

## Decision

Case number: 398043

## BACKGROUND

### The Issues as Raised in the Complaint:

#### Issue

The complainant raises issue with the fairness of the current public online survey used in the site selection process.

#### Specific Issues Raised

In particular, the complainant alleges that **option sets** including site locations and transportation methods as it relates to treatment of solid waste are not yet final and as such, **are not clearly defined** within the survey tool, undermining the ability for participants to adequately respond to the survey questions. Without knowledge of the true costs and impacts associated with various options, the complainant argues that participants are unable to make reasonably informed decisions to guide the options selection process.

## FINDINGS

### Overview of the Survey

The survey is a component of a public consultation exercise underway until February 20<sup>th</sup> (other aspects of the consultation include 9 community open houses, a storefront display at the CRD offices open weekdays from 11am-7pm, and an option to provide comments via email). The survey is focussed on asking the public questions related to two distinct issues: the first relates to the **seven current options for wastewater treatment facilities**, and the second relates to **two possible approaches to processing the solids** that are left after treatment, including locations and possible forms of treatment. As it relates to the latter, there are currently two locations on the table: Rock Bay or Hartland.

The primary issue as framed by the complainant is with respect to the waste water solids treatment options. The complainant suggests that the survey, **as it relates in particular to transportation of solids**, does not adequately lay out the details relative to cost and impact. The transportation method of solid waste has yet to be determined (i.e. by pipeline or vehicle). The complainant suggests that the outcome of the transportation scenario and solid waste site location becomes complicated should the selection of multiple liquid waste treatment sites be chosen rather than the one site at Rock Bay.

The issue raised in the complaint centers of the fairness of asking the public to comment on options for locating the treatment facilities without having a full understanding and appreciation of the complete project costs and associated impacts, inclusive of solids

treatment costs. It is argued that it is impossible for a taxpayer to understand the ramifications of their choices in a survey that does not clearly identify the future impacts both directly and indirectly associated with his or her choice.

## **What would be needed to satisfy the demands of procedural fairness**

The complaint suggests that there has been a breach of procedural fairness through the design of a survey instrument which is patently unfair.

First, I turn to the general requirements of procedural fairness and then I will turn my mind to what is required of procedural fairness in this instance.

### ***What does procedural fairness require?***

It is well recognized that the concept of procedural fairness is variable and that the parameters of what constitutes procedural fairness will change depending on the context of the case.

The existence of a duty of procedural fairness does not determine what needs to be done to fulfill that duty. What amounts to procedural fairness in one set of circumstances may be very different than what amounts to procedural fairness in another set of circumstances.

Good process generally leads to effective decisions and bolsters the legitimacy of decisions. In contrast, deficient process can contribute to suboptimal decisions and breed disrespect for public policy decisions. Complaints about process lead to concern that substantive results are flawed, whereas a fair, predictable, and transparent process bolsters the legitimacy of the substantive outcome.

At its core, transparency and due process are inputs that lead to better outcomes as it allows for intelligent consideration and response. These inputs allow testing of options and the empirics that may or may not back up these options. The lack of effective transparency and due process in this instance potentially threatens to undermine effective decision making. Transparency promotes effective participation and will assist the CALWMC to make better decisions by exposing their thinking to informed criticism before they make a final choice among the options.

### ***Requirements of procedural fairness in this instance***

As stated, the requirements of fairness are context specific. What then is the context of the survey? This can be considered by reviewing both what the public is being asked to do in this survey and how the results will be used.

The introduction to the survey provides only very general guidance on how the results will be incorporated into the decision process. What the reader finds is as follows: *"Your input will help guide these decisions."*

It is unclear whether the responses will be weighted; ranked; or whether the results will be determinative. It is also unclear how the results of this survey will inform decisions relative to the potential use of Hartland.

The survey asks respondents to indicate preferences among seven treatment plant options as well as between two solids treatment options based on information about a variety of relative costs, water quality outcomes and environmental impacts.

In order to make an informed choice, one would expect to have a fairly complete understanding of all issues which are material to the decision at hand. Information is material if its omission or misstatement could influence the economic decisions of users.

What is material is somewhat subjective but I would suggest that in in this instance, materiality would be something that has the potential to impact individual taxpayers in an important way; such as cost, noise levels, or emissions / energy efficiency. The survey instrument itself identifies considerations which might be material to taxpayers. In the beginning of the survey, respondents are canvassed on priorities for the project. Of particular relevance to this complaint, priorities offered for consideration include: *impact on household taxes; location of plants; and how truck traffic will affect the quality of life in one's neighborhood.*

Therefore, at a minimum, I would suggest that procedural fairness would demand that respondents be able to adequately understand these three considerations.

### **Information available through the survey**

Each of the seven options for establishing treatment facilities includes information about a defined set of characteristic (e.g. their capital and operating costs, water quality outcomes, carbon and energy footprint, potential for heat recovery and water reuse, length of new piping that would be required). In addition, a technical memo attached to each option further describes (among other things) the anticipated amount of truck traffic associated with each option to move solids to a treatment site.

The costs associated with transportation of solids do not appear to be reflected in the current estimates, which is perhaps not surprising given that a site for solids treatment has not yet been chosen. However, if the costs (capital and operating) and environmental/noise considerations associated with the choice of transportation method and site for processing solids has a material impact on the relative costs and environmental characteristics of the seven options for treatment, it could be argued that the absence of this information undermines a respondent's ability to accurately reflect their preferences.

### **What information does the survey point to related to transportation costs?**

Below is a screenshot of a report which can be accessed by clicking a link within the survey.

### 3.3 Hartland Landfill and Rock Bay

Locating solids-energy treatment and recovery at either Hartland Landfill or Rock Bay is driven by five key factors as outlined in Table 3-1.

Table 3-1: Key Factors and Considerations

FACTOR	CONSIDERATIONS
<b>1. Neighborhood interest in gasification or anaerobic digestion at Rock Bay or Hartland Landfill</b>	<ul style="list-style-type: none"> <li>» <i>Local industrial land uses presently experience noise, vibration, aesthetic, air and odour concerns</i></li> <li>» <i>Solids-energy recovery would not significantly affect current conditions except if additional municipal solids are received, stockpiled and sorted at Rock Bay; odour management equipment is accounted for at all facilities</i></li> <li>» <i>Neighborhood input (with consideration to the local context for land use) will further influence the suitability of siting solids-energy recovery in Rock Bay.</i></li> </ul>
<b>2. Cost of land</b>	<ul style="list-style-type: none"> <li>» <i>Prime industrial land in Rock Bay is about five times more costly (per hectare) than land at Hartland Landfill.</i></li> </ul>
<b>3. Costs of trucking and pumping wastewater solids to Hartland Landfill</b>	<ul style="list-style-type: none"> <li>» <i>Processing all solids at Rock Bay could eliminate most of the costs of trucking/pumping since there will be some residuals to convey off the site</i></li> <li>» <i>Trucking solids (20% solids) or pumping solids (at 1 to 2% solids) from Rock Bay to Hartland present a similar net present value at approximately \$35M+; trucking net present value includes a lower capital cost than pumping (a liquid return line to Rock Bay is still required for trucking) but the higher operational costs of trucking, including potential carbon taxes, results in a comparable net present value.</i></li> </ul>

This report ends with the following statement as it relates to transportation costs: *“trucking or pumping to Hartland) offset themselves yielding no clear advantage for two of the five factors.”*

The information above appears to focus on transporting waste from Rock Bay to Hartland; but what if several plants are the chosen option? It is not clear from the screenshot above whether the costing scenarios and the statement related to piping costs versus transportation costs also apply in a multiple treatment plant scenario. In the report (screenshot above) we see the costs associated with trucking and/or piping (\$35 million); what is not addressed are the impacts (social and environmental); nor the implications of a multiple plant option.

Before continuing, I would like to comment on the “materiality” of the potential transportation costs. Given the overall potential costs of any given option - \$1.031 billion – 1.348 billion – how significant will transportation costs be in terms of impacting the overall cost of any given option? While it is unclear what options are covered by the \$35 million referenced in the report above, I would expect that in any scenario the costs impacts are likely a fairly minor component of the overall costs of this project. What is clearly not known are the environmental, air quality and community noise impacts of trucking as these would depend on number of loads and location of plants.

The survey does provide a list of “key considerations” related to the two potential sites for processing solids which reflect a range of areas of potential interest to respondents, including:

- Hartland landfill already receives different solid wastes, which could help integrate solid waste into wastewater solids processing. This would help facilitate gasification.
- Integrating waste at Rock Bay could increase land requirements.
- Industrial land in Rock Bay is about five times more costly (per hectare) than land at Hartland Landfill.
- **Processing all wastewater solids at Rock Bay would eliminate trucking/pumping to Hartland Landfill (emphasis added)**
- Having wastewater solids treatment at Rock Bay would avoid conveyancing costs.
- Excess energy from the landfill energy generation facility could be used to off-set operating costs.

Respondents are afforded the opportunity to comment on whether they have any further questions or concerns about the potential locations for the treatment of solids.

## Conclusion

The lack of clarity on how the survey results will be used and the inability to gauge the materiality of the impact on the treatment options if Hartland is chosen as the location to treat solids combine to create a less than ideal situation.

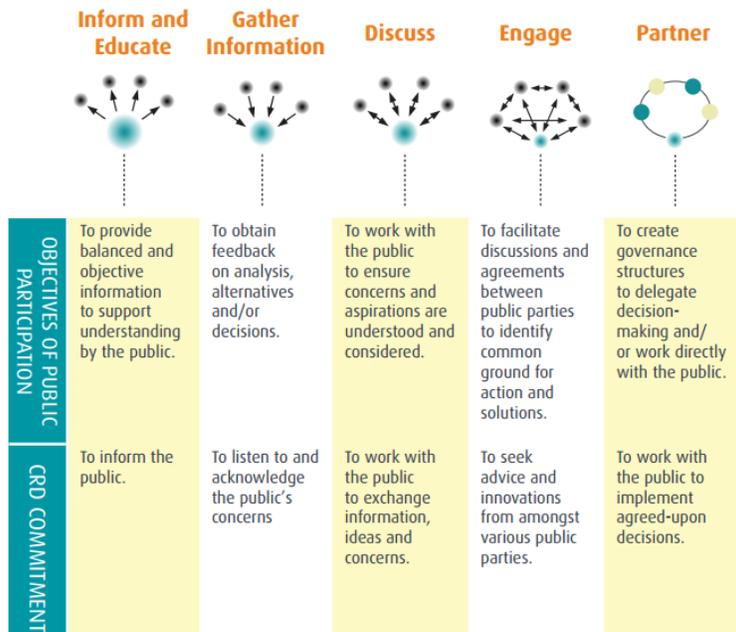
If the decision-maker intends to rely substantially on the survey results to narrow the list of options, I would contend that this would result in a breach of the duty of fairness. If, however, the decision maker intends to use the survey results to better understand public sentiments and interests associated with the options, then I would find no breach in procedural fairness.

Unfortunately, I am unable to land definitively on any side of this issue. I say this because I am unclear on how the results will be used.

In looking at the CRD's public engagement framework, I note that the framework contemplates different kinds of engagement with the public.

The CRD's public participation framework (Diagram 1 below) recognizes a spectrum of activities that may be considered part of public consultation. At the low end is providing information; at the high end is a robust model which sees CRD staff or committees actively engaging with the public in a back and forth of information sharing and analysis.

### Diagram 1



It is unclear to me whether the CRD is operating at the lower end of the spectrum (gather information) or whether they are seeking to discuss agreements to identify common ground (which is more akin to a determinative process).

As such, I offer two possible conclusions.

### Survey used as determinative

One view is that if the survey is being used as a way of further narrowing options based on what is believed to be a fully deliberative process; I would offer that I am persuaded by the evidence that there has been a breach of the duty of fairness and transparency by reason of a departure from full disclosure.

Under this scenario, I cannot say with any confidence that I understand the cost implications related to transportation nor can I comfortably say how those costs would translate into impacts on individual tax payers. I am also not able to comment on quiet enjoyment issues as these have not been defined and assessed. For the most part, options are well defined and are reasonably supported by full information on costs and impacts. This cannot be said of the solids treatment process at Hartland and its impact on treatment plant options.

While it may be legitimately argued that, at least with respect to some of the requirements of providing the public complete information within the survey instrument, the rules could be relaxed if the information was elsewhere available. I do not believe that this is one of those instances. I did undertake a quick review of historical documents to see if this issue of transportation costs and impacts relative to Hartland was explored in previously published documents and found very little clear documentation (although even if it does exist, it seems unfair not to include it in the survey instrument itself.) Issues associated with transportation must be brought to bear in any final analysis and I am of the view, that these issues must be known now, in order for the public to effectively be able to rank all options.

As such, it is unfair to ask respondents to rank my choices which will then be used to weigh the options. In this scenario, I must find in favour of the complainant.

### **Survey not determinative**

A second view could be that if the survey will not be used as a determinative instrument and simply as a further step in understanding public sentiment on various interests associated with the option sets (e.g. will not be used to further narrow options) then there has not been a breach of procedural fairness. If the survey is a tool used to understand interests rather than to eliminate options, then no decisions are being made based on the results therefore there can be no breach.