes that Bylaw 181 does not allow or require him to assess the business efficacy of a particular application or proposed activity in making a licensing decision, but rather to assess the application in light of the factors in Article 3.7 of the Bylaw and the goals of the ISWRMP. In this case, the Applicant did not provide their business plan to the Manager in any event, and the Manager notes that that evidence has also not been provided in this appeal.

Finally, the Manager argues that there is no reason to presuppose that the Licence would not be renewed at the end of 15 years, provided that the MRF complied with all applicable enactments at that time.

Decision

The regulatory context for waste management is dynamic. During the course of the consideration of this application alone the GVS&DD introduced Bylaw 280 (which would have imposed new requirements in relation to material recovery facilities), Bylaw 280 was rejected by the Ministry, and the Province began a regulatory review. Since this appeal started, the Province introduced amendments to *OMRR* in relation to Class A and B composters. Every level of government, from the federal, to the provincial, regional and municipal levels are actively engaged in considering regulatory and other changes to achieve higher levels of resource recovery, less landfilled waste, and lowered greenhouse gas emissions.

The regulations and technologies related to reducing waste and improving resource recovery have been and will change over time, likely more rapidly than ever before.

In light of both the anticipated changes in technology, and the changes to the regulatory environment at multiple levels of government, all of which are relevant to the type of mixed waste facility proposed, a Licence for this type of facility with no term at which it is reviewed for renewal is not reasonable.

I consider that the Manager has the authority to impose terms related to operation of the proposed facility, including limiting the term of the Licence, pursuant to Bylaw 181. Licence terms allow for a comprehensive review at the time of Licence renewal in light of current regulations and technology. If those regulations or technologies have changed, merely relying on the ability of the Manager to amend a perpetual Licence "when necessary" is not sufficient to ensure ongoing regulatory compliance or best practices in the industry.

I note that an expiry term in a facility licence does not mean that the licence will not be renewed at the end of its term, but it does ensure that the licence is reviewed on a regular basis to ensure that it is consistent with current regulations and best practices. For example, it is standard practice for municipal business licences to have a term of only one year, despite the substantial investments that are made in these businesses.

In this case, 15 years seems to be a reasonable term to provide both a level of certainty to the Applicant, and an opportunity for comprehensive review of the Licence after a reasonable period.

While I accept the Applicant's evidence that they expect to make a substantial investment of close to $30 million, this does not mean that a 15 year Licence period is not viable (to the extent that such a consideration is relevant to this decision). The Applicant provided no evidence, despite the Manager noting its absence in their submissions, of the anticipated revenues or the business plan of the proposed facility. Therefore, I have no evidence as to whether a $30M investment of this type would take 1 year, 5 years, or 50 years to recover.

What is apparent from the Appellant's materials is that its business plan is based on achieving a rate of diversion from the landfill that would allow the operator to collect tipping fees on the waste received, but to divert a sufficient amount of that waste from the regional landfill such that the tipping fees paid are less than those received. Using the current GVS&DD tipping rates as a very general guide, the *revenues* the Applicant could receive from receipt of 260,000 tonnes for tipping of municipal solid waste could be in excess of $20 million dollars annually. While the net profit will clearly be lower, I have no evidence that 15 years is not a financially sustainable term for the Licence, even with a 30 million dollar investment.

Given the changing technologies and regulatory framework, I consider that 15 years is an appropriate term in this case.

3. ***Is it reasonable or lawful to impose conditions in an MRF Licence regarding the quantity and quality of waste or recyclables that may be received, processed and/or discharged from the facility?***

Applicant's position

The Applicant argues that the Licence conditions relating to the quantities of recyclables recovered are invalid. The Applicant states that its business model is based on offering a more cost-effective service than the cost of delivering municipal solid waste to a regional facility for disposal by recovering marketable recyclables from the waste stream. The Applicant argues that because there are market-based incentives to recover recyclable materials, conditions relating to quantity of waste diverted are therefore unnecessary to accomplish the goal of waste diversion and to ensure that the facility is a true MRF in the sense that it does recover recyclable materials.

With respect to regulations regarding the quality, or types, of recyclables that may be recovered, the Applicant argues that the Licence conditions related to the quality of recyclables recovered by the proposed MRF are invalid. The Applicant argues that it is the marketable value of the recyclable that should be considered over its 'quality.' The marketplace should determine what "valuable" products are, not the Manager.

In response to the Manager's position regarding the recovery value of Class B compost, the Applicant argues that as Class B compost is defined as a recyclable under the EMA,

the GVS&DD must also accept that it is a recyclable for the purposes of licensing MRF's under Bylaw 181. The Applicant did not specifically respond to the Manager's submissions regarding alternate daily cover, and the clear focus of the submissions, is the alleged invalidity of a distinction between Class A and Class B compost.

Manager's Position

The Manager argues that a Licence condition relating to the quantity and quality of recyclables to be recovered is reasonable and necessary in the context of this MRF application.

The Manager argues that the Licence conditions requiring a percentage of quality recyclables produced at the facility is reasonable and valid. The Manager further argues that he has the authority to consider the sustainability value of the products produced in MRFs pursuant to the ISWRMP, and to set reasonable standards in that regard. The Manager states that the distinctions between the waste classes are necessary as they represent different qualities of recovered materials. Under the ISWRMP, the Manager argues that certain qualities of waste and recyclables are more desirable than others. For example, higher grade compost materials are able to be used for the production of food, which is a more desirable product for the region, where lower grade organic materials are only suitable for disposal at landfills between layers of other waste.

The Manager specifically references Goal 2 of the ISWRMP to "Maximize Reuse, Recycling and Material Recovery", and Strategy 2.6, which is to "Target organics for recycling and recovery."

The Manager argues that organics used as alternate daily cover at landfills are not "diverted" from the waste stream, and are not a recyclable. The Manager would therefore not consider alternate daily cover to be a recyclable material recovered from a material recovery facility.

The Manager is almost as circumspect regarding Class B compost, which the Manager argues is essentially "waste", as there is no market for it, it requires a special discharge permit to be applied to land pursuant to *OMRR*, and one generally has to pay to get rid of it.

Specifically, the evidence of Rick Laird, submitted by the Manager, was as follows in this regard:

> 31. The use of compost in British Columbia is regulated by the Organic Matter Recycling Regulation ("OMRR"). The effect of the OMRR is that the use of Class A compost is unrestricted and may be distributed with no volume restriction. The contaminant level in Class A compost is minimal and can be

used for growing food. Class B compost, on the other hand, contains a larger amount of contaminants and its use is restricted.

32. The restrictions on the use of Class B compost are similar to "waste", albeit a waste with some agronomic value. Class B compost can only be applied to land in strict compliance with requirements in either the OMRR or a waste discharge permit. While Class B compost may be useful for mine reclamation, landfills and the like, it represents resource destruction as the product does not meet the quality of soil that achieved in producing Class A compost.

33. Alternative daily cover ("ADC") is a use for very low grade composted materials. ADC is used at landfills between layers of waste. There is some value to this material as it can be used in place of other more valuable resources, such as wood waste, contaminated soil, as barrier between recently placed putrescible waste in a landfill and vectors such as rodents and birds. The value of ADC represents a substantial loss of resource quality when compared with the Class A compost. While the use of organics as ADC has some value, the material ends up in landfill, which is the same result as if there were no diversion. There is minimal resource recovery when organics are used as ADC. While the resource recovery formula recognizes some value for the creation of ADC, it is substantially discounted which is appropriate. If ADC were treated the same as Class A compost, there would be no regulatory drivers for recovery of the valuable growing media resource from organics.

The Manager's own evidence is that the MRFs that he has visited in the United States to better understand the Applicant's proposed technology were not recovering materials that were of sufficient quality to be recycled, and that market forces alone were not adequate to ensure the diversion of valuable resources from the waste stream. Nevertheless, the Manager's view was that with enough resources (adequate manual labour on the sort lines, slower processing speeds), diversion of recyclable material could be achieved with proper incentives in the licensing terms.

Overall, the Manager's main concern appears to be that without conditions related to the quantity and quality of recyclables to be recovered, mixed waste could simply be transferred through the facility without recovery of recyclables at all. This would make the facility a waste transfer station, and not a material recovery facility.

Decision

One of the main issues on this appeal, and perhaps key to the dispute between the Manager and the Applicant, appears to be the adequacy of the proposed recovery of recyclables in the application and Operations Plan in relation to the requirements for a material *recovery* facility (as opposed to a waste transfer station). One aspect of this is the amount or quantity of material that will be recovered for recycling, and thus diverted from landfills. Another aspect is whether that diverted material is actually a recyclable, and whether it is lawful and reasonable to impose conditions on a MRF relating to the quantity and quality of materials that it is required to divert.

Section 4.1(a) and (h) of Bylaw 181 clearly authorize the Manager to specify the quantities of waste that both may be received, and released by a facility.

Those provisions also authorize the Manager to consider the types of waste being received and processed, and to put conditions on the receipt, processing and release of waste on the basis of its type and quality.

Unsurprisingly, the application form completed by the Applicant for the proposed MRF requires the Applicant to state this information. Furthermore, Licences issued for all facilities are generally based on the information stated in the application, and state limits on the quantity and type of waste to be received, processed, and discharged from the Licenced facility.

The more difficult question in this appeal is not whether the Manager can make these distinctions, but whether the actual distinctions made by the Manager are reasonable and lawful, particularly as between types of recyclable materials.

The Manager says that in the context of the broad discretion he is granted under the Bylaw, his obligation is to make reasonable and judicious decisions. It is on this basis that the Manager ultimately says that he is entitled to impose conditions relating to the value of waste as that value pertains to the goals and objectives of the ISWRMP.

Specifically, the appealed conditions rely on distinctions between materials to be discharged or recovered from the proposed MRF, between high and low value resources, and what is classified in the Licence as waste with some beneficial qualities.

I agree with the Manager that quality dry recyclables, and organic matter that is capable of being composted into Class A compost is not waste once recovered and diverted, but is recyclable material. I also agree that these are high value resources that MRF's should be focused on recovering and diverting, and that such diversion supports the goals of sustainability under the ISWRMP.

I agree with the Manager that alternate daily cover (ADC) is waste. Organic material that is not composted or otherwise treated in accordance with *OMRR* is not compost, and remains waste. Alternate daily cover placed in landfills cannot be said to be "diverted" from landfills or "recovered" from the waste stream. It may not be subject to tipping fees, but nor is it counted as landfill diversion or material recovery.

With respect to organic matter that is not capable of or diverted for the purposes of creating Class A compost, but which may be used to produce Class B compost, I agree with the Manager that Class B compost has little or no current market value. The restrictions placed on the production and land application of Class B compost under

OMRR and the *EMA* are onerous, though not as extensive as the restrictions for the discharge of waste into the environment.

Nevertheless, Class B compost is defined as a recyclable under the *EMA*, and provided that it meets the requirements of *OMRR*, it is not "waste" under that *Act*. Although on a discounted basis, the current License also reflects this.

I consider that for these purposes Class B compost should be considered a recyclable that is counted toward the organics recovery stated in the application. I therefore disagree with the Manager's argument on this point that Class B Compost is essentially waste. I consider that the recovery and diversion of a substantial percentage of organic material composted into Class B compost from the waste stream would qualify a facility as an MRF under Bylaw 181.

Having said the above, it is essential that the Licence contain conditions that ensure that the recyclable materials to be recovered are both capable of being recycled and are recycled. To that end, the information regarding the quality and disposition of both dry recyclables and organic material set out in the Licence, and the reporting requirements in relation to them, should be maintained, and the Applicant has not contested those requirements in this appeal.

I would add that the Operations Plan does not provide any information or assurance as to how the extracted organic materials will meet *OMRR* requirements for the production of Class A and Class B compost, although it is clear that the Applicant is confident that this is achievable. For example, Schedule 4 of OMRR requires that the *finished* Class A and B compost must have a foreign matter content less than or equal to 1% dry weight, meet certain substance composition limits, and contain only organics listed in Schedule 12, which excludes some types of potential organic waste which may be present in mixed municipal solid waste. Conditions that ensure that organic matter diverted for composting purposes is accepted by a facility capable of meeting these criteria with the material provided should therefore be maintained in the Licence, with the associated reporting requirements.

I do not consider that market forces alone are sufficient to ensure that the Applicant recovers the maximum amount of recyclables from the waste it receives. While maximum recovery of recyclables from the waste stream would generate a profit for the Applicant, lesser efforts at recovery may still generate a profit at lesser expense. In addition, the Applicant could profit on the difference between tipping fees charged to its clients and tipping fees paid for residual waste disposed of at regional facilities simply by producing organics for the purposes of ADC, for which tipping fees are generally not charged.

Overall, I consider that market forces alone are not sufficient to ensure that facilities regulated under Bylaw 181 comply with that Bylaw, or achieve the goals of the ISWRMP. The Bylaw is premised on a regulatory context that requires applicants to state the

amount and type of waste that they will receive and recover. In my view it is the proper role of the Manager to ensure that the Licence that is issued ensures that the facility will operate as stated, and is consistent with the requirements, goals and objectives stated in the Bylaw, the ISWRMP, and all related enactments.

4. *If it is reasonable and lawful to impose the above conditions, is the formula imposed by the Manager in this Licence appropriate?*

I have found that the Manager may properly impose conditions in the Licence related to both quantity and quality of the materials received, processed and discharged, under both the *EMA* and Bylaw 181.

The next question that I must consider is whether the formula included in the Licence, should be kept, modified, or removed altogether.

Applicant

The Applicant argues that the formula imposed is in conflict with the goals of the ISWRMP and provisions in the *EMA* and the *OMRR*. The Applicant argues that the formula creates unnecessary distinctions between classes of waste, resulting in a limitation that effects only private-sector MRFs. Overall, the Applicant claims inclusion of the formula introduces a barrier to private-sector investment and innovation in waste diversion and the minimization of residual waste requiring disposal by means of landfill or incineration, and is therefore counter to the goals and objectives of the ISWRMP.

Manager

The Manager argues that the formula is a performance measure aimed at ensuring a certain quantity of recyclable output is derived from the proposed MRF, while encouraging higher value resource recovery and conservation. The Bylaw does not require the SWM to assess the business efficacy of a proposed activity. Specifically, the rationale and purpose of the formula are described at paragraphs 25-28 of the affidavit of Rick Laird as follows:

> **Resource Recovery Rate Formula (the "Formula")**
>
> 25. The Formula is a performance measure aimed at ensuring a certain quantity of output is derived from the NextUse activities, while at the same time encouraging higher value resource recovery. The Formula is weighted in favour of the higher quality recyclable material recovered, when calculating the performance formula.
>
> 26. The Formula states that (all of the high value resources) + (50% of the low value resources) + (15% of the beneficial waste) must exceed 30% of the total quantity of materials received at the facility in each of the first 7 years. It goes on to specify a similar formula for the following 7 years.

27. To satisfy the Formula in the first 7 year, NextUse can either produce high value resources from 30% of the total materials received; or produce low value resources from 60% of the total materials receive; or a combination of the two.

28. What NextUse would not be able to do it satisfy the Formula by producing only "beneficial waste".

Fundamentally, I understand that the formula was imposed to address the amount and quality of recyclables to be recovered at the proposed MRF, and to ensure that what was being licenced was in fact a material recovery facility, rather than a transfer station.

Decision

Under Bylaw 181, a material recovery facility is intended to remove recyclable materials from the waste stream for the purpose of recycling. This is distinct from a waste transfer station, which may rearrange waste, but ultimately the bulk of the material handled is expected to end up in a landfill. It is also distinct from a brokerage facility, where recyclable material is received from the purposes of recycling, and the waste residue may not exceed 10%.

Although Bylaw 181 does not define MRFs in terms of a required level of recyclable recovery, in my view, a facility that does not recover any recyclable material could not possibly be licenced as an MRF. Therefore some amount of recyclables must be recovered by a proposed MRF before it can be licenced as a material *recovery* facility. A Licence term that specifies this amount is normal, and indeed in my view necessary, for any MRF.

This raises the obvious question as to what threshold of recovered recyclables is contemplated when a facility is licenced as a material recovery facility, rather than as a waste transfer station. Generally speaking, 10% is considered a residual amount under the Bylaw, and in my view would not be a sufficient level of recovery alone to licence the proposed facility as a MRF.

Through the formula in the Licence, the Manager has effectively suggested that a 30% recovery rate of recyclables from the waste stream would be sufficient for a facility to be considered a material recovery facility that is consistent with the ISWRMP. I agree.

In this case, the Applicant has stated that it will recover somewhere between 10-20% of the mixed solid waste that it receives as dry recyclables, and another 25-50% as recyclable organic material. The total amount of materials that will be recovered from the waste stream as recyclables at this proposed MRD is therefore stated at between 35-70%.

The Operations Plan indicates that the recovered organic material will be sent to a licenced composting facility. It does not state how much, if any, will be composted as Class A compost, but it does state the compost facilities will comply with *OMRR*, so it is implied that they will at least be capable of producing Class B compost. As noted above,

the Applicant has also advised the Manager that most of the organic material recovered will be composted into Class A compost.

In my opinion, a facility that successfully diverts 10-20% of the waste it receives to accredited recyclers of dry recyclables like paper, plastic and glass, and 25-50% to accredited Class A and Class B compost facilities, with the primary stream being composted as Class A, should properly be licenced as an MRF. This is what the application describes on its face, and is also supported in the Applicant's correspondence with the Manager.

In my view, the formula in the Licence is therefore unnecessary and unduly complicated. It also does not directly reflect what the Applicant has applied for in this case. I would instead direct that the Licence impose the recovery levels stated in the Licence application as described above.

With respect to the distinction between Class A and B compost, I am cognizant of the Applicant's statement that the majority of the recovered organics will be composted as Class A compost. However, the thrust of the Applicant's appeal in this case is that I should reject any regulatory distinction between the two classes of compost, and require the issuance of the Licence for the MRF without that distinction.

While I appreciate the significant benefits to the recovery of Class A compost over Class B compost in the overall goal of waste reduction and sustainability, I accept the Applicant's position that both are recyclables under the *EMA*. I would therefore decline to include in the Licence any distinction between these two classes of compost, provided they meet *OMRR* requirements. However, the Applicant can be sure that the GVS&DD and others will be watching to see what level of Class A compost it is able to recover.

To be clear, the Licence should maintain the requirements currently in the Licence for reporting with respect to the facilities that receive the recyclables, and should also maintain or incorporate conditions in relation to establishing that at least 25% of the organics are sufficiently clean to meet the current requirements of *OMRR*, including Schedules 4 and 12.

5. ***Is it reasonable or lawful to impose conditions in an MRF Licence requiring generators or haulers whose waste is received at the facility to have a recycling program in place?***

Applicant

The Applicant argues that a requirement to only receive waste from generators with a recycling program imposes an invalid and unfair operational and regulatory burden on a private MRF, as it is not able to distinguish the origin of parts of a truckload of waste collected from multiple sources, and does not have the means of encouraging source separation through the imposition of tipping fees and other such incentives available to

the GVS&DD. Legally, the Applicant argues that the imposition of this requirement is an invalid subdelegation to the Applicant of requirements that the GVS&DD and its member municipalities could pass by bylaw, but have not.

Manager

The Manager argues that the need to promote and require source separation within the Region is within the considerations available to the Manager under Article 3.7 of the Bylaw 181. The terms imposed are within Article 4.1 of Bylaw 181 and are logically connected to that consideration. Furthermore, the Manager argues that the Applicant has stated repeatedly in correspondence related to the application (and indeed at numerous points in its appeal submissions) that the purpose of the proposed MRF is not to undermine source separation, but to extract recyclables from waste as a final resort after all other efforts at source separation have been applied. The imposition of the condition to require generators or haulers to impose a waste program supports the goals of the ISWRP by encouraging source separation.

Decision

It is somewhat inconsistent for the Applicant to both insist that the subject MRF will not undermine the goal of source separation or the ISWRMP because it will only be processing waste after all other efforts at source separation have been applied, but then appeal a condition that compels compliance with that assertion. Nevertheless, I agree with the Applicant that the primary responsibility for ensuring source separation is with the GVS&DD and its member municipalities.

The Applicant's appeal of the condition is on the basis that the Applicant has no control over whether a recycling program is in place, and that it does not wish to be limited to receiving waste only from haulers and generators that can show that such a program is in place.

The Applicant's reluctance is understandable in the current factual situation where sources of their proposed waste may not have source separation in place, and the waste that the Applicant intends to receive is mixed waste containing potentially high levels of putrescibles from multi-family, commercial, and even some single family households, including in jurisdictions that do not have a comprehensive recycling program.

In this context, I consider that it is reasonable and most likely accurate for the Applicant to assert that they cannot ensure that their proposed and anticipated source material will ever have been subject to a recycling program. I approach this Licence appeal on that basis.

Concomitantly, I do not accept the Applicant's submission that the Manager has no reason to be concerned that their MRF will not contribute to recycling at source, and might even undermine efforts in this regard. Ultimately, however, I am of the view that

source separation by generators is not best addressed as a condition of a Licence for this MRF. I agree with the Applicant that requiring source separation to achieve the goals of the ISWRMP is best done through regulation of waste generators and waste haulers.

I would therefore remove this condition.

6. ***Is it appropriate for the MRF Licence to reserve discretion to the Manager to provide additional approvals "acceptable to the Solid Waste Manager" as currently stated in the Licence?***

Applicant

The Applicant appeals the inclusion of the term "acceptable to the Solid Waste Manager" in the following definitions contained in the Licence:

a. The definition of "High Value Resource"
b. The definition of "Beneficial Waste"
c. The definition of "High Value Resource Recovery"

The Applicant argues that the Manager does not have the authority to issue a Licence that reserves further discretionary authority to the Manager through the term "acceptable to the Solid Waste Manager" in these provisions, and requests that this term be struck from the Licence. The Applicant argues that the retention of the term "acceptable to the Solid Waste Manager" in these definitions is an unlawful delegation of discretionary authority back to the Manager, that allows the Manager to "give himself some abstract authority to determines when he is satisfied with operating parameters" rather than "impose certain and determined conditions."

Manager

The Manager argues that the reservation of authority to the Manager in the above Licence definitions must still be reasonable and assessed in good faith, and remain subject to appeal if the Applicant objects.

The Manager agrees that the use of the appealed term in the definition of "Beneficial Waste" can be removed. The Manager states that the term in the other two definitions (with some modification to the first) simply provides the Applicant with an additional option for approval without need for the Applicant to apply to amend the Licence. Specifically, it allows a written approval by the Manager for the inclusion of certain types of waste or for the approval of alternatives to recycling brokers not currently contemplated in the Licence, but which the SWM considers are similar enough not to require a Licence amendment.

Decision

I note that the appealed terms are all related to the Formula, and I have directed that the Manager issue a Licence with requirements for material recovery that are not tied to the Formula. Nevertheless, I realize that the final Licence may still contain similar terms in relation to the definitions of waste or recycling facilities, and so I will consider these concerns.

The Manager agrees with removal of the term from the definition of Beneficial Waste. I would therefore direct its removal.

With respect to the remaining terms, while I recognize that it may be of assistance to many applicants for a facility Licence to incorporate some discretion in this regard, in this case, the Applicant does not wish the Manager to reserve any discretion to approve additional types of waste or types of acceptable recycling facilities.

In light of the Applicant's objections, I grant this portion of the appeal. The term in the Licence that allows the Manager to approve additional types of waste recovery or additional types of recycling facility not listed in the Licence should be removed.

7. Does the Licence adequately address the problem of receipt of banned or unacceptable waste?

Applicant

The Applicant argues that the terms of the Licence are not sufficiently clear as to how they must deal with banned or restricted materials. The Applicant wants to ensure that the ability to transfer received waste is explicit in section 3 of the Licence. The Applicant aims to receive waste for the purpose of recovering and brokering recyclable material. The Applicant claims that clear wording in the Licence that the Applicant may receive and transfer banned or restricted materials reduces uncertainty for the actual facility operations. It states that, while the intention is that haulers would remove any banned or restricted materials when the loads are tipped, the current wording implies that no banned or restricted materials may be received at the Facility even if they are hidden in permitted MSW.

Manager

The Manager argues that Section 3 of the Licence should be read together with Section 5.8(9). If read together, Section 5.8(9) mirrors the intended manner of operations presented by the Applicant in paragraph 59 of their submissions, and applies to all items listed in Section 3 which are "hazardous waste."

Decision

I agree with Manager that s. 5.8(9) addresses Applicant's concerns.

CONCLUSION

The relief requested in this appeal is listed at page 20 of the Applicant's submissions. I have granted some of that relief, but not all of it. I therefore refer the Licence back to the Manager with the following directions:

1. The term of the Licence of 15 years shall remain;
2. The Formula and related definitions shall be removed and replaced with the recovery rates stated directly in the application with respect to dry recyclables and organics. Specifically:
   a. The required recovery rates for dry recyclables shall be as stated in the application, with a minimum recovery of 10%, which may be expressed either in terms of the specific recyclables and tonnages of dry recyclables listed in the application, or more generally as a recovery rate that appropriately captures the global recovery rate of 10-20% annually of dry recyclables, together with robust reporting requirements to ensure that these recyclables are received by accredited recycling brokers or end users and recycled;
   b. The required recovery rate for organics as compost shall be a minimum of 25% in accordance with the application, which may be recycled as Class A or Class B compost at facilities properly accredited under *OMRR*, together with robust reporting requirements to ensure that these organic materials are both capable of being composted, and are composted, as Class A or Class B compost at such facilities.
3. The Applicant shall not be required to ensure that the materials it receives have been previously source separated; and
4. The appealed terms in the Licence that allows the Manager to approve additional types of waste recovery or additional types of recycling facility not listed in the application or operating plan (or otherwise specified prior to issuance of the Licence), shall be removed; and
5. All other Licence terms to be reviewed and modified to conform to the directions and decisions contained in this decision.

Carol Mason, Commissioner GVS&DD

OCT 0 7 2016

Date

PRELIMINARY CONSIDERATIONS REGARDING APPEAL PROCESS OPTIONS IN BYLAW 181

A. Appeal to Commissioner

There are a number of benefits of the current Bylaw 181 appeal process. These benefits include:

Benefits

- Consistent with s. 35 of the *Environmental Management Act* in that it provides an appeal to the delegated decisions of the Manager back to the body granted the authority to set licensing conditions
- Generally consistent with provisions in private facility licensing bylaws in other regional districts
- Administratively simple; leverages existing staff and procedures
- Short time frame for decision
- Cost-effective for taxpayer and complainant
- 20 year history of successful process

The drawbacks to the current appeal process include:

Potential Drawbacks

- Private sector stakeholders suggest that a process where a decision of a Metro Vancouver employee is appealed to another Metro Vancouver employee is inherently biased
- Less transparent than an appeal to the Board or a panel
- The primary decision maker under the EMA is the GVS&DD Board, and more direct oversight by Board members is supported by the *Act*

B. Appeal to ad hoc Committee of the Board

Rather than to the Commissioner, the appeal would be considered by an *ad hoc* dispute resolution select committee of the GVS&DD Board. The Board would appoint 3 of its members to form the Committee, consider the dispute and make a final decision. This approach is consistent with the approach approved by the GVS&DD Board on September 23, 2016, for non-private facility license related disputes.

Benefits

- Transparent and accountable decisions by elected officials
- Most closely aligned with the requirements of the *EMA* that the GVS&DD consider appeals from its delegated decision maker
- Does not unlawfully delegate or fetter the GVS&DD in performing its statutory and regulatory roll under the EMA
- Administratively simple, leverages existing Board committee and membership
- Cost-effective
- Hearings can be open to the public and involve all affected parties

Drawbacks

- Does not include independent or expert advice or input to the Board

C. Appeal to Expert Panel

Rather than a Board Committee, the panel could be an expert panel selected by the Board. In order to comply with the EMA and the rules against sub-delegation and fettering, the panel may have to be a select or standing committee of the GVS&DD, but could be constituted in a way to enhance independence. The Panel could be made up of experts with defined qualifications, or alternatively experts from specific sectors. The number, qualifications and distribution of experts would need to be determined. New policies and procedures for the selection, conduct and remuneration of the expert panel would need to be developed.

Benefits

- Transparent and independent decisions or recommendations by experts
- Parallels Environmental Appeal Board (EAB) process

Drawbacks

- Not as clearly supported by s. 35 of the EMA as a decision of the Board or Board committee
- No express authority granted by EMA to an expert panel to review Manager's decision
- Administratively complex; requires new processes, procedures and panel members
- Could take longer than options involving internal staff or elected officials
- Potentially costly
- May be challenging to find experts without conflicts or perceived conflicts

D. Binding Arbitration

The 2016 *Guide* includes an example policy for dispute resolution that includes a binding arbitration option. This option appears to be favoured by some private sector stakeholders.

Arbitrations are not typically used in appeals of decisions by statutory decision makers, for a number of reasons including that arbitrators are not elected decision makers delegated the statutory authority to make legislative or regulatory decisions. In addition, the *Arbitration Act* does not grant arbitrators legislative or regulatory powers, and the remedies they can order under that *Act* are generally not applicable to the types of regulatory or legislative disputes that may arise between regional districts and their various stakeholders, such as the public, member local governments, industry operators, and advocacy groups.

The Province of British Columbia has a range of statutory decision making authorities, including Regional Directors, the Agricultural Land Commissioner, etc. These decisions are typically appealed through a Minister, Deputy Minister, expert panel or other similar body constituted by provincial statute and specifically granted the authority to review administrative decision making and to make orders in that regard.

Arbitrations on the other hand are used to resolve commercial disputes that are typically between parties of equal legal standing where a private dispute between them arises. Arbitrators can bind private legal parties in this regard, but they do not have the authority to make legislative decisions regarding the contents of laws or bylaws, or regulatory or licensing decisions. Arbitration is often chosen in commercial transactions in preference to other processes because of its confidential nature (and lack of transparency) allowing parties to settle matters without having to have a public process.

As a result, it is the GVS&DD's view that it is not legally possible for binding arbitration to apply to regulatory decisions made by the Manager under Bylaw 181. Similarly, disputes regarding what should or should not be included in a bylaw that is being considered as part of the implementation of the ISWRMP, or the terms and conditions of licenses issued by the GVS&DD pursuant to its regulatory authority granted by the EMA, are also not amenable to binding arbitration, as this would constitute an unauthorized sub-delegation of the GVS&DD's legal authority, an unlawful fettering of that authority, and would significantly exceed the authority of an arbitrator under the *Arbitration Act*.

There are other, more practical, drawbacks with respect to a binding arbitration process for disputes arising out of licensing decisions under Bylaw 181:

- Unlike processes such as the appeals to the Environmental Appeal Board no other parties have standing in the arbitration. For an appeal of a statutory decision related to achieving environmental regulations, a number of other stakeholders may have an interest in the decision and thus want to seek standing;
- Where an arbitration is invoked by a third party to a licencing application, such as a member of the public, a competitor, or a member local government, there is no clear mechanism to ensure the involvement of the party most affected by the decision—the licensee;
- Arbitrations are typically conducted in private, and thus the flow of information to the public and other stakeholders is restricted and transparency is not possible;
- It is arguable that members of the public, competitors, and other groups should not have standing to invoke mediation or arbitration with respect to a licensing decision made by the authorized decision maker that might overturn the issuance of a facility license;
- Under the Regional Growth legislation, a binding arbitration process may proceed if member municipalities are in dispute with the regional district regarding finalization of a Regional Growth Strategy, but not simply because a developer is not happy with an OCP or zoning decision. Providing the option of binding arbitration to an individual private facility operator or members of the public related to a licensing decision would be analogous to a developer having the ability to seek binding arbitration to compel the adoption of a favourable zoning application.

Binding arbitration is therefore not a suitable process for appeals of statutory decisions related to licensing of private facilities under Bylaw 181.

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