DECISION

Note: Requests no. 17 (398761), 18 (398763), 19 (398766), 20 (398772), 21 (398776), 22 (398783), 23 (398802), 24 (398806), 25 (398762), 26 (398875), 27 (398866), and 28 (399630) each raise the same issue. As such, the FTA has issued one decision in response to all of these requests for review.

BACKGROUND

The Issues as Raised in the Complaint:

Twelve separate complaints were received which were all of a similar nature. The complaints relate to the CALWMC's February 24th Motion to examine the feasibility of new options, which were brought forward through a process different than the approach used to identify the seven options that were the subject of recent public consultation.

FINDINGS

Can the CALWMC consider new options at this stage of the process?

Three key issues arise in determining whether the CALWMC was permitted to direct consideration of additional sites:

1. whether they had jurisdiction;
2. whether they had the power to exercise discretion; and
3. whether discretion was appropriately exercised

1. Did CALWMC have jurisdiction?

The Terms of Reference (TOR) for the CALWMC states that their purpose, in part, is to "*…oversee and make recommendations to the Board regarding the Core Area Liquid Waste Management Plan…*".

It is my view that the CALWMC has the power to act with respect to all aspects of the process to identify and select a wastewater treatment option for recommendation to the Board, and therefore they have jurisdiction.

2. Did CALWMC have the power to exercise discretion?

In order to answer whether the CALWMC was entitled to exercise discretion in this instance, we must first understand if there are any statutory limitations informing the process which might limit their discretion. A review of project documentation suggests that there are no statutory limitations that relate specifically to the process of selecting a site.

Given that there are no statutory constraints on the process, the CALWMC is entitled to exercise its discretion within the confines of existing procedures and guidance documents. As I have noted in previous decisions, discretion is not boundless. In this instance, while it is certainly true that the decision-maker has discretion to devise the process - and in fact to consider new sites as per the TOR for the TOP - should they be bound by any procedural constraints in doing so; do they owe any duty to the public?

In this instance, the relevant information would be the existing procedures and any guidance documents that inform the various deliberations associated with the project. Before commenting on the individual documents below, I believe it is necessary to state that the exercise of discretion should be assessed in

the context of the totality of all guiding documents. I believe that it is critical to look at each document as a stand-alone first but then to look at all of the documents taken together and how the whole of the guiding documents come together to inform the process.

CRD Board Procedures Bylaw

The CRD and its committees are bound by Procedure Bylaw No. 3828 which outlines various processes related to meetings and other matters. This Bylaw outlines the required steps for introducing a motion.

At the February 24th meeting, the Committee followed these procedures by first raising a Notice of Motion, proposing an Amendment to the Motion, and then voting on the Motion.

What do the CALWMC TOR say about the options selection process?

According to the TOR for the CALWMC,

> *"…the committee will **consider recommendations** to the CRD Board **from Select committees** established to develop core area subregional wastewater treatment and resource recovery options and Liquid Waste Management Plan amendments..."[emphasis added]*

There is nothing in the TOR that restricts the CALWMC to accepting only those recommendations coming from the select committees (e.g., the Westside and Eastside Committees which brought forward options from the municipalities).

What does the Project Charter say about the options selection process?

The Project Charter speaks generally to the roles and responsibilities of the various bodies involved, and while mostly silent on process, includes a few procedural aspects that deal with timelines and milestones. These are provided below.

The Charter includes public consultation on the options under the description of Project milestones, indicating its centrality to the process:

> *7. MILESTONES*
>
> *The Proposed Work Plan Overlay.., provides the overarching timelines and milestones through the completion of the project (Attachment 2). … The scheduling and implementation of the public consultation on the preferred solution sets (after the costing analysis) is anticipated to occur in early December, but is dependent on all of the deadlines being met up until that point.*

In terms of procedurals aspects, the Project Charter elucidates the process by which viable options would be brought forward from the municipalities. The Charter states:

> *"The work of the Eastside and Westside Select Committees, the CALWMC, and the public between June 2014 and July 2015 lays the groundwork for the current project, Core Area Sewage and Resource Recovery System 2.0."*

More specifically, the Charter explains the Westside and Eastside processes for bringing forward potential option sets:

> *"The **Westside Select Committee** participants initiated the Westside Solutions Project as a way to engage residents to **work collectively to identify solutions for wastewater treatment and resource recovery that meet the unique needs of the Westside communities**…. This work, along with the*

work from the Eastside Select Committee, ***will inform*** *the Core Area Sewage and Resource Recovery 2.0 project and* ***the amendment to the Liquid Waste Management Plan***." [emphasis added]

"In January 2015, Oak Bay, Saanich and Victoria formed the ***Eastside Wastewater and Resource Recovery Select Committee to engage with their communities and develop wastewater treatment options that meet the needs of the Eastside municipalities****… The Eastside Select Committee's plan, in combination with the work from the Westside Select Committee,* ***will inform*** *the Core Area Sewage and Resource Recovery 2.0 project and could form the basis for an amendment to the CALWMP".* [emphasis added]

The Charter states that the options put forward by the municipalities "*will inform*" / "*could form the basis for*" the amendment to the Liquid Waste Management Plan (which includes the siting of wastewater treatment facilities). The language of the Charter does not stipulate that considered options have to come from any particular source(s) (e.g. the public or the Select Committees); rather, it indicates that the solicitation of public input is to inform the options brought before the Committee for consideration.

What do the TOP TOR say about the options selection process?

I turn now to the terms of reference for the Technical Oversight Panel; a panel created by the CALWMC to support them in their decision-making process related to selecting a viable wastewater treatment option. The Terms of Reference speak to the purpose of the Panel and which option sets they will be responsible for:

*"The team will begin its work with the option set sites provided. But i****t may consider additional sites*** *that will ensure the best business case scenario that maximizes benefit to the best value for taxpayers. Once identified, the TOP will recommend to the CALWMC that the budget be amended and the respective councils will be asked to put forward the sites for further analysis."* [emphasis added]

As such, I can conclude that it is not incongruent with the mandate given to the TOP by the CALWMC to review the new sites, as outlined in the February 24th Notice of Motion.

Conclusion

The CALWMC decision to accept the February 24th Notice of Motion to have the TOP prepare an assessment of new options, prior to sending information to municipal councils, does not contravene the Charter, the CALWMC TOR, nor the TOP TOR. The CALWMC had the jurisdiction to exercise its discretion in approving the Motion to consider new options, in keeping with the CRD Procedures Bylaw.

The issue then becomes one of process. How should that discretion be exercised?

3. Was discretion appropriately exercised?

Discretion is the power to make a decision that cannot easily be determined to be right or wrong in any objective way. "*The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred*". [1]

[1] Secretary of State for Educ. and Science v. Tameside Metropolitan Borough Council, [1977] A.C. 1014 at 1064 (C.A.). See also Dussault, Traitj de droit administratif canadien et quibicois (Qudbec: Les Presses de l'universit Laval, 1974) at 1398.

Discretion must be exercised or a decision body could be accused of having fettered their discretion. The exercising of discretion poses a dilemma: it is both necessary and problematic. It is problematic because it is challenging to assess a decision that has been made pursuant to discretionary powers.

In choosing to exercise that discretion, what then should guide a decision-maker? That, I believe, is the central question.

How then should CALWMC apply their discretion?

What should guide a decision maker in exercising discretion? In this instance, because of the extensive history and the circumstances surrounding this project (including the potential impact on individual taxpayers and property owners), I am choosing to assess the fairness of the discretion exercised using a fairly demanding test, set out below.

Did the Committee act in good faith;

Decision-makers must use discretionary powers in good faith and for a proper, intended and authorized purpose. If it can be determined that a decision-maker acted in bad faith, where moral turpitude was present, then it must be found that the exercise of discretion was inappropriate.

In order for the Committee to have acted in good faith, the outcomes of the Notice of Motion at the February 24th and 26th meetings will need to have been driven by the Committee's given mandate. Here we seek to understand whether the Committee acted with due regard and appreciation for its responsibilities. In doing so, we turn to examine the Committee's requirements as laid out in the Charter.

The Project Charter outlines the Minister's requirement and Project goals to minimize costs.

With respect to costs, the Motion states the rationale to investigate other options which may prove more financially feasible:

> "WHEREAS the **December 9, 2015 estimated costs to be borne by local residents range from twice to over three times as much as the earlier McLoughlin project proposal**," [emphasis added]

I find that in entertaining this Motion the Committee acted in good faith, under their mandate to find a solution that minimizes costs.

Consider only relevant considerations and ignore irrelevant ones;

In the exercise of discretion, a decision-maker should not allow themselves to be influenced by extraneous, irrelevant and collateral considerations.

As I have already established, the Project Charter suggests that one of the goals of the project is to ensure a cost-effective solution. Review of the deliberations at the February 24th and 26th meetings reveals that the Committee's decision to add additional options was supported by fulsome debate on the pros and cons of putting forward new options for feasibility and costing study at this stage in the project. Indeed, the Motion makes reference to the March 31st funding deadline:

> "WHEREAS **costs borne by local residents would rise further if provincial and federal funding lapses due to the effluxion of time**," [emphasis added]

Timelines and costs are both relevant considerations in this project. In the end, it is evident that the Committee turned their minds to the process, including the project timelines and commitments to public consultation as laid out in the Charter, but decided that the costing issue was more important.

At the meeting, the Committee put forward an Amendment to the Motion so as to add additional potentially viable sites for consideration to the Motion. The Committee determined that if feasibility and costing studies were to be revisited at this stage in the project, the added time and costs to conduct the studies would prove less of a risk if more than one potential site were included. It was also determined that sending information to municipalities and First Nations before feasibility and costing analysis was done on the new option set would further delay this process and expose the project to risk.

As such, their decision was made in light of project constraints as well as timeline and cost constraints (to have a solution prepared and delivered to the Ministry by March 31st).

Discretion was not arbitrary and was made on reasonable grounds;

The Free Dictionary defines arbitrary as "*a course of action or a decision that is not based on reason or judgment but on personal will or discretion without regard to rules or standards. An arbitrary decision is one made without regard for the facts and circumstances presented, and it connotes a disregard of the evidence."*

In assessing whether the committee's decision to add these new options was made on reasonable grounds, I have attempted to understand what information the Committee had before it when it made this decision. What we know is the costs for the seven options had just been released when the Motion was first raised and the committee was faced with projected costs which far exceeded any previous estimates received. It is thus not unreasonable for them to be swayed by the re-introduction of previously considered and potentially viable options i.e., a wastewater treatment facility at Mcloughlin Point.

The original McLoughlin Point proposal rejected by Esquimalt Council was to construct a centralized (one plant) solution to serve the entire Core Area. The Notice of Motion put forward for debate on February 24th was to consider a new option set to look at McLoughlin Point in conjunction (to function in tandem) with (an)other plant(s) located elsewhere. Generally speaking, the new option set put forward is suggesting a distributed wastewater treatment system be considered, which potentially includes one plant at McLoughlin Point. The Amendment to the Motion approved at the February 24th meeting goes further to suggest the new option consider: "To locate facilities at **either** McLoughlin Point **or** Macaulay Point and Clover Point and a possible site to serve western communities." Consideration for the original McLoughlin Point proposal was much different in nature. This new option set would be a decentralized, distributed wastewater treatment system design compared to that of the original proposal, which was a centralized design.

Therefore, I can conclude that the committee's entertaining of revised options was based on reasonable grounds.

Provide the persons affected by the decision with procedural fairness;

The duty to be fair is always part of the duty to act reasonably. While it is true that the Committee has the jurisdiction and power to exercise discretion with respect to the Motion, this is not without difficulty.

This difficulty relates to an expectation that the public has come to have with respect to engagement. As we know, the engagement process has been well documented and robust. The Committee's process to-date was one in which input was solicited from the public on the acceptability of wastewater treatment options. Departure from this process would raise concerns. The previous process of soliciting options from municipalities is a key issue raised in all of the twelve complaints related to the recent Motion. As such, I will now turn to the issue of the site selection process and the involvement of municipalities and First

Nations through the Eastside and Westside Select Committees. But first, I examine what the Committee decided on February 24th and 26th as it relates to process.

What procedures were determined at the Committee meetings?

At the February 24th and 26th meetings, the CALWMC determined that the TOP will first prepare an assessment of each site proposed in the new option set. The Committee considered the process to-date that sought input from municipalities and First Nations but in the end decided to stray from this process at this juncture.

It was resolved that the Committee currently lacks any substantive information on how the technical feasibility and costs of the newly considered options compare with the seven option sets presented to the public in early 2016. Ultimately, the Committee determined to proceed with feasibility and costing on the new options first before presenting these to the public for feedback.

The FTA's understanding from the Committee's deliberations at these meetings is that once an assessment is completed by the TOP, the CALWMC will – as per the Project Charter – send this detailed information to municipal councils and First Nations to review. This process-related matter is important with respect to the notion of a "legitimate expectation" as discussed below.

Legitimate Expectation

As mentioned above, the options as put forward by municipalities were recommended by the CALWMC as ones to proceed to further feasibility and costing analysis. That the CALWMC appears to have deviated from this practice raises concern. It could be argued that the public has a "legitimate expectation" that any new site options would be generated through the same process as before; that is that new site options would come forward from municipalities and First Nations through respective Eastside or Westside Committees.

In fact, I would suggest that this is likely why there were twelve complaints about the recent introduction of the new options. The previous public engagement process is seen to have been dislodged.

The public may have come to have a "legitimate expectation" to be fully engaged in the process. Legitimate expectation is a legal principle. *"…[A]s applied in Canada, [legitimate expectation] is based on the principle that the circumstances affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will* ***generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights****."*[2] *[emphasis added]*

The FTA notes that the courts have found legitimate expectation to comprise one part of the determination of procedural fairness and that it can be outweighed by other factors[3].

The Committee still has the opportunity to go back to the public once more substantive information is available in order to inform Project decisions. So long as the Committee engages with the public and presents these new options back to the public for consideration, soliciting feedback through a fair and transparent consultation process, I do not find the Committee's actions lacking in procedural fairness. However, in moving forward, this commitment needs to be given prominence and the public's expectation to be consulted must be duly considered.

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[2] Canadian Union of Public Employees v. Ontario, 2000 CanLII 16932 (ON CA)

[3] See, for example, *Jono Developments Ltd. v. North End Community Health Association*, 2014 NSCA 92

Conclusion

The process which has been in place since the defeat of the original McLouglin proposal has been one characterized by an iterative exchange in which municipalities and First Nations bring forward options for consideration by the CALWMC and the Consultants, working with the TOP. I have previously commented that I believe this to be fair and reasonable approach.

While it may be perplexing to some to have new options surface at this time - given the very clear process laid out to canvass the municipalities and First Nations for options and the fact that these options are not being brought forward by the municipality of Esquimalt - I am unable to agree that an error of discretion was invoked and that it was unreasonable to alter the process making room for new options. The Committee is being flexible and responsive by accommodating this Motion. For me to find that the actions of the Committee were unreasonable, it must be conduct which no sensible authority acting with due appreciation for its responsibilities would have adopted. This is simply not the case.

If there is sufficient evidence that the new options are in fact viable, then the committee would be ignoring them at the taxpayer's peril. The CRD, through the CALWMC in this matter, must exercise its powers on a fair and just basis because they are acting on behalf of the public. There are many people potentially affected by this decision; people dispersed throughout many communities; all with different reasons for wanting, or not wanting such a treatment plant in their neighborhood, or at all for that matter. There is nothing to be gained by ignoring viable options, unless entertaining new ones will unduly jeopardize Project timelines and funding.

There is no perfect answer for what is fair. As I have noted in previous decisions, fairness is contextual. An assessment of the fairness of a process must be done in the context of all of the factors involved. In this instance I must find that the economic considerations should be given prominence in the deliberations on process. A fair process should not hamper decision makers in such a way as to interfere with reasonable decisions. I find that what the committee has chosen to do (to adjust the process at the margins) is not incompatible with a reasonable and prudent approach. While some might argue that there has been a wholesale dismissal of the agreed upon process and that there has been a capricious disregard for procedural fairness, I cannot agree.

While it cannot be known how this new process (one which does not have the stability of the original site selection process whereby municipalities and First Nations put forward recommended options) might be weakened, it cannot be said that the Committee acted unreasonably.

Recommendations Moving Forward

However, having said that I do not find that exercising discretion was in error, I offer the following suggestions.

In my view, there is no such thing as absolute and untrammeled discretion; that is, that any action can be taken on any ground or for any reason and in any fashion. Fair process - agreed upon process - is vital. Ultimately, the exercise of discretion, even if applied within jurisdiction and within discretionary powers, will still have to be exercised fairly.

What is required, in my view, is to ensure that procedural fairness guides this new direction. The CALWMC has asked the Consultants, working with TOP staff, to assess new options. If it is determined that they are technically and financially viable, I would strongly recommend that this new information be taken back to the public to undergo further discussion and deliberation. This new public engagement process must be laid out and communicated to the public with clear information on the timelines and key decision points.

I would further suggest that the CALWMC undertake an assessment of all implications of changing the process at this juncture. One of the risks identified in the Project Charter was: "*Potential loss of senior government funding if timelines are not met".* This risk was clearly of sufficient importance to be noted in the Charter and therefore it would be advisable for the Committee to turn its mind to how to mitigate against this risk, with respect of any changes to the current process. This information would then need to be communicated to the public in a timely and clear fashion, including any implications for Project outcomes.