



Appeal No. 84/08 PES

J U D G E M E N T

PERMIT NO. - 108-21-84/86, issued to Canadian Pacific Limited (CP Rail), in the name of Mr. H.L. MacAulay, Superintendent, for the use of Karmex (diuron) and Spike 80 W (tebuthiuron) weed killer for Railway Ballast Weed Control on the E. & N. Railway right-of-way between Courtenay and Victoria, Parksville and Port Alberni, and Duncan and Lake Cowichan (with specific exclusions - Schedule I). Treatment area = 160 acres per year.

Total Quantity of Herbicide Permitted:-

Karmex - 3584 kg (a.i.)

Spike 80W - 2304 kg (a.i.)

APPEAL -

The appeal was taken against the application of Karmex and Spike 80W by rail mounted low pressure nozzles over a 5-meter-wide ballast section, on the following grounds:

1) While the track areas adjacent to certain properties have been exempted (Schedule 1), the appellants believed that there were other areas which should also be exempted. They believed that if spraying took place on these other areas, unreasonable adverse effects would take place in the surrounding environment, particularly in respect to domestic water supplies.

2) One of the appellants' representative, Joan Spira, stated that Spike 80W was refused to the C.P.R. in the 1979 spraying program and that she would present evidence to show that this herbicide was still unsuitable for the present program.

3) Alternatives to spraying were possible; therefore, on this basis, any spraying program would cause an unreasonable adverse effect to the environment when compared with the alternatives.

HEARING INFORMATION -

The hearing took place on June 12th, 1984, at the Tally-Ho Motel in Nanaimo, B. C.

The Board consisted of a panel of one.

Mr. Frank Hillier, P. Eng., Chairman of the Board, was the Panel.

Miss Shirley Mitchell was the official recorder.

A representative of the Pesticide Control Branch, Ministry of Environment, was invited to attend the hearing. The Pesticide Control Branch was given full party status.

REGISTERED APPELLANTS -

- 1) The Arrowsmith Ecological Association,  
represented by

Mr. & Mrs. William Spira

- 2) Mr. A. D. Galbraith

- c) Mrs. Debbie Doherty

PROPONENT -

Canadian Pacific Limited - represented by

Miss Gail MacDonald, Spokesman and Legal Counsel

Mr. Douglas Mills - Asst. Roadmaster

PESTICIDE CONTROL BRANCH -

represented by

Mr. Robin Mullett, Regional Manager

LIST OF EXHIBITS -

One exhibit only (Exhibit No. 1) was presented to the Board, which was, firstly, a joint application to the Board from the C.P.R. and the Arrowsmith Ecological Association ("AEA") for an amendment to the permit on items which the Railway and the Appellants could agree upon, and, secondly, a request for a decision on twelve areas for exemption from application of the herbicide, which the Railway and the Appellants could not agree upon.

The "AEA" had written authority from Mrs. Debbie Doherty to act on her behalf. Mrs. Doherty was not at the hearing.

Mr. A.D. Galbraith was at the hearing and was in agreement with the joint proposals.

No evidence was given at the hearing by either the CPR or the Appellants.

EVENTS LEADING UP TO THE HEARING -

The following events took place prior to the hearing:

1) Mr. William Spira, of the Arrowsmith Ecological Association, phoned the Chairman of the Appeal Board in May with a request for a pre-hearing meeting with the CPR, which would be monitored by a representative of the Board. He said that if he could have a reasonable discussion with the railway personnel, he thought he could reach an agreement whereby his concerns, and the concerns of the other appellants in relationship to the herbicide application could be resolved. Further, he said that he would approach the other two appellants in order to gain their acceptance for his proposals.

2) The Chairman of the Appeal Board appointed J.O. Moore, a panel chairman of the Board, to convene a meeting of the interested parties to the appeal in Nanaimo on May 29th, 1984 for the purpose of resolving their differences and thereby making it possible to do away with the appeal or reduce the issues involved.

3) The results of the pre-hearing meeting, as reported by J.O. Moore, were as follows:

- (1) Both parties would appear before the Panel of the Board with a joint recommendation that the Permit be amended to include additional sections of the railway which would be exempted from the spraying. The list of properties to be added to those already excluded from treatment as set out in Schedule I of Permit 108-21-84/86.
- (2) The parties agreed to consider further areas for exemption from treatment in the second and third years of the Permit's life through a request and response procedure through which the parties would deal directly with each other. In the event of disagreement on whether the exclusion should be granted, the permittee agrees to appoint a mediator acceptable to both parties. A person qualified as a university biologist was discussed as a likely candidate for such an assignment. Few disputes were anticipated by both parties.
- (3) The parties agreed that they would not seek changes to the Permit relative to the duration or the type and quantities of pesticides approved.
- (4) The permittee would enter into on-going discussions with the appellants' representative to consider alternative means of vegetation management other than using pesticides.
- (5) The permittee agreed to arrange a "reasonable" number of after-spray inspections for the appellants' representative, provided responsibility waivers would be signed. The appellants expected that for the most part, inspections would be made on their own.
- (6) The appellants sought a number of assurances relative to their rights to report pesticide use infractions and that the permittee would abide by all rules and regulations governing the use of pesticides. The permittee agreed to the inclusion of certain of the assurances in the terms and conditions of the permit.

Mr. Moore's further comments and recommendations:

- (1) The meeting provided an opportunity for the parties to exchange viewpoints and to gain a better understanding of each other's needs and objectives. The appellant's spokesman congratulated the board chairman

for his action in arranging the meeting and on his decision to provide the meeting place and a board member to act as Moderator.

- 2) Mr. Moore recommended that the Panel of the Board adopt the amendments to the Permit which would be presented at the June 12, 1984 hearing as a joint recommendation of the parties to the appeal.
- 3) At this time, May 29th, 1984, Mr. Galbraith's position in respect of his appeal is unknown, but it is highly likely that if spraying adjacent to his property is withheld, he, too, will not proceed with his appeal.
- 4) If, by the time of the hearing, all of the parties have reached agreement, it is anticipated the appellants will appear before the Panel with a statement of their intention to withdraw their appeals subject to the Board ratifying the amendments to the Permit, which they jointly recommend. If this occurs, as anticipated, Mr. Moore recommends that the appellants be permitted to withdraw their appeals, and that their \$25.00 deposits be refunded.

#### Proposed Amendments to the Permit

- as presented at the hearing to the Panel of the Board.

The proposed amendments to the permit, which the Board and the Pesticide Control Branch found acceptable, and which were recommended by CP Rail and the three appellants, were as follows:

- 1) Schedule 1 to the said permit be amended to include the following areas as excluded from the treatment area:

Nanoose Bay - in the area from the Nanoose Indian Reserve to Nanoose Bay. Leave a pesticide-free zone commencing 10 meters south of mile 83.7 Victoria Subdivision, and ending 10 meters north of mile 84.3 Victoria Subdivision.

Bexton Property - Nanoose. Leave a pesticide-free zone commencing 10 meters south of the Creek at approximately mile 88.7 Victoria Subdivision, and ending 10 meters north of the culvert at mile 88.8 Victoria Subdivision.

Burnett Property - Qualicum Bay. Leave a pesticide free zone commencing 10 meters south of mile 109.1 Victoria Subdivision and ending 10 meters north of mile 109.2 Victoria Subdivision.

Four Cedars Farms Property - Qualicum Bay. Leave a pesticide-free zone commencing 10 meters south of mile 112.5 Victoria Subdivision and ending 10 meters north of mile 112.8 Victoria Subdivision.

Coombs - Lacey Property - Coombs. Leave a pesticide-free zone commencing 10 meters south of mile 4.8 Port Alberni Subdivision and ending 10 meters north of mile 4.85 Port Alberni Subdivision.

Hilliers Properties. Leave a pesticide-free zone commencing 10 meters west of mile 6.7 Port Alberni Subdivision and ending 10 meters east of mile 7.2 Port Alberni Subdivision.

Doherty Property - Lake Cowichan. Leave a pesticide-free zone commencing 10 meters west of the creek and ending 10 meters east of the easterly end of that portion of the creek which runs adjacent to the trackage on the Lake Cowichan Subdivision.

Galbraith Property - Lake Cowichan. Leave a pesticide-free zone commencing 10 meters east of mile 15.9 Lake Cowichan Subdivision, and ending 10 meters west of mile 15.7 Lake Cowichan Subdivision.

2) Paragraph 6 be amended by renumbering 6 as paragraph 6(a), by amending 6(a) as follows:

"6(a). A 10-meter pesticide-free zone shall be maintained along all water bodies".

and by adding the following paragraphs (b) and (c):

"6(b) A 50-meter pesticide-free zone shall be maintained at all school grounds, playgrounds and hospital grounds and at the following waterworks water sources:

- (1) Goldstream River
- (2) Shawnigan Lake

- (3) Cobble Hill Spring
- (4) Duncan City Waterworks
- (5) Nanaimo River
- (6) Sunset Beach Waterworks
- (7) William Spring at Nanoose Bay
- (8) French Creek
- (9) Little Qualicum River
- (10) Nile Creek
- (11) Olympic Spring near Horne Lake Road
- (12) Cowie Creek
- (13) Whisky Creek
- (14) Cherry Creek
- (15) Beaver Creek

"6(c) The boundaries of the pesticide-free zones shall be clearly marked before pesticide application. "

3) Paragraph 7 be amended as follows:

"7. Appropriate precautions shall be taken to ensure that the herbicide is not used

- (a) in a manner that will result in damage to non-target plant species or the contamination of soil used for agricultural crop production, gardening or landscaping purposes, or,
- (b) on significant areas of the treatment area where, in the opinion of CP Rail, the degree and nature of the weed problem does not pose a threat to the safe and efficient operation and maintenance of its railway."

4) The following be added as paragraph 14 to the permit:

"14. The public shall have the right to notify the Administrator appointed under the Pesticide Control Act of any violations of the terms of this permit and to apply to the said Administrator for any amendments to the permit, including amendments to Schedule 1."

- 5) The following be added as paragraph 15 to this permit:

"15. CP Rail will comply with all statutes, orders and regulations and guidelines enacted pursuant to the said statutes, orders and regulations as are applicable to the application of herbicides on the ballast section of its right-of-way (the treatment area)."

Additional Proposed Amendments to Schedule I.

- presented at the hearing to the Panel of the Board

In addition, 12 areas were put forward to the Panel of the Board for possible exclusion from the herbicide application. These areas were requested by the appellants but denied by the CPR at the pre-hearing meeting. The decision as to whether they would be excluded or not was left to this panel of the Board.

The areas of track involved were adjacent to the following properties:--

- 1) Prodeahl Property - 667 Martindale Road, Parksville, B.C.
  - claims well near track, swampy area back of property.
- 2) Willy Property - 114 Maple Crescent, Parksville, B.C.
  - claims well below track, water collects at track and seeps to well.
3. Engdahl Property - 138 Maple Crescent, Parksville, B.C.
  - claims uses neighbour's well and contemplates drilling own well; garden close to tracks.
4. MacIntyre Property - North of Qualicum Beach near mile 107 Victoria Subdivision.
  - claims drinking water from spring near tracks.
5. Taschuk Property - North of Qualicum Beach, right at Polegate Road.
  - claims drinking water from shallow well below tracks.

6. Vanderburg Property - North of Qualicum Beach  
at Polegate Road.
  - claims well has underground tile pick-up that comes from tracks - also year-round waterway under tracks feeds creek used for the garden.
7. Ward Property - North of Qualicum Beach, left at  
Goodyear Road.
  - claims well below and near tracks.
8. Williams Property - North of Qualicum Beach,  
right on Goodyear Road.
  - claims shallow well close to tracks.
9. Oakley Property - Horne Lake, near mile 110,  
Victoria Subdivision.
  - claims water for garden and occasional drinking water from streams along the tracks.
10. Stone Property - Bowser, B. C., on Jamieson Rd.
  - claims drinking water taken from creek 100 feet from tracks.
- 11) O'Neal Property - Fanny Bay, B.C., near mile 124.9  
Victoria Subdivision
  - claims creek water used in garden.
- 12) Qualicum Bay, Horne Lake Waterworks District -  
Cochrane Road crossing to Nile Creek.
  - claims artesian wells along tracks which feed waterworks.

Appeal Registration Fee -

The appellants notified the Board that they wished to go on record as protesting the fact that they had to pay a registration fee of \$25.00 in order to launch their appeals. Also, the CPR pointed out that the appellants had been most cooperative and reasonable, and, together with themselves, had

largely resolved the areas of concern before the hearing took place. The CPR supported the application of the appellants to have their registration fees returned to them and noted that the Board had the authority under Section 15 (4) of the Pesticide Control Act, to take such action.

DECISION:

This Environmental Appeal Board Panel has considered the joint application of the appellants and CP Rail, and all of the other information submitted to it, in the appeal hearing on Pesticide Control Permit No. 108-21-84/86, issued by the Administrator of the Pesticide Control Act to Canadian Pacific Limited, and has decided the following:

- 1) The herbicide application will not cause an unreasonable adverse effect to mankind and/or the environment.
- 2) The five proposed amendments which were agreed upon between CP Rail and the appellants shall become part of the permit (i.e. those listed on pages 5,6,7 and 8 of this Judgement). Should a conflict arise between the various individual exclusions within the permit and the general exclusions, the greater requirement will govern.
- 3) After a site inspection of each of the twelve additional areas submitted for exclusion from the pesticide application, this panel of the Board has decided the following:

Prodeahl Property - will not experience an unreasonable adverse effect - exclusion denied.

Willy Property - will not experience an unreasonable adverse effect - exclusion denied.

Engdahl Property - will not experience an unreasonable adverse effect if extreme care is taken to prevent any drift of the pesticide into the vegetable garden next to the tracks. Spray vehicle should be run at extremely slow speeds past this property - exclusion denied.

MacIntyre Property - will not experience an unreasonable adverse effect - exclusion denied.

Taschuk Property - will not experience an unreasonable adverse effect - exclusion denied.

Vanderburg Property - remote possibility of an unreasonable adverse effect - therefore, exclude track area from 30 meters south of Polegate Road to 10 meters north of Polegate Road.

Ward Property - will not experience an unreasonable adverse effect - exclusion denied.

Williams Property - some possibility of minor contamination of the well close to the tracks; therefore, exclude the track area from Goodyear Road to 50 meters north of Goodyear Road.

Oakley Property - reasonable possibility of stream contamination on this property - therefore, exclude track area from 50 meters north of Goodyear Road to 10 meters north of Oakley Creek.

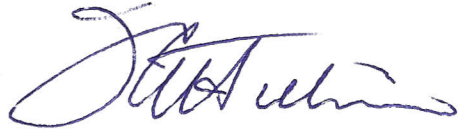
Stone Property - remote possibility of stream contamination through this property - therefore, exclude track area from Jamieson Road south to 10 meters beyond the first culvert from Jamieson Road.

O'Neal Property - remote possibility of stream contamination through this property - therefore, exclude track area 10 meters either side of the culvert for the stream which passes through this property.

Qualicum Bay-Horne Lake Waterworks District - will not experience an unreasonable adverse effect - exclusion denied.

- 4) This Panel of the Board accepts the recommendations of Mr. J.O. Moore and CP Rail in regards to refunding the appeal registration fees. The Panel notes that the appellants made a concerted effort to resolve their differences with the railway, thereby saving the Provincial Government substantial funds

in Appeal Board costs. Appeal registration fees are hereby returned to the appellants, under separate cover.

A handwritten signature in blue ink, appearing to read 'F. A. Hillier', written in a cursive style.

F. A. Hillier, Chairman  
Chairman, Environmental Appeal Board

VICTORIA, B. C.

June 28th, 1984