



# Environmental Appeal Board

Fourth Floor 747 Fort Street  
Victoria British Columbia  
**Telephone:** (250) 387-3464  
**Facsimile:** (250) 356-9923

Mailing Address:  
PO Box 9425 Stn Prov Govt  
Victoria BC V8W 9V1

## **APPEAL NOS. 2000-PES-025(b) to 042(b); 044(b) to 049(b); 052(b); 053(b)**

In the matter of appeals under section 15 of the *Pesticide Control Act*, R.S.B.C. 1996, c.360.

**BETWEEN** Northwest BC Coalition for Alternatives to Pesticides,  
Lakes District Friends of the Environment, Tony Harris,  
Christoph Dietzfelbinger, John Smith, Dave Stevens **APPELLANTS<sup>1</sup>**

**AND:** Deputy Administrator, Pesticide Control Act **RESPONDENT**

**AND:** Canadian Forest Products Ltd. **THIRD PARTY**

**BEFORE:** A Panel of the Environmental Appeal Board  
Cindy Derkaz, Panel Chair  
Joanne Dunaway, Member  
Fred Henton, Member

**DATE:** January 29 to February 2, February 5 to February 8,  
March 19 to March 23, April 9 to April 11,  
May 8 to May 11, June 11 to June 15, 2001  
Concluded in writing October 9, 2001

**PLACE:** Smithers, B.C.

<b>APPEARING:</b> For the Appellants:	
Northwest BC Coalition for Alternatives to Pesticides	Paul Glover
Lakes District Friends of the Environment	Thomas R. Buri, Q.C., Counsel
Tony Harris	Frank Lehmann
Christoph Dietzfelbinger	Fran Hazelton
	Tony Harris, Gordon Wadley
	Christoph Dietzfelbinger
	Thomas R. Buri, Q.C., Counsel
John Smith	John Smith
Dave Stevens	Dave Stevens
For the Respondent:	Leonard S. Marchand, Counsel
For the Third Party:	Clifford G. Proudfoot, Counsel
	Sheri Allen-Fawkes, Counsel

<sup>1</sup> The Office of the Wet'suwet'en was an Appellant and participated in the hearing for 9 days until withdrawing its appeal on March 16, 2001.

## APPEAL

The Northwest BC Coalition for Alternatives to Pesticides (the "Coalition"), the Lakes District Friends of the Environment, Tony Harris, Christoph Dietzfelbinger, John Smith and Dave Stevens (collectively the "Appellants") appeal the August 10, 2000 decision of Jennifer McGuire, Deputy Administrator, Pesticide Control Act (the "Deputy Administrator") to approve Pest Management Plan No. 147-464-00/05 (the "PMP") submitted by Canadian Forest Products Ltd. ("Canfor"). The PMP is for Canfor's Forest Licences A16824 and A16828 within the Prince Rupert Forest Region. It authorizes the use of *Vision* (active ingredient-glyphosate) and *Release* (active ingredient- triclopyr) to manage vegetation competing with crop trees. The term of the PMP is from August 10, 2000 to August 11, 2005.

The Appellants also appeal the Deputy Administrator's decisions of August 17, 23, 24, and 25, 2000, approving pesticide treatments for the year 2000 on a number of cutblocks, in accordance with the PMP.

The appeals were heard together.

The Environmental Appeal Board has the authority to hear the appeals under section 11 of the *Environment Management Act*, R.S.B.C. 1996, c.118, and section 15 of the *Pesticide Control Act* (the "Act"). Section 15(7) of the *Act* provides:

**15** (7) On an appeal, the appeal board may

- (a) send the matter back to the person who made the decision being appealed, with directions,
- (b) confirm, reverse or vary the decision being appealed, or
- (c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

The Appellants seek an order that the Deputy Administrator's decisions approving the PMP and the year 2000 treatments be reversed. The Appellants also request that the Panel provide various directions and recommendations to the Deputy Administrator.

## BACKGROUND

Forest Licences A16824 and A16828 grant Canfor the right to harvest timber within the Morice Forest District and the Lakes Forest District, Prince Rupert Forest Region. The Licences are for Canfor's Houston B.C. Division, with an operating area from Ootsa Lake in the south to Boucher Creek in the north, and from Morice Lake in the west to the east end of Francois Lake in the east. The PMP covers all of Canfor's current operating area for its Houston Division.

The total land base in the Morice and Lakes Forest Districts is 1,498,697 hectares and 1,124,522 hectares, respectively. The total timber harvesting land base in the Morice Forest District is 634,396 hectares. Canfor has rights to approximately 50% of this area. In the Lakes Forest District, the total timber harvesting land base is 589,988 hectares and Canfor's share is approximately 5%.

John Brockley, Canfor's Forest Renewal British Columbia Coordinator for the Houston Division, coordinated the PMP application. He testified that Canfor harvests approximately 3000 hectares annually. It is managing approximately 43,000 hectares of crop tree plantations.

Canfor is required under the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c.159 (the "*Code*") to reforest harvested areas. The silviculture activities for each cutblock are set out in a Silviculture Prescription approved by the Ministry of Forests ("MOF").

A Silviculture Prescription stipulates the preferred and acceptable crop tree species to be planted, states target and minimum stocking standards (i.e. the number of crop trees per hectare), and the date by which the crop trees must be determined to be "free to grow." The definition of "free to grow," as set out in the *Code*, is technical. For the purpose of this discussion, it is sufficient to say that the crop tree must have achieved a minimum height (usually 1.5 metres) and be sufficiently taller than surrounding competing vegetation, so that it can be expected to survive and eventually mature into a tree for future harvest.

A forest company remains responsible for harvested areas until the planted crop trees have been declared to be free to grow by MOF in accordance with the provisions of the *Code*. There are penalties for failing to meet the conditions of a Silviculture Prescription.

Competing vegetation may hinder a crop tree's growth, sometimes to the point of mortality. Forest companies use various methods, including pesticides, to control competing vegetation. The control of competing vegetation is commonly known as "brushing."

Prior to 1997, a forest company was required to obtain a pesticide use permit (a "PUP") in accordance with the *Act* before applying pesticides. PUPs were issued for a period of three years or less, and authorized the use of pesticides on specific tracts of land.

In 1997 the *Act* was amended to add PMPs for the purpose of achieving, among other things, "administrative efficiencies." As well, section 44 of the *Pesticide Control Act Regulation*, B.C. Reg. 319/81, (the "*Regulation*") was amended to provide some exemptions from the requirements of the *Act* and *Regulation* with respect to PMPs.

The Ministry of Environment, Lands and Parks ("MELP") (now the Ministry of Water, Land and Air Protection) (the "Ministry") also provided an information bulletin, *Update on Integrated Pest Management - Implementing Pest Management Plans*,

June 26, 1998, in which the Ministry indicated its intention to replace the PUP system with PMPs.

Under a PMP, a forest company must set out a decision-making process relating to anticipated pesticide use within all of its operating area. A PMP must describe a program for controlling pests or reducing pest damage using integrated pest management ("IPM").

PMPs are approved for a maximum term of 60 months, and annual pesticide treatments may take place in accordance with the conditions of an approved PMP. Under the terms of Canfor's PMP, some but not all of the annual treatments must be separately approved by the Deputy Administrator. A decision of the Deputy Administrator to approve an annual treatment is a "decision" under section 15(1) of the *Act* that can be appealed to the Board.

In its PMP, Canfor has identified wet alder, mixed shrub, and aspen vegetation complexes as the major vegetation complexes competing with crop trees. In the wet alder and mixed shrub vegetation complexes, the main concern is crop tree survival. In the aspen vegetation complexes, the concerns are crop tree survival inside aspen clones and meeting the free to grow requirements.

Canfor's PMP defines pests as "non crop species which interfere with the Free Growing status, or survival, of crop trees as defined by an approved Silviculture Prescription." In the definition of non-crop species, deciduous pests include aspen, cottonwood and birch, with some exceptions. Shrub pests include wet alder, black twinberry, thimbleberry, red raspberry, red elder, douglas maple and highbush cranberry. Herbaceous pests include lady fern, bracken fern, fireweed, Sitka valerian, blue joint reedgrass, Indian hellebore and mountain arnica.

The PMP outlines how Canfor should decide if brushing treatments are required and which of the treatment methods it should select. In the past, Canfor has used chemical, manual and biological (cattle grazing) methods to deal with problem vegetation complexes in its Houston Division operating area.

If Canfor selects a chemical brushing method under the PMP, it must prepare a Detailed Site Assessment for each site proposed for pesticide treatment. Section 7.11 of the PMP stipulates that the Detailed Site Assessments must include, among other things, site characteristics (from the Silviculture Prescription), particulars of associated vegetation, waterbodies, wetlands and watercourses, other identified resource users, a habitat assessment and a 1:10,000 scale site map.

On May 31, 1999, Canfor submitted its application to prepare a PMP to the Deputy Administrator. By a letter dated September 13, 1999, the Deputy Administrator advised Canfor that its application was acceptable and provided Canfor with information about consultation, advertising and other requirements for completing a PMP as well as a copy of the Draft PMP Guide titled: *Guide for the Development of a*

*Pest Management Plan for Forest Vegetation Management for the Omineca-Peace, Cariboo & Skeena Regions—March 1999 (the “PMP Guide”)*<sup>2</sup>.

The Deputy Administrator testified that the application and approval process for PMPs in a forestry context was developed through a pilot project involving the Vancouver Island and Omineca-Peace regions of the Ministry. The Panel notes that many of the documents used in the preparation and approval of Canfor's PMP were in draft form and were evolving during the time that the PMP was being considered by the Deputy Administrator.

During the fall of 1999, Canfor prepared its draft PMP that was advertised and circulated between December 1999 and February 2000. The draft PMP was submitted to the Deputy Administrator on February 17, 2000. On March 15, 2000, the Deputy Administrator provided a written review of the draft PMP and outlined required amendments.

While the PMP was being developed, Canfor was planning its pesticide treatments for the year 2000. Under the PMP, the particulars and location of any planned pesticide treatments must be set out in a document known as a Notice of Intention to Treat (a “NIT”). Canfor prepared NITs for the treatments proposed for the year 2000, and advertised them in three local newspapers on June 14, 2000.

The revised PMP and the NITs were submitted to the Deputy Administrator for approval on June 22, 2000. Canfor also sent the revised PMP and NITs to various government ministries and interested parties on June 22 and 27, 2000, and to area First Nations in early July 2000.

Both Canfor and the Deputy Administrator received comments about the draft PMP and the NITs from government ministries, First Nations, stakeholders and the public. The PMP was modified as a result of the comments. Meetings and information sessions were also attended by interested individuals.

The PMP was approved by the Deputy Administrator on August 10, 2000 (the “PMP Approval”).

On August 16, 2000, the Deputy Administrator and her assistant, Nicole Pressey, together with representatives from Canfor and from Bugbusters Pest Management Inc., the spray contractor, viewed 18 of the sites proposed for pesticide treatments in the year 2000.

A habitat assessment report was prepared by Todd Zimmerling M.Sc., R.P.Bio., P.Biol., and Chad Croft, F.I.T., of Applied Ecosystem Management Ltd. (the “AEM Report”) for 18 sites in the NITs (some were the same sites visited by the Deputy Administrator). The Deputy Administrator received the AEM Report on August 17, 2000.

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<sup>2</sup> In addition to the March 1999 version of the PMP Guide, there are drafts dated November 1999, March 2000 and July 2000. In this decision the “PMP Guide” refers to the March 1999 version unless otherwise stated.

The treatments for the year 2000 were approved between August 17 and August 25, 2000, (the "NIT Approvals"), authorizing pesticide treatments on approximately 2,200 hectares in 80 cutblocks.

After receiving the PMP Approval and the NIT Approvals, Canfor applied pesticides on 771 hectares.

The Appellants appealed the PMP Approval and the NIT Approvals by Notices received by the Board between August 29 and September 11, 2000. Some of the Appellants requested a stay of the PMP Approval and NIT Approvals, pending the outcome of their appeals. On September 1, 2000, Canfor voluntarily consented to a stay of its spray program until March 31, 2001. During the hearing, Counsel for Canfor agreed to extend the voluntary stay until December 31, 2001.

The Coalition is a non-profit environmental group, formed in 1989. It promotes alternatives to pesticides, participates in and facilitates access to public processes, and disseminates information about pesticides.

The Lakes District Friends of the Environment is also a non-profit environmental group. It has been involved in a number of environmental issues in the area.

Tony Harris is a Smithers resident who makes his living from outdoor recreation, including guiding people in the mountains and on the rivers in the area. He is a member of the Community Resource Board with responsibility for monitoring the Land and Resource Management Plan ("LRMP") in the Bulkley Forest District.

Christoph Dietzfelbinger is a mountain guide operating in areas within and adjacent to Canfor's operating area.

John Smith and Dave Stevens are area residents who are concerned about pesticide use.

The Appellants raised a number of issues in their Notices of Appeal and during the hearing, including: the statutory jurisdiction of the Deputy Administrator to approve the PMP; the adequacy of consultation and public involvement in the PMP process; deficiencies in the PMP; the necessity of pesticide treatments for vegetation management; and unreasonable adverse effects on human health and the environment, including biodiversity, which may result from pesticide treatments under the PMP.

## **RELEVANT LEGISLATION AND THE PMP**

### ***Pesticide Control Act***

#### **Definitions**

**1** In this Act:

**"adverse effect"** means an effect that results in damage to humans or the environment;

...

**“integrated pest management”** means a decision making process that uses a combination of techniques to suppress pests and that must include but is not limited to the following elements:

- (a) planning and managing ecosystems to prevent organisms from becoming pests;
- (b) identifying potential pest problems;
- (c) monitoring populations of pests and beneficial organisms, pest damage and environmental conditions;
- (d) using injury thresholds in making treatment decisions;
- (e) reducing pest populations to acceptable levels using strategies that may include a combination of biological, physical, cultural, mechanical, behavioural and chemical controls;
- (f) evaluating the effectiveness of treatments;

...

**“pest”** means an injurious, noxious or troublesome living organism but does not include a virus, bacteria, fungus or internal parasite that exists on humans or animals;

**“pest management plan”** means a plan that describes

- (a) a program for controlling pests or reducing pest damage using integrated pest management, and
- (b) the methods of handling, preparing, mixing, applying and otherwise using pesticides within the program;

**Pesticide must be applied in accordance with permit or approved plan**

- 6** (1) Except as provided in the regulations, a person must not apply a pesticide to a body of water or an area of land unless the person
- (a) holds a permit or approved pest management plan, and
  - (b) applies the pesticide in accordance with the terms of the permit or approved pest management plan.
- (2) An application for a permit or the approval of a pest management plan must
- (a) be made to the administrator,
  - (b) be in the form required by the administrator,

(c) contain the information prescribed by regulation and any other information required by the administrator, and

(d) be accompanied by the applicable fee established by regulation.

(3) The administrator

(a) may issue a permit or approve a pest management plan if satisfied that

(i) the applicant meets the prescribed requirements, and

(ii) the pesticide application authorized by the permit or plan will not cause an unreasonable adverse effect, and

(b) may include requirements, restrictions and conditions as terms of the permit or pest management plan.

### **Additional terms for licences, certificates, permits and plans**

**6.1** A licence, certificate, permit or approved pest management plan is subject to its terms and to those terms prescribed by regulation.

Other sections of the *Act* and the *Regulation* considered by the Panel will be referred to within the body of this decision.

### **Power to make regulations**

**24** (2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:

(g) establishing requirements and standards of competence for a person to obtain a licence, certificate, permit or approval of a pest management plan;

(h) respecting criteria for granting licences, certificates and permits and for approving pest management plans;

(i) respecting the terms of licences, certificates, permits and approved pest management plans;

(5) A regulation under subsection (2) may delegate to the administrator those powers and functions that the Lieutenant Governor in Council considers desirable, including authorizing the administrator to determine matters that are otherwise contemplated by this Act to be established by regulation.

### **The PMP AND THE PMP APPROVAL**

Canfor's PMP is divided into 8 parts with the following headings:

1. Introduction



2. Overview and History of the Plan Area
3. Relevant Legislation, Authorities and Guidelines
4. Consultation
5. The Integrated Pest Management Program
6. Environmental Protection
7. Standards
8. Appendices

The PMP Approval forms an integral part of the PMP and states that it should be attached thereto. It alters many of the provisions of the PMP. One must first read a provision of the PMP and then check the PMP Approval to see if it has been amended. The Panel notes that there is nothing in the PMP to direct a reader to the PMP Approval.

Addendum 1 of the PMP Approval is the draft *Habitat Section Input into the Development of Pest Management Plans for Forest Vegetation Management within the Prince Rupert Forest Region and the Ministry of Environment, Lands and Parks, Skeena Region*, July, 1999, prepared by Darren J. Fillier, R.P.F., R.P.Bio. (the "Fillier Report").

At the hearing, Part 5 (The Integrated Pest Management Program) and Part 6 (Environmental Protection) were the most contentious sections of the PMP. Part 5 describes the decision making process for brushing treatment decisions and treatment selections, and establishes the PMP Operating Zones as follows:

**5.7 PMP Operating Zones** [note that the amendments made by the PMP Approval are set out in the next paragraph]

**5.7.1 Operating Zone 1 (OZ1)**

All blocks not in Zones 2, 3 or 4.

**5.7.2 Operating Zone 2 (OZ2)**

This operating zone encompasses all areas identified in which treatment using herbicide exceeds 200ha/100km<sup>2</sup>. If this threshold will be exceeded in any given year, referral to the Ministry of Environment Habitat Specialist will be required for those blocks in question.

**5.7.3 Operating Zone 3 (OZ3)**

All blocks in this zone will require approval from the MELP before herbicides may be used for treatment. These blocks include:

- All blocks exceeding application rates as described in Appendix 5
- All blocks in Class II or III ungulate range (Class II and III Moose winter range)
- Morice LRUP [Local Resource Use Plan] Zone B
- Goat winter range
- Caribou recovery area

#### **5.7.4 Operating Zone 4 (OZ4)**

Blocks in this zone are not to be treated with herbicides.

- Class I ungulate range (Class I Moose winter range & Class II-III Deer winter range)
- Zone A of the Morice LRUP [Local Resource Use Plan]
- Red and Blue listed plant communities

These provisions were amended by the PMP Approval as follows:

#### **1.4** Section 5.7.2 (page 29) of the plan is amended as follows:

- The last sentence of this section is deleted and replaced with the following:

If this threshold is proposed to be exceeded in any given year, referral of all proposed treatments to the Deputy Administrator is required. The Detailed Site Assessments for each proposed treatment location within this area of proposed herbicide use shall be submitted to the Deputy Administrator for review and approval.

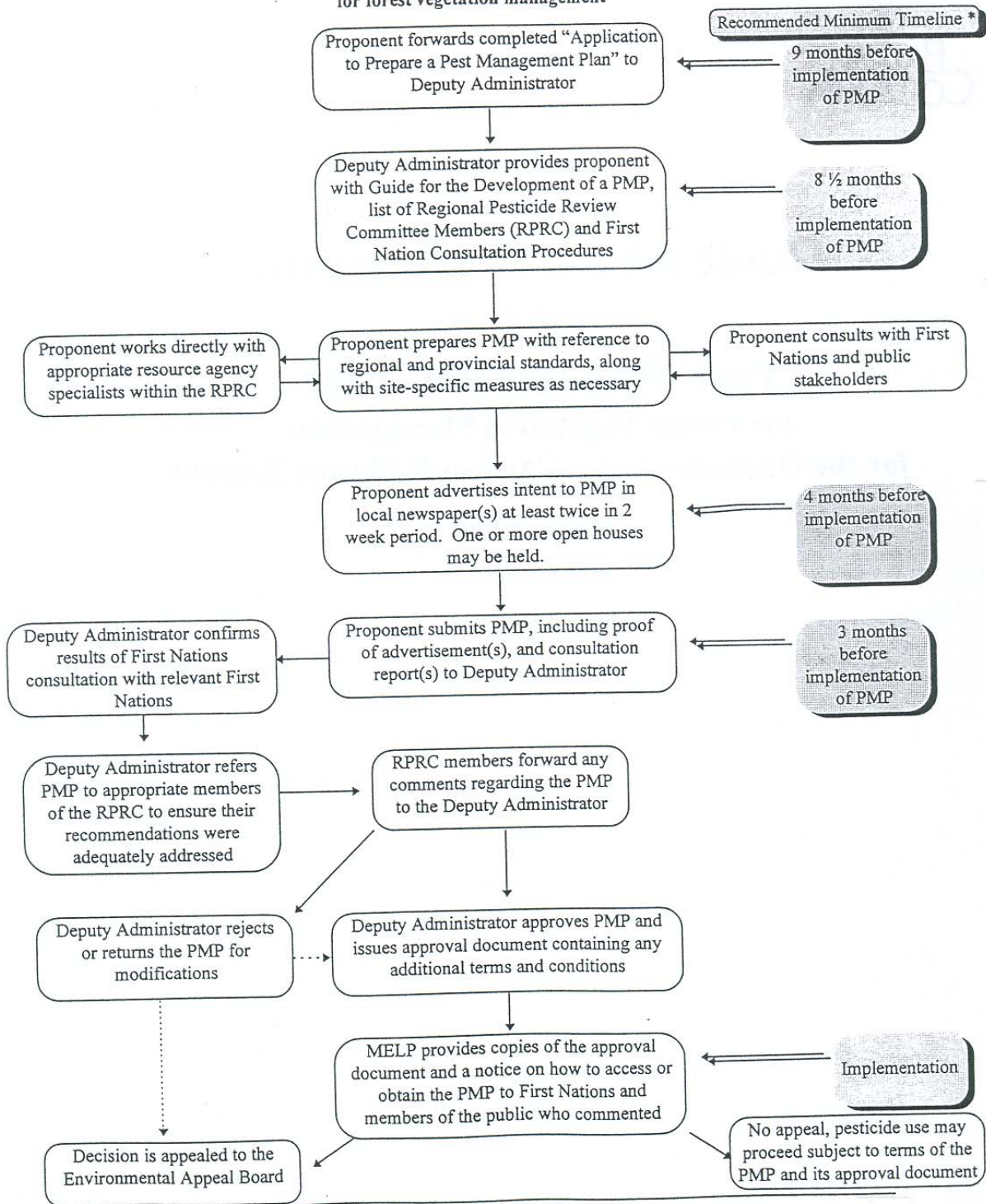
#### **1.5** Section 5.7.4 (page 30) of the plan is amended to reflect the addition of the following bullet to the list of Operating Zone 4 areas:

Floodplains of S1 streams with a frequency to occasional flood hazard rating are designated as no herbicide treatment areas.

The NIT Approvals and other relevant parts of the PMP and PMP Approval are referred to in the body of this decision.

The PMP Guide has a *Proposed PMP Process for Forest Vegetation Management* flow chart, as follows (the "Flow Chart"):

PROPOSED PEST MANAGEMENT PLAN (PMP) PROCESS  
for forest vegetation management



## ISSUES

The main issues before the Panel at the hearing can be summarized as follows:

1. Whether the Deputy Administrator exceeded her jurisdiction when she approved the PMP in the absence of regulations enacted under the *Act* relating to PMPs.
2. Whether there was adequate consultation during the development of the PMP with the Regional Pesticide Review Committee (the "RPRC"), First Nations, stakeholders and the public.
3. Whether the PMP, as approved by the Deputy Administrator is flawed. Under this issue the Panel will consider whether the PMP contains clear objectives and strategies for non-timber resources; is based on IPM; and was prepared in accordance with the Fillier Report.
4. Whether the application of pesticides authorized by the PMP will have an adverse effect on human health or the environment and if so, whether that adverse effect is unreasonable in the circumstances. Under this issue, the Panel will consider if pesticide treatments are necessary for vegetation management, other methods of controlling competing vegetation, and the "zonation" and other restrictions on pesticide treatments set out in the PMP and the PMP Approval.
5. Whether the Deputy Administrator erred in approving NITs for the year 2000 that were developed prior to the PMP Approval.
6. Whether the application of pesticides in accordance with the NITs for the year 2000 will have an adverse effect on human health or the environment and if so, whether that adverse effect is unreasonable in the circumstances.

## DISCUSSION AND ANALYSIS

- 1. Whether the Deputy Administrator exceeded her jurisdiction when she approved the PMP in the absence of regulations enacted under the *Act* relating to PMPs.**

### Appellants

In their initial submissions, the Appellants submit that the Deputy Administrator had no authority to approve the PMP because the procedures and requirements for approving PMPs under the *Act* were intended to be established by regulation, and no such regulatory regime has ever been established. In the absence of a regulatory regime, the Deputy Administrator used an "ad hoc scheme" developed by the Ministry as an alternate means for establishing procedures and requirements for the approval of PMPs, and in so doing acted outside the scope of her authority.

In their Response, the Appellants clarify that their argument is as follows:

1. The Appellant agrees with the position taken by the Respondent and the Third Party in that:

- (a) the Respondent's authority to approve pest management plans is found in the statute, not the regulations;
  - (b) the passing of regulations is permissive, not mandatory;
  - (c) permissive regulations are not a prerequisite for the Respondent to exercise her jurisdiction under the statute.
2. However, the Appellant does not agree that the absence of permissive regulations does not affect the authority granted in the statute.

The Appellants conclude that:

[T]he absence of any regulation prescribing the requirements referred to in section 6(3)(a)(i) does not prevent the Respondent from approving a pest management plan so long as her approval authority is not used to establish such requirements since those requirements were intended by the statute to be established by regulation. They further conclude "When the Respondent purported to **establish** various requirements (the MELP scheme) for the approval process in the absence of any regulation, she exceeded her jurisdiction." (emphasis in original)

In particular, the Appellants argue that the procedures and requirements referred to in section 24(2), which allows the Lieutenant Governor to make regulations, are intended to be established only by regulation unless the *Act* grants the Respondent the power to establish procedures and requirements herself. They also argue that Cabinet could have passed a regulation under section 24(5) which delegated to the Respondent the power to establish the regulatory regime that was otherwise contemplated to be established by regulation. They noted that to date, Cabinet has chosen not to delegate any such power to the Respondent.

In support of their argument, the Appellants rely on the decision of Harvey J. in *Valley Rubber Resources Inc. v. British Columbia (Minister of Environment, Lands and Parks)* (2001) 90 B.C.L.R. (3d) 165 (B.C. Supreme Court)<sup>3</sup>. In 1991, MELP established and thereafter administered a regulatory scheme for recycling scrap tires. A draft regulation was prepared by MELP but was never passed pursuant to the *Waste Management Act* (the "*WMA*"). The program was administered by means of "rules" and "policies" which were approved by Cabinet.

The plaintiff argued that the only manner in which government policy in relation to the collection and recycling of scrap tires in B.C. could be effected was the procedure prescribed in the *WMA*. It submitted that under the *WMA*, the Lieutenant Governor in Council was given the power to make regulations within its ambit, and that the Ministry and/or its director of Pollution Prevention and Remediation Branch had no statutory authority to regulate the tire recycling industry.

Mr. Justice Harvey concluded that the implementation and administration of the regulatory scheme by MELP was not being carried out in accordance with the

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3 A decision of the B.C. Court of Appeal is pending.

manner prescribed by legislation. The government was given a period of 90 days within which to promulgate regulations and establish a lawful regulatory scheme.

The Appellants also refer the Panel to the Ontario Court of Appeal decision of *Ainsley Financial Corporation v. Ontario Securities Commission*, (1994) 21 O.R. (3d) 104, that was cited in the *Valley Rubber* case.

In *Ainsley*, the Commission issued a draft policy statement about the marketing of penny stocks by securities dealers who were not members of the Toronto Stock Exchange. At issue was whether the statement was a non-binding statement or guideline intended to inform and guide securities dealers. The Court found that the policy statement read like a statute setting out a detailed regime and was linked to the Commission's power to sanction in the public interest. The coercive tone and threat of sanctions was held to be the essence of a mandatory requirement, which the Commission could not impose without the appropriate statutory authority.

The Panel was also referred by the Appellants to the decisions of the B.C. Court of Appeal in *Associated Respiratory Services Inc. v. British Columbia (Purchasing Commission)* (1994) 95 B.C.L.R. (2d) 357, and *Pharmaceutical Manufacturers Association of Canada v. British Columbia (Attorney General)* (1997) 38 B.C.L.R. (3d) 175. Leave to appeal *Associated Respiratory* to the Supreme Court of Canada was dismissed.

*Associated Respiratory* involved the Home Oxygen Program established in 1967 to provide oxygen and related respiratory services to chronically ill patients at home. In 1991, the Ministry of Health requested proposals from contractors as part of a cost reduction. The Petitioner, who was not awarded a contract, challenged the Ministry of Health's authority to set up the restructuring program. The *Continuing Care Act* (the "CCA") had been passed and came into effect in 1990. The CCA would have authorized the restructuring program if the Home Oxygen Program had been designated by the Minister as a continuing care service. The Court was of the view that when the CCA came into effect it "occupied the field" and if the Province wanted to administer and fund the Home Oxygen Program, it must do so under the CCA.

*Pharmaceutical Manufacturers* also involved the CCA. The Petitioner challenged the Crown's authority to adopt a pricing policy for prescription drugs paid for under the Provincial Pharmacare Program. Under the policy, patients were only reimbursed for any drug in a category up to the cost of the reference drug. The Pharmacare Program was largely non-statutory. The Court found that the CCA contained no provisions relevant to the Pharmacare Program. There was nothing incompatible with the Crown's authority to adopt the pricing policy. Therefore, there was no "code" which would exclude the reference based pricing policy initiated by the Ministry of Health.

In *Pharmaceutical Manufacturers*, Madam Justice Newbury questioned the use of the concept of "occupied field" when there is no constitutional issue involving federal and provincial jurisdiction. She stated at paragraph 20 that "[t]he more conventional approach in *ARS* [*Associated Respiratory*] would have been to treat it

as raising a question of statutory construction: Did the *CCA* by its terms indicate an intention on the Legislature's part to create a code covering all aspects of continuing care benefit?"

In *Valley Rubber*, Mr. Justice Harvey distinguished *Pharmaceutical Manufacturers* on the basis that the *WMA* did contain provisions relevant to the recycling program.

The Appellants also cite *Independent Contractors and Business Association of B.C. v. British Columbia* 6 (1995) B.C.L.R. (3d) 177 (B.C. Supreme Court). The case involved the "fair wage policy" announced by the Ministry of Labour and Consumer Affairs in 1992. This policy required contractors to pay a minimum hourly rate to construction workers employed in public building construction projects. The petitioners argued that the fair wage policy was an attempt to regulate wages, not simply a policy setting out general expression of future intention. The *Wage (Public Construction) Act* gave the Lieutenant Governor in Council the authority to make regulations determining fair wages. Scarth J. held that that the policy conflicted with the *Act* and was therefore invalid.

#### Deputy Administrator

The Respondent submits that

[S]ection 6(3)(a) of the *PCA* clearly and unequivocally empowered the Respondent to approve Canfor's PMP. Unlike the cases relied on by Mr. Buri, the Respondent's jurisdiction is not dependent on a grant of authority by regulation...The Lieutenant Governor in Council's regulation-making power under the *PCA* is permissive, not mandatory. It need not be exercised. The Lieutenant Governor in Council's decision against making regulations does not and cannot remove the jurisdiction granted to the Respondent by the legislature through the *PCA*. Regulations are subservient to and can supplement, but not override, a validly enacted statute.

The Respondent further submits that nothing in the *Act* precludes the Deputy Administrator from adopting her own procedures, particularly in circumstances where the Lieutenant Governor in Council has not exercised its regulatory power. The Respondent refers the Panel to section 27(2) of the *Interpretation Act*, R.S.B.C. 1996, c.238, in support of her argument that the Deputy Administrator is empowered to do all things necessary to enable her to discharge her responsibility to approve PMPs.

#### **Ancillary powers**

**27** (2) If in an enactment power is given to a person to do or enforce the doing of an act or thing, all the powers that are necessary to enable the person to do or enforce the doing of the act or thing are also deemed to be given.

As well, the Respondent argues that to adopt the Appellants' submissions would result in having to "recreate the wheel" for each PMP application.

The Respondent further notes that the concerns of the Appellants with respect to the reconciliation of sections 12(2) and 24(5) of the *Act* can be addressed by reading both sections together to give meaning to both sections. By doing so, the Respondent argues that the Deputy Administrator has the powers necessary to carry out the *Act*, but these powers do not extend to matters contemplated to be exclusively established by regulation. For matters **exclusively** established by regulation, the Deputy Administrator would have no power unless that power had been delegated to her by regulation under section 24(5) of the *Act*.

With respect to the case law provided by the Appellants, the Respondent concludes that these cases are of no assistance, because in each of the cases, the Legislature had not empowered the "scheme" at issue by statute.

Rather, the "schemes" were to be empowered, if at all, by regulation. The "schemes" were found invalid as no empowering regulations had been made.

In support of the Respondent's argument, the Panel was referred to the B.C. Supreme Court decision in *British Columbia (Broiler Hatching Egg Commission) v. Reid* [1996] B.C.J. No. 2619, Q.L. This case involved an appeal from an order of the B.C. Marketing Board that the Broiler Hatching Egg Commission should pay the "actual costs" of Mr. Reid relating to hearings before the Board. The sole issue was whether the Board had erred in law by exceeding its jurisdiction when it awarded "actual costs" in the absence of the "prescribed limits" contemplated by section 11(9) of the *Natural Products Marketing Act*. The Lieutenant Governor in Council had not enacted any regulation establishing a tariff.

Mr. Justice Allan stated:

I find that the clear intention of the legislature in enacting s. 11(9) of the Act was to empower the Board to calculate and grant the actual costs of a party to the appeal proceedings. The language in s. 8(3) which enables the Lieutenant Governor in Council to establish a tariff is permissive. The fact that the Lieutenant Governor has not formulated "prescribed limits" cannot render the section ineffective. The term "actual costs" is sufficiently described so as to be ascertainable without reference to a tariff setting out "prescribed limits." In my opinion, the creation of a tariff is not an essential prerequisite to the power of the Board to award costs in appropriate circumstances.

In reply, the Appellants distinguish the *Reid* decision. They submit that the Administrator could have approved the PMP if she had not exceeded her jurisdiction by purporting to establish procedures and requirements that were intended by statute to be prescribed by regulation.

The *Reid* decision was also considered in *Valley Rubber*. It was distinguished on the grounds that there was no equivalent in the *WMA* to section 11(9) of the *Natural Products Marketing Act*, which would justify the actions of the Ministry in



implementing the scheme outside of regulations enacted by the Lieutenant Governor in Council.

The Respondent also submits that, because the Board has a *de novo* jurisdiction, even if the Respondent has lost her jurisdiction by imposing procedures and requirements, that has no bearing on the Board's ultimate disposition of the case. The Board has the jurisdiction to make any decision that the Board considers the Respondent could have made.

#### Canfor

Canfor agrees with the submissions of the Respondent that the absence of permissive regulations is not a prerequisite to the Respondent exercising the statutory authority conferred on her by the Legislature. Canfor submits that the fundamental premise underlying the Appellants' argument, as stated in the Appellants' Reply, is not supported by the *Act*.

First, Canfor notes that the Appellants do not challenge the Respondent's authority to provide guidance documents, and section 6(2)(c) of the *Act* specifically authorizes provision of informational requirements.

Second, Canfor submits that there is no provision in the *Act* indicating a legislative intent that "procedures and requirements" for approving pest management plans be established only by regulation. Canfor further submits that the Appellants do not clarify which provision of the *Act* the Lieutenant Governor in Council would employ in order to create such "procedures and requirements." In particular Canfor states:

There is no provision in the *Act* that grants the Lieutenant Governor in Council the power to pass regulations respecting "procedures and requirements" relating to the approval of PMPs, as the Appellant describes them. The only provision relating to the Lieutenant Governor in Council's power to create regulations respecting "procedures and requirements" for approval of pest management plans is s.24(2)(h), which authorizes the Lieutenant Governor in Council to make regulations: (h) respecting criteria for...approving pest management plans.

Third, Canfor submits that the contention that the Respondent may not create "procedures and requirements" is also laid to rest by reference to section 6(2)(c). Section 6(2)(c) provides that an application for the approval of a pest management plan must contain the information prescribed by regulation and any other information required by the administrator.

Fourth, with respect to the Appellants' arguments that section 24(5) of the *Act* is proof that the Respondent does not have the power to do everything that is necessary for the approval of pest management plans, Canfor agrees that there are some activities included in section 24(2) that are intended to be established by regulation, and which the Respondent cannot therefore engage in unless a regulation under section 24(5) authorizes the Respondent to do so. Examples of these would include classification of substances as pesticides in section 24(2)(a),

and prescribing fees in section 24(2)(o). However, Canfor argues that the following matters do not have to be established by regulation:

- Impose requirements respecting the form of an application for approval of a pest management plan (s.6(2)(b));
- Require information to be provided in an application for approval of a pest management plan (s.6(2)(c)) (and exercise the powers necessary to carry out this task (s.12(2)));
- Determine whether the applicant for approval of a pest management plan has met the prescribed requirements (s.6(3)(a)(i)) (and exercise the powers necessary to carry out this task (s.12(2)));
- Determine what constitutes an unreasonable adverse effect in a particular instance (s.12(2)(a));
- Determine whether the pesticide application authorized by a plan will cause an unreasonable adverse effect (s.6(3)(a)(ii)) (and exercise the powers necessary to carry out this task (s.12(2)));
- Approve a pest management plan if satisfied that the pesticide application authorized by the plan will not cause an unreasonable adverse effect (s.6(3)(a)(ii)) (and exercise the powers necessary to carry out this task (s.12(2)));
- Include requirements, restrictions and conditions as terms of the permit or pest management plan (s.6(3)(b));
- Suspend, amend, revoke, or refuse to grant a pest management plan (s.12(2)(b.1));
- Exercise other powers necessary to carry out the *Act* and the *Regulation* (s.12(2)).

Canfor also relied on the *Reid* decision in support of its submissions. In addition, the Panel was referred to other decisions in support of the proposition that where there is a regulation making power that is not mandatory, the absence of regulations is not a bar to the exercise of a statutory power. These cases include *Carling Export Brewing and Malting Company Limited v. The King*, [1931] 2 D.L.R. 545 (Privy Council); *Capital Cities Communication Inc. v. CRTC* [1978] 2 S.C.R. 141; *Canadian Union of Public Employees (CUPE) v. Canadian Broadcasting Corp. (CBC)* (1985), 17 D.L.R. (4<sup>th</sup>) 709 (Federal Court of Appeal); *French v. Canada Post Corp.* (1988), 87 N.R. 233 (Federal Court of Appeal); and *Nova Scotia Dental Technicians Assn v. Fall River Dental Lab Ltd.* (1994), 134 N.S.R. (2d) 149 (N.S. Supreme Court).

In response to the Appellants' submission with respect to *Valley Rubber*, Canfor argues that in *Valley Rubber* there was no independent statutory authority for the

actions taken by the Ministry in implementing the program for recycling scrap tires. Canfor submits that this is unlike both the *Reid* and present case.

#### Panel

In summary, the Appellants submit that, although the Deputy Administrator can approve a pest management plan without prescribed regulations, she cannot establish procedures and requirements that were intended to be established by regulation. Although the Deputy Administrator had the original jurisdiction to approve the PMP, she lost that jurisdiction when she purported to establish procedures and requirements that could only be established by regulation.

In addressing this issue, the Panel must first examine the language of the statute. A key provision is section 6(3)(a) which states:

The administrator...may issue a permit or approve a pest management plan if satisfied that

- (i) the applicant meets prescribed requirements, and
- (ii) the pesticide application authorized by the permit or plan will not cause an unreasonable adverse effect.

In the Panel's view, based on the interpretation of section 6(3), the Deputy Administrator has the jurisdiction to approve a PMP under this section even if no regulations have been made in respect of PMPs. Although clearer terms could have been utilized in the *Act*, the Panel finds that the language in the statute conferring the power to make the decision is sufficiently clear to stand on its own. In particular, the Panel finds that the Deputy Administrator may not issue a PMP unless she is satisfied that the pesticide application authorized by the plan will not cause an unreasonable adverse effect within the meaning of the *Act*, and unless the PMP contains the matters required by the definition of "pesticide management plan" in section 1 of the *Act*. As well, the Panel finds that it is clear that the regulation-making power of the Lieutenant Governor in Council under section 24 of the *Act* is discretionary. The Panel notes that this interpretation was not disputed by any of the Parties.

In support of its interpretation, the Panel notes that section 6(3) includes a legal test to be applied by the administrator in deciding to approve a PMP. This test is elaborated on in the definition of "adverse effect" in section 1 of the *Act*. As well, section 1 also defines what a PMP must contain. Consequently, this is not a case where the statute does not provide any detail about what constitutes a PMP, or what legal test the decision-maker should employ in deciding whether to approve a plan. Further, the Panel notes that sections 6(2)(b) and (c) clearly allow the administrator to determine the form and content of an application for approval of a PMP, and section 12(2) provides the general power necessary to carry out the *Act*. As well, because the *Regulation* was amended to include some provisions with respect to PMPs, it can be argued that the Legislature intended that the authority to approve PMPs would arise as soon as the statutory amendments were brought into effect.

What is in dispute is whether, as the Appellants submit, the Deputy Administrator lost jurisdiction to make a decision under section 6(3) of the *Act* once she established procedures and requirements that the Appellants submit could only be established by regulation.

Under section 12(2) of the *Act*, the administrator has the powers necessary to carry out the *Act* and the regulations. These powers are illustrated in subsection (2), however, the Panel notes that this is not an exhaustive list. As well, the Panel notes that there is nothing in section 12(2) that indicates that the authority under this section is conditional upon regulations being in place.

The Panel further notes that under sections 24(2)(g), (h) and (i), regulations *may* be made with respect to requirements for approval of a pest management plan, criteria for approving pest management plans, and terms of approved pest management plans. Under section 24(5), a regulation under subsection (2) may delegate powers and functions to the administrator that the Lieutenant Governor in Council considers desirable, including with respect to matters that are otherwise contemplated by the *Act* to be established by regulation.

The Panel agrees with the submissions of the Deputy Administrator and in part with the submissions of Canfor, with respect to the interpretation of these provisions. The regulation-making power under section 24(2) is permissive, rather than mandatory. The decision of the Lieutenant Governor in Council not to prescribe regulations does not remove the jurisdiction of the administrator under the *Act*, including those broad powers granted to the administrator under section 12 to carry out the *Act* and regulations. The Panel agrees with the Deputy Administrator that there is nothing in the *Act* that precludes the Deputy Administrator from adopting her own procedures, and that section 27(2) of the *Interpretation Act* empowers the Deputy Administrator to do all things necessary to enable her to discharge her responsibility to approve PMPs.

With respect to the Appellants' arguments regarding the reconciliation of section 24(5) with section 12(2), the Panel finds that the powers under sections 24(2)(g),(h) and (i) were not contemplated to be exclusively established by regulations. Hence, these provisions can be interpreted in a manner that allows them to co-exist.

The Panel does not believe that the decision in *Valley Rubber* alters the Panel's conclusions. In *Valley Rubber*, there was no equivalent to section 6(3) of the *Act*, and the government purported to set up the scheme entirely outside the statutory and regulatory authority. The Panel also agrees with the Deputy Administrator and Canfor that the various guides, guidebooks, reports, procedures and fact sheets to which the Administrator referred were not a comprehensive regulatory code such as that developed by the Ontario Securities Commission in *Ainsley*.

With respect to the other case law cited by the Appellants, the Panel finds that these cases are of little assistance to the Panel. In those cases, the legislature had not empowered the "regulatory scheme" at issue by statute. Rather, they were to be empowered by regulations, which had not been made.

Finally, the Panel also agrees with the Deputy Administrator that, because the Board has *de novo* jurisdiction, even if the Deputy Administrator did exceed her jurisdiction by imposing procedures and requirements, the Board has the jurisdiction to make any decision that the Respondent could have made, and that the Board considers appropriate in the circumstances.

## **2. Whether there was adequate consultation during the development of the PMP with the Regional Pesticide Review Committee (the "RPRC"), First Nations, stakeholders and the public.**

### (a) Consultation with the RPRC

MELP established a RPRC for the Skeena Region. The *Terms of Reference for the Skeena Regional Permit Review Committee*<sup>4</sup> dated March 31, 1999, provide that the RPRC shall have a representative from each of the Ministry of Health or Regional Health Boards, Ministry of Agriculture and Food, MELP [Ministry], MOF and Environment Canada, Environmental Protection Service.

According to the Terms of Reference, the members of the RPRC are to be "guided" in their roles by the appropriate members of the B.C. Pesticide Control Committee and shall provide guidance to applicants during the development of a PMP. The Deputy Administrator shall determine which, if any, RPRC members shall be consulted by her, and shall make decisions that do not conflict with more than one half of the RPRC members that were consulted.

The Terms of Reference also establish a referral process:

### **Referral Process**

The Deputy Administrator will send PMP or permit applications and/or relevant documents to the members(s) by mail and request comments within a reasonable time period. Typical referral period for permits is 56 days; for PMP document review, 56 days; and for PMP annual Notification of Intent to Treat, 21 days. Failure to provide a comment within the time period provided would be considered as a lack of concern with the permit application.

The Deputy Administrator stated that she did not prepare the Skeena RPRC Terms of Reference, and did not know if any members of the RPRC were aware of the document.

MELP's information release, titled *Update on Integrated Pest Management - Implementing Pest Management Plans*, June 26, 1998, advises the public that the system for PMP approvals will operate in a similar way to the current PUP system. It states on page 2:

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<sup>4</sup> At the hearing, the Deputy Administrator confirmed that the Regional Pesticide Review Committee and the Regional Permit Review Committee are the same entity.

...PMPs will be reviewed by government Regional Pesticide Review Committees which will recommend approval, denial or modification. The Deputy Administrators of the *Pesticide Control Act*, acting at the regional level, will use guidance from the review agencies, program policies and procedures in making a decision...

The process provided in the Flow Chart indicates:

- The Deputy Administrator will provide proponent with... list of RPRC members – 8 1/2 months before implementation of PMP.
- The proponent works directly with appropriate resource agency specialists within RPRC...
- After the proponent submits the PMP to the Deputy Administrator, 3 months before the implementation of the PMP, Deputy Administrator refers PMP to appropriate members of the RPRC to ensure their recommendations were adequately addressed.
- RPRC members forward any comments regarding the PMP to the Deputy Administrator.
- Deputy Administrator rejects or returns the PMP for modifications, or approves the PMP, and issues an approval document containing any additional terms and conditions.

In September of 1999, the Deputy Administrator sent copies of Canfor's application for a PMP to Dave King, MELP, Prince George; Mike Wan, Environment Canada, Environmental Protection, North Vancouver and Lou Tromp, MOF, Smithers. In July 2000, the Deputy Administrator sent copies of the PMP final submission to Dave Butts, MOH; Lou Tromp, MOF; Dave Riendeau, Ministry of Agriculture, Fisheries and Food and Jen-ni Stroh, Environmental Protection.

The PMP Guide states at page 9:

#### **Section 4 - Consultation**

...

All details of consultation are to be submitted in a separate document entitled "Consultation Report." This report is intended to support the PMP and provide details regarding consultation activities with RPRC members, special interest groups, First Nations and the public during the development of the PMP.

Section 4.2 states at page 10:

#### **Regional Pesticide Review Committee (RPRC)**

The results of the consultation, such as conditions specific to each zone, shall be included in this section. The applicant may be supplied with a list

of minimum standard conditions. Deviation from these conditions can only be done with the approval of the Deputy Administrator. The applicant shall commit to following the conditions developed during consultation with RPRC members, as well as those conditions provided as regional standards by the Deputy Administrator.

In the PMP, section 4.2, Canfor states:

Letters soliciting meetings and or comments and the "draft" PMP were sent to members of the Regional Pesticide Review Committee in December 1999. Comments and suggestions received are summarized in the Consultation Report.

Canfor's Consultation Report, dated June 9, 2000, does not refer to the RPRC by name. However, it states in section 3.0–Government/Ministries:

Copies of the draft PMP and letters requesting comment were submitted to the following government interests; Andy Witt (MELP), John Stadt (MELP), Lou Tromp (MOF), Dave Riendeau (MAFF), Greg Tone (Health Officer), Mike Wan (Environment Canada), Dave Butts (Health Officer), Jennifer McGuire (MELP).

The Appellants submit that there has been inadequate consultation with the RPRC representatives from MELP and MOF.

*i) Consultation with MELP*

Brian Fuhr is Section Head, Habitat Protection Section, MELP [Ministry] in the Skeena Region. He is the MELP [Ministry] representative on the RPRC. Mr. Fuhr testified that he did not receive or review the PMP while it was being developed. He received the PMP on January 17, 2001 (12 days before the hearing) and first saw the zonation maps at the hearing.

Dave King (now retired), the MELP, Habitat Protection Section Head, in Prince George who was "lateral to" Mr. Fuhr, was provided the PMP application in September 1999. Mr. King did not have any overlapping responsibilities for the area covered by the PMP. The Deputy Administrator stated that sending the PMP application to Mr. King was an "administrative error."

The Panel heard evidence about the development of PMPs, following the amendment of the *Act* in 1997, from both Mr. Fuhr and the Deputy Administrator. Mr. Fuhr testified that in the fall of 1998, the Deputy Administrator asked MELP, Habitat Protection Sections, in each of the three regions she administers, to provide guidelines for their respective regions. In response, Mr. Fuhr seconded Mr. Fillier in April 1999 for a special assignment to draft the Skeena Region Habitat Protection Section guidelines for the PMP process.

Mr. Fillier submitted his draft report to the Deputy Administrator on August 3, 1999. The Fillier Report discussed various options and made recommendations. It was intended to solicit input from the Deputy Administrator prior to being finalized.

Mr. Fillier testified that he did not receive any response to his Report from the Deputy Administrator until a chance encounter on the airplane returning to Smithers in January 2000. At that time, the Deputy Administrator told Mr. Fillier that there was "a level of agreement" with the document and that she would be requesting electronic versions of the report. As of the time of the hearing, the draft Report had not been modified.

The Deputy Administrator acknowledged that she did not send the PMP application or PMP final submissions to Mr. Fuhr. In her Reply to the Appellants' Closing Arguments, she stated that Mr. Fuhr was not consulted during the development of Canfor's PMP, "by design and not by mistake."

The Deputy Administrator testified that she only sent the PMP application to the members of the RPRC "who wanted to be involved." She did not send the PMP application to Mr. Fuhr because he had indicated to her that he did not want to be involved with PMPs.

The Deputy Administrator testified that:

He [Mr. Fuhr] does not review the applications. He has communicated to me that he has delegated that responsibility to FES's [Forest Ecosystem Specialists] with the caveat that there are some FES's who will not review them, Pesticide Use Permit or PMP applications because of workload. And in that absence we are to rely on the Fillier document. And in other instances there may be some FES involvement, but again it is going to be dependent upon that FES's workload. And if we are able to obtain their input, great. In the absence of it we rely upon [the] Fillier [document]. (Transcript Day 11, page 1207, lines 31 to 41).

The Deputy Administrator stated that although Mr. Fuhr did not provide her with this direction in writing or email, she had her notes from a meeting in April 1999 with Mr. Fuhr and Terry Roberts, her predecessor in the Skeena Region. The notes were not entered into evidence at the hearing.

The Panel notes that this direction, as remembered by the Deputy Administrator, is from a meeting that took place before Mr. Fillier commenced work on the draft habitat guidelines.

Mr. Fuhr testified that he had never indicated that the Habitat Protection Section would not review PMPs. Although they do not have the capacity to do field work or on site inspections, his section will assist in the preparation of PMPs. In Mr. Fuhr's opinion, the guidelines in the Fillier Report do not constitute RPRC consultation.

Forest Ecosystem Specialists are MELP [Ministry] employees who work out of MOF District Offices. John Stadt is the Forest Ecosystem Specialist for the Lakes Forest



District and Andy Witt is the Forest Ecosystem Specialist for the Morice Forest District. They report to a supervisor who reports to Mr. Fuhr.

Mr. Brockley testified that the draft PMP was sent to Mr. Stadt and Mr. Witt in December of 1999, resulting in the following communications:

- February 14, 2000 Mr. Stadt wrote to Mr. Brockley outlining objectives and strategies in the Lakes District Land and Resource Management Plan that affect pesticide use.
- March 27, 2000 A meeting was convened between Canfor, represented by Mr. Brockley, Andrew Leffers and Bill Bristow, and Mr. Stadt and Mr. Witt.
- March 29, 2000 Mr. Brockley sent an email to Mr. Stadt and Mr. Witt, describing the over 4-hour meeting as "a long but productive session" and summarizing his understanding of the discussion and the amendments to be made to the PMP.
- March 30, 2000 Mr. Stadt sent an email to Mr. Brockley, copied to Mr. Witt, responding to the March 29th email. He stated "Andy took our notes so he may have further comments. I have just made a few comments below regarding ungulate ranges."
- March 31, 2000 Mr. Witt sent an email to Mr. Fuhr asking for a copy of the Fillier Report so that he could compare it with Canfor's PMP.
- April 4, 2000 Mr. Brockley sent an email to Mr. Witt stating that he had not received Mr. Witt's comments confirming the meeting summary set out in his March 29th email. Mr. Brockley advised "if I don't get a reply, I will assume you agree."
- April 4, 2000 Mr. Witt sent an email to Mr. Brockley advising that he was just putting the "finishing touches" on his comments. He enquired if Mr. Brockley had the Fillier Report.
- Mr. Brockley then contacted the Deputy Administrator's office to enquire about the Fillier Report. The Deputy Administrator provided Canfor with an electronic copy of the Fillier Report.
- April 6 & 7, 2000 Mr. Witt asked Mr. Brockley in an email if the Fillier Report had been used by Canfor in the preparation of the PMP. Mr. Brockley replied the next day, saying that Canfor had "followed the direction and guidelines provided by the Deputy Administrator." He advised Mr. Witt that he had received input from other Ministries and again requested Mr. Witt's comments.

- April 20, 2000 Mr. Brockley sent an email to Mr. Witt and Mr. Stadt advising that Canfor had completed the G.I.S. [Geographic Information Systems] work to determine the treatment density threshold for Zone 2 (200 ha/10 km<sup>2</sup>).<sup>5</sup> He asked that they review the work and provide comments. He asked Mr. Witt to provide his comments because Canfor was "closing off" its PMP submission that week.
- May 11, 2000 Mr. Brockley advised the Deputy Administrator's office that he had received no response from Mr. Witt and was therefore finalizing the PMP based on the input Canfor had received and their understanding of the joint discussions.
- June 27, 2000 Mr. Leffers wrote to each of Mr. Witt and Mr. Stadt enclosing Canfor's revised PMP, the year 2000 NITs and the NIT Plan.

There is no evidence before the Panel that either the Deputy Administrator or Canfor received any further comments on the PMP from Mr. Witt or Mr. Stadt. Neither Mr. Witt nor Mr. Stadt appeared as witnesses at the hearing.

In response to questions from the Panel, Mr. Fuhr stated that he did not delegate his role on the RPRC to Mr. Stadt or Mr. Witt. If he had received the PMP from the Deputy Administrator, he might have asked the Forest Ecosystem Specialists to comment, "to do some of the legwork," but he would have made the response himself.

When Mr. Fuhr was asked if he felt adequately consulted in the development of the PMP, he replied that there had been no review in his capacity as a member of the RPRC, "no activity whatsoever."

During cross-examination by Counsel for the Deputy Administrator, Mr. Fuhr was shown a document (exhibit #8) purporting to show who on the RPRC were to receive copies of the PMP application, draft and final PMP, and NIT. It lists the Skeena Forest Ecosystem Specialists. Mr. Fuhr did not recognize that document. However, Mr. Fuhr agreed that the process of review of PMPs within his section is at the Forest Ecosystem Specialists' level.

The Deputy Administrator and Canfor submit that the Deputy Administrator could not have failed in her duty to consult with the RPRC because there is no statutory duty to do so. Canfor argues that section 17 of the *Act* only requires consultation with the RPRC with respect to PUPs, not PMPs, and only at the request of the Deputy Administrator.

Section 17 of the *Act* provides for the appointment of a pesticide control committee by the Minister. Section 17(4) provides:

- 17** (4) The committee must review applications for permits referred to it by the administrator and perform other duties the minister requires.

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<sup>5</sup> The Panel notes that the threshold in the PMP is 200ha/100km<sup>2</sup>

The Panel finds that section 17 does not establish RPRCs. The only evidence before the Panel connecting the RPRCs with the B.C. Pesticide Control Committee is the statement in the Terms of Reference for the Skeena RPRC that members of the RPRC "shall be guided in their roles by the current member of the B.C. Pesticide Control Committee."

The Deputy Administrator and Canfor submit that there has been adequate RPRC consultation with MELP, Habitat Protection Section because the Forest Ecosystem Specialists reviewed the draft plan and met with Canfor. Their review resulted in changes to the PMP. Further, the Fillier Report was used in the development of the final PMP.

In her closing submission the Deputy Administrator asserts that:

9. The following factors adequately ensure the Plan has been developed and will be implemented responsibly:
  - (a) The use of MELP guidelines in the development of the Plan;
  - (b) The high level of public, stakeholder, First Nations and government scrutiny, both pre and post approval...

The Panel notes that under the Flow Chart it is the Deputy Administrator's responsibility, not the proponent's, to refer the PMP to appropriate members of the RPRC to ensure their recommendations are adequately addressed. The RPRC are to forward any comments regarding the PMP to the Deputy Administrator. The Deputy Administrator did not send the final PMP to anyone within Skeena, MELP, Habitat Protection Section, prior to her approval of the PMP on August 10, 2000.

The Panel finds that Mr. Fuhr, as the representative for Skeena MELP [Ministry], Habitat Protection Section, is "an appropriate member of the RPRC" to have been consulted by the Deputy Administrator. The Panel does not find that the Deputy Administrator had direction from Mr. Fuhr to consult with the Forest Ecosystem Specialists (workload permitting) and in the absence of their review, to rely on the Fillier Report.

In any event, the Deputy Administrator did not consult with the Forest Ecosystem Specialists, although Canfor did seek their input.

We do not know if Mr. Witt agrees with Mr. Brockley's summary of the March 27 meeting. There is no evidence before the Panel that Mr. Witt's workload prevented him from reviewing the PMP. On the contrary, Mr. Witt's email of April 4 stated that he was putting "the finishing touches" on his comments. The Panel notes that Mr. Witt is the Forest Ecosystem Specialist for the Morice Forest District where Canfor's operating area covers over 300,000 hectares of Crown land.

While there is no statutory duty to consult with members of the RPRC, the guidelines are held out as being an important part of the PMP process. The Panel finds that RPRC input is an integral part of the PMP process, meant to provide a

check and balance in the process. The *Update on Integrated Pest Management - Implementing Pest Management Plans*, June 26, 1998, PMP Guide, and the PMP itself assure the public that members of the RPRC are consulted, and that their concerns and recommendations are considered and addressed in the PMP.

The Panel notes that the PMP Approval states on page 6:

I am satisfied that the submitted plan has been prepared in accordance with current PMP guidelines. I hereby approve this pest management plan in accordance with Section 6 of the Pesticide Control Act.

The Panel finds that Canfor's consultation with the Forest Ecosystem Specialists is not sufficient to fulfil the Deputy Administrator's responsibility, as set out in the PMP Guide, to refer the PMP to appropriate members of the RPRC to ensure their recommendations have been adequately addressed. The Panel finds that the Deputy Administrator did not adequately consult with MELP, Habitat Protection Section, before approving the PMP.

*ii) Consultation with MOF*

Lou Tromp is the Stand Tending Forester, Prince Rupert Forest Region, and is the MOF representative on the Skeena RPRC. As indicated above, the Deputy Administrator sent Mr. Tromp a copy of Canfor's application for a PMP and the final PMP submission.

In her covering letter dated July 5, 2000, enclosing a copy of the final PMP, the Deputy Administrator requested that Mr. Tromp return his comments to her by July 26. On July 18 Mr. Tromp sent an email to the Deputy Administrator which stated that he would not be able to review the Canfor PMP in the near future as it was a very busy time of the year. He indicated that it was his understanding that the MOF was to be involved in the development of a PMP, not just in the approval of the final product.

By email on September 5, Mr. Tromp informed the Deputy Administrator that he will always provide the results of his PMP review when completed, whether positive or negative, and stated that "for the record, I have not approved any of the PMPs I have not commented on to date or in the future."

Mr. Tromp did not appear as a witness at the hearing.

Although Canfor sent a copy of the draft PMP to Mr. Tromp, there is no evidence that he provided any comments. Mr. Brockley testified that the MOF was not involved in the development of the PMP. The Panel notes that the PMP Guide provides that the proponent is to work with appropriate resource agency specialists within the RPRC in the preparation of its PMP.

The Panel finds that the MOF representative is an "appropriate member of the RPRC," to whom the Deputy Administrator should refer the PMP. The Panel is concerned that the "turn around time" of 20 days for Mr. Tromp's review was

unrealistic. The Panel finds that the MOF representative on the Skeena RPRC should be provided a reasonable time to review the PMP and forward comments so that the Deputy Administrator can ensure that any MOF recommendations are adequately addressed.

The Panel finds that the PMP should be referred back to the Deputy Administrator so that the RPRC review can be completed in accordance with the PMP Guide. Specifically, the Deputy Administrator is directed to refer the PMP, as amended by the PMP Approval, to Mr. Fuhr and Mr. Tromp, to ensure their recommendations have been adequately addressed.

#### (b) Consultation with First Nations

The Office of the Wet'suwet'en, which was an Appellant until it withdrew on day 10 of the hearing, and many of the other Appellants raised the issue of the adequacy of First Nations consultation in the development and approval of the PMP. None of the other Appellants represent a First Nation.

The PMP Guide refers to First Nations' consultation. The Flow Chart on page 2 indicates:

- Deputy Administrator provides proponent with...First Nations' Consultation Procedures – 8 1/2 months before implementation of PMP.
- Proponent consults with First Nations and public stakeholders.
- After the proponent submits the PMP and consultation report to the Deputy Administrator – 3 months before the implementation of the PMP, the Deputy Administrator confirms results of First Nations' consultation with relevant First Nations.

The PMP Guide states at page 10:

#### **Section 4 – Consultation**

...

##### **4.1 First Nations**

This section should clearly outline an annual process and timeline which will be followed when communicating proposed treatments to those First Nations who have requested such notification. The PMP must also reference the consultation procedures used during the development of the PMP.

The Deputy Administrator testified that the Ministry has a "signed off" First Nations Consultation Policy. This is the only policy in the PMP process that has been approved at the Ministerial level. It is the same policy the Deputy Administrator uses for PUP approvals. The Deputy Administrator developed a guidebook titled

*Forestry Pest Management Plans Consultation Procedures and Completion of Report Draft - December 1998* (the "Consultation Report Guide"), based on the First Nations' Consultation Policy.

After the Office of the Wet'suwet'en withdrew its appeal, the Coalition applied to have two members of the Wet'suwet'en summoned to give evidence about consultation efforts by Canfor and the Deputy Administrator. Both the Deputy Administrator and Canfor, supported by Counsel for the Wet'suwet'en, strongly opposed the application.

At the hearing, the Panel drew a distinction between the Crown's fiduciary duty to consult with aboriginal peoples where aboriginal rights or title are concerned, and an obligation to consult as a matter of procedural fairness.

The Panel issued a summons for Andrew George, the Forest Manager for the Wet'suwet'en. In addition to Mr. George, the Panel heard evidence about First Nations consultation from Adam Gagnon (a hereditary chief who was called as a witness by the Wet'suwet'en on day 8 of the hearing), and from witnesses for the Appellants, the Deputy Administrator and Canfor.

The Deputy Administrator and Canfor submit that after the Wet'suwet'en withdrew, the issue of First Nations consultation is not properly before the Panel because no First Nation is a party to the appeal.

Before analyzing the evidence, the Panel must decide whether a non-First Nation Appellant can properly raise the issue of the adequacy of consultation with First Nations.

In this appeal, the Panel is not being asked to decide if there has been a failure to consult, as an aspect of the Crown's fiduciary duty. There is no evidence before the Panel of the nature or extent of asserted or proven aboriginal rights or title or ongoing negotiations with First Nations in the area.

In the Panel's view, the issue raised by the Appellants is whether the Deputy Administrator satisfied a procedural duty of fairness that may be owed to First Nations.

In other words, have the Deputy Administrator and Canfor followed the requirements for consultation with First Nations that are held out to be an integral part of the PMP application and approval process.

The Deputy Administrator, in her closing submission, submits that the Panel should not determine whether First Nations have been treated in a procedurally unfair fashion in the absence of a First Nation as a party. She further submits that the Appellants' efforts to step into the shoes of First Nations and argue issues that uniquely affect First Nations are "paternalistic, inappropriate and contrary to the principles of administrative law."

Both the Deputy Administrator and Canfor argue that the Panel should not make findings on matters potentially affecting parties not before the Panel. To do so could result in the Panel making a decision without the benefit of full evidence and submissions from potentially affected First Nations.

The Panel considered whether it is in the public interest to allow non-First Nations parties to raise the issue of the adequacy of the consultation with First Nations. As well, it considered whether ministries should be obliged to follow their own guidelines, and if so, whether a public interest group such as the Coalition or an interested individual should act as a “watchdog” to make sure that the Deputy Administrator and PMP proponents follow the rules.

The Panel was not provided with any legal authority on the question of whether non-aboriginal appellants before an administrative tribunal can raise the issue of a breach of the duty of procedural fairness owed to First Nations.

Section 15(2) of the *Act* provides very broad standing to “any person” to appeal a decision of the Deputy Administrator:

**15** (2) Any person may appeal a decision of the administrator under this Act, or of any other person under this Act, to the appeal board.

However, broad standing to appeal must not be confused with unlimited grounds for appeal. An appellant alleging a breach of the duty of procedural fairness should have some connection with the harm or mischief that may arise from that alleged breach.

For the most part, advocacy groups such as the Coalition and the Lakes District Friends of the Environment, or concerned individual appellants such Mr. Dietzfelbinger, Mr. Stevens, Mr. Harris and Mr. Smith in the present appeal, raise issues affecting the general public’s interest. These groups or individuals are members of the general public.

An objective test is applied to determine if there has been a breach of a duty of procedural fairness owed to the public. For example, if a potentially interested or affected person is not properly notified, such that he or she may have been deprived of an opportunity to be heard, the Courts have held that there has been a breach of natural justice.

First Nations consultation, as contemplated by MELP’s [Ministry’s] First Nations’ Consultation Policy, is a separate matter outside of the general public’s interest. It arises because of the unique characteristics of aboriginal rights and title as protected under section 35(1) of the *Constitution Act*.

Despite the considerable evidence before the Panel from all Parties, including Canfor and the Deputy Administrator, the Panel finds that it would be contrary to the principles of administrative law to decide whether First Nations have been treated in a procedurally unfair fashion, without the benefit of full evidence or submissions from a First Nations Appellant.

The Panel finds that a non-First Nations Appellant cannot raise the issue of a breach of the duty of procedural fairness that may be owed to First Nations by the Deputy Administrator. Therefore, the Panel will not proceed to discuss the adequacy of the efforts made by Canfor and the Deputy Administrator to consult with area First Nations.

(c) Consultation with stakeholders and the public

The Appellants submit that there has been insufficient consultation with the public and interested parties in the development of the PMP. They further submit that both Canfor and the Deputy Administrator sought site specific information during consultation on the PMP. The Coalition argues that this site specific requirement is appropriate to PUPs which prescribe pesticide treatments on specific sites, but is inappropriate to PMPs which are not site specific but instead describe a strategy and a decision making process. Finally, the Appellants submit that the public's concerns did not significantly change the PMP.

The PMP Guide contemplates that there will be consultation with stakeholders and the public. The Flow Chart on page 2 states "Proponent consults with...public stakeholders." In section 4.3 on page 10, it states:

**4.3 Stakeholders and Public Consultation**

The results of the consultation and advertising during the development of the PMP shall be included in this section. The applicant shall commit to following an annual advertising (if required) and notification process...

The Consultation Report Guide states on pages 5-7:

**2. PUBLIC STAKEHOLDERS**

Public consultation is a critical element to developing a successful PMP. In addition to the information contained in this guide, proponents may wish to consult the Forest Practices Code Public Consultation Guidebook for more guidance in this area. (page 5)

**2.1 Past Consultation Practices**

Provide summary of previous interactions with stakeholders in the PMP operating area. Stakeholders can be broadly defined as individuals or groups who have interests in the plan area which could be impacted by proposed vegetation management programs; examples of these include water users, recreational interests, trap line holders, berry pickers, other resource users etc.

**2.2 Review of Stakeholder Consultation**

Summarize consultation with stakeholders that occurred during development of the PMP and prior to newspaper advertisements, including:



- a) Names and addresses of stakeholders who provided input
- b) Nature of stakeholder concerns and/or recommendations
- c) Proponent response to stakeholder input

### **2.3 Newspaper Advertisements**

...

#### **Summary of Activities Related to Newspaper Publications**

List newspapers in which notification of pending PMP submission appeared and the relevant publication dates. Summarize the nature of public input received and the proponent's response to it. Append correspondence from the public and letters of response from the proponent to the consultation report.

The PMP states the following in section 4 – Consultation:

#### **4.3 Stakeholders and General Public**

Newspaper advertisements regarding the PMP application and the "draft" PMP were put in the Houston Today (Houston), Lakes District News (Burns Lake) and the Interior News (Smithers) in January [2000]. An open house was held at Canfor's Houston office February 3 [2000]. Copies of the plan have been sent to interested parties upon request. Responses have been incorporated in the Consultation Report.

In its Consultation Report, Canfor summarizes the consultation that took place with public stakeholders. It states that both the draft plan and final submission were forwarded to 12 individuals or businesses including Dave Stevens, John Smith, Gordon Wadley and Paul Glover. Written responses were received from 3 individuals. There was a meeting on July 4, 2000, in Smithers attended by the Deputy Administrator, Mr. Glover, Mr. Wadley and representatives from Canfor.

At Tab 62 of the Common Book of Documents prepared by the Deputy Administrator and entered into evidence at the hearing, there is a document titled: Northwood Pulp and Timber Limited<sup>6</sup> – Referral List for Pest Management Plan ("Canfor's Referral List"). Canfor's Referral List is 13 pages long and includes four municipalities, Mr. Glover for the Coalition, seven First Nations, a number of range, guide and trapper licence holders and water licensees.

Mr. Brockley testified, on behalf of Canfor, that although Canfor's Referral List was submitted to the Deputy Administrator with the application to prepare a PMP, it was not used to give the public and stakeholders notice of the PMP submission. According to Mr. Brockley, Canfor followed a referral list provided by the Deputy Administrator. Canfor's Consultation Report states that copies of the draft PMP

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6 Canfor purchased Northwood Pulp and Timber Limited during the period that the PMP was being developed.

along with letters requesting comments were sent to First Nations groups, stakeholders, and government interests as identified on a referral list provided by MELP, Pesticide Control Branch, in December, 1999. This referral list was not entered into evidence.

The Deputy Administrator testified:

Q: Now, as I was at, in Binder 2 at Tab 62, and this is a referral list, this is a document that Canfor sent to you to tell you who they had sent the draft Pest Management Plan to?

A: Right.

Q: Including municipalities, Mr. Glover, First Nations, and other stakeholders?

A: Right.

(Transcript day 11, page 1192, lines 1- 8)

Mr. Brockley stated that First Nations were sent copies of the draft PMP as were government ministries. However, Canfor's notice to stakeholders and the public was done by newspaper advertisements.

The Panel notes that the PMP was advertised, in accordance with the provisions set out in the PMP Guide, two times in three newspapers circulating in the area.

The advertisements ran under the "legal notices" section of the classified ads of the newspapers. The heading gave notice of "Submission of a Pesticide Management Plan." It described the purpose of the PMP and the requirement for IPM, as well as giving a description of the area and methods of vegetation control proposed. The ad stated that the PMP could be viewed at the Canfor office or by contacting Mr. Brockley. It gave notice of an open house at the Canfor office on February 3, 2000. It concluded with the following statement:

A person wishing to contribute to the development of the proposed Pest Management Plan can send written copies of comments to both the applicant and the Deputy Administrator...at the following addresses...

As noted in the Consultation Report, a number of people requested copies of the draft PMP. Mr. Brockley testified that only one person attended the open house. The Deputy Administrator testified that there was a good deal more public response to the proposed PMP than was usually received for PUP applications.

In its closing submission, Canfor points out that there are no statutory or legal requirements for advertising for PMPs or for public consultation. Canfor complied with the "suggestions for advertising" in the PMP Guide.

The Panel notes that the requirements for advertising a PUP are set out in section 16 of the *Regulation*. An applicant for a PUP is required to meet a higher standard

than an applicant for a PMP, which has a far broader scope and a longer term. Section 16(6) requires a PUP applicant to submit to the Regional Manager of the Pesticide Control Program, a signed statement describing the action the applicant proposes to take in response to information received about the proposed PUP. There is no such legal requirement for advertising or reporting on information received about proposed PMPs.

In the absence of regulations, the Panel finds that the process set out in the PMP Guide is an integral part of the development of a PMP. It is the only assurance the public has that there will be an opportunity for meaningful consultation in the development of a PMP.

Both Mr. Glover and Mr. Wadley testified about their involvement in consultation during the development of the PMP. On behalf of the Coalition, Mr. Glover prepared 19 pages of comments plus addenda. The Coalition's comments were received by Canfor on May 2, 2000. The Deputy Administrator was also provided with a copy of the Coalition's comments. Mr. Glover testified that he did not receive any response to his comments from Canfor until the meeting on July 4, 2000.

Mr. Wadley testified that he went to the Canfor office to obtain a copy of the draft PMP and to discuss some of his concerns. Mr. Wadley sent an email dated May 9, 2000 to Mr. Brockley commenting on the draft PMP. Mr. Brockley responded by email dated May 21, 2000. These emails were provided to the Deputy Administrator.

The Deputy Administrator and Mr. Glover testified with respect to a number of telephone conversations they had concerning the draft PMP. At least two of these calls were lengthy, one being for over an hour on a Friday evening.

One of the provisions of the draft PMP opposed by the Coalition was the proposed aerial spraying of *Vision*. The Panel notes that aerial spraying was deleted from the final PMP.

On an examination of the evidence, the Panel finds that the Deputy Administrator did carefully consider the submissions from the Coalition and verified information and/or required amendments to the PMP as a result of the Coalition's extensive input. The Panel also finds that the Deputy Administrator considered submissions received from other members of the public.

Canfor submitted its final PMP to the Deputy Administrator on June 22, 2000, and sent copies to Mr. Glover and Mr. Wadley on June 22 and 27, 2000.

The July 4 meeting, which took place at MELP's office in Smithers, was attended by Paul Glover, Gordon Wadley, the Deputy Administrator, Ms. Pressey, and John Brockley, Andrew Leffers and Bill Bristow representing Canfor. The meeting covered a number of topics about the PMP and about vegetation management in general. A field trip including Mr. Glover and Mr. Wadley was proposed, but subsequent attempts to arrange this trip were unsuccessful.

The Panel finds that in seeking information from the public, neither the Deputy Administrator nor Canfor restricted the type of information they were willing to consider. The Panel heard some evidence relating to site specific information discussed with or requested from First Nations. As set out above, the Panel is not making a decision on the adequacy or nature of First Nations consultation. The Panel agrees that a PMP consultation process should not be restricted to site specific information. Canfor's advertisements clearly invited information for development of the PMP that was not site specific.

However, the Panel is concerned that Canfor's Referral List was not used in the development of the PMP. It appears that, at one point, Canfor expected to use it and the Deputy Administrator thought it had been used. The Panel finds that holders of range, guide, trapper and water licences should receive notice of the proposed PMP if their licence falls within Canfor's operating area. As well, municipalities in proximity to Canfor's operating area should be notified. The Panel is not satisfied that two ads in three local newspapers in January 2000 gave sufficient notice to these parties.

The Panel refers the PMP back to the Deputy Administrator so that she can direct Canfor to send written notice to those stakeholders identified on the Canfor Referral List, who did not receive either written notice or a copy of the draft PMP during the development of the PMP. The Panel finds that it is sufficient for Canfor to send a letter to these parties giving notice of the PMP and containing information about the PMP similar to that contained in its original advertisement, with appropriate modifications. The parties shall have an opportunity to provide comments on the PMP to Canfor and the Deputy Administrator within 30 days. The Panel notes that it would be helpful to have information about the PMP available electronically, for example on the company's website, with email addresses provided. The Panel directs the Deputy Administrator to consider if the PMP will require any amendments as a result of additional information provided to her by these parties.

**3. Whether the PMP, as approved by the Deputy Administrator, is flawed. Under this issue the Panel will consider whether the PMP contains clear objectives and strategies for non-timber resources; is based on IPM; and was prepared in accordance with the Fillier Report.**

(a) Whether the PMP contains clear objectives and strategies for non-timber resources

The Appellants submit that the PMP is missing objectives and strategies for non-timber resources and lacks standards to determine whether objectives are being met. They assert that the PMP must consider and work to maintain all resources and should not focus solely on the health and development of crop trees. In particular, the Appellants say the PMP lacks objectives and strategies for maintaining biodiversity, reducing pesticide use and protecting public land for other uses such as recreation and tourism.

The Panel has considered how a PMP fits within the forestry planning hierarchy in British Columbia.

A LRMP is a “higher level plan” outlining broad objectives for a forest district. The development of a LRMP involves many stakeholders and provides an opportunity for participants to weigh and make social choices around harvesting and other values such as recreation and tourism. A LRMP may contain provisions about pesticide use in the forest district. There is an approved LRMP for the Lakes District.

In the Morice Forest District, there is no LRMP. However, the District Manager, MOF, has established potential higher level plans, namely the Morice River Local Resource Use Plan and the Nadina Local Resource Use Plan. Local Resource Use Plans also provide the public and user groups with an opportunity for input.

A Forest Development Plan sets out a forest company’s operational plan at the landscape level. It must meet the objectives laid out in a LRMP or a Local Resource Use Plan. There is an opportunity for input from referral agencies, MOF personnel, field observation and the public in the preparation of a Forest Development Plan.

The Deputy Administrator submits that the PMP does not, and cannot, “manage” other resources on the landscape. It is a “pest management plan” as defined by the *Act*. It deals with the control of competing vegetation which is only one component of stand management.

A PUP or a PMP is required only if a licensee intends to use pesticides in its vegetation management program. Non-chemical vegetation management plans are not subject to public scrutiny.

The Panel finds that social concerns such as public recreation and tourism are addressed by LRMPs, Local Resource Use Plans and Forest Development Plans, all of which provide an opportunity for public and stakeholder input about non-timber resources. A PMP must be consistent with objectives, strategies and directions contained in these more comprehensive planning documents. There was no evidence before the Panel that the PMP was inconsistent with objectives and strategies for public recreation and tourism as addressed in higher level plans.

The Appellants submit that, although the PMP purports to address biodiversity, there is no clear objective stated in the PMP with respect to biodiversity, nor are there strategies on how to maintain it.

The PMP Guide in part 6.0 Environmental Protection, states on page 14:

### **6.7 Biodiversity Considerations**

Describe possible biodiversity concerns within the PMP area. Refer to the **Biodiversity Guidebook** and consult Landscape Units plans for objectives within the planning area.

The PMP refers to biodiversity on page 32, as amended by the PMP Approval:

## 6.7 Biodiversity Considerations

Landscape level biodiversity concerns are addressed through the Forest Development Plan. Seral stage<sup>7</sup> and patch size distribution tables are tools used to measure to what extent biodiversity objectives are being achieved. Stand level biodiversity objectives are identified in Silviculture Prescriptions. Wildlife tree patches, dispersed leave trees, stub snags, and reserves are all used at the stand level to manage species and structural diversity. Wildlife tree patches will not be treated with herbicides.

Operations conducted under this plan will preserve the intent of the Silviculture Prescription with respect to biodiversity. Retention areas and species will not be treated.

Mature aspen (defined "danger trees") will only be removed as required by WCB regulations.

...

The Coalition retained Donald S. McLennan, Ph.D., R.P.Bio., the principal of Oikos Ecological Services Ltd., to critique biodiversity aspects of the PMP. Dr. McLennan was qualified as an expert witness in the areas of conservation biology and vegetation ecology. Dr. McLennan concluded that biodiversity and habitat conservation objectives are not included in the PMP. Although the PMP defers to higher level plans and prescriptions, these seldom provide sufficient direction on potential changes to species composition brought about by vegetation management on a site by site basis.

In his report, Dr. McLennan states that "where the plan falls down is in not addressing biodiversity objectives with the same energy and organization as free growing objectives." Surveys under the PMP focus on crop tree performance in relation to competing vegetation and make no formal assessment of changes in biodiversity values. Dr. McLennan opined that biodiversity targets for vegetation management objectives outlined in the Biodiversity Guidebook of the *Code* are not well addressed by the PMP.

The Coalition takes issue with the Deputy Administrator's testimony that the PMP is not intended to be a biodiversity management plan, and that she does not have the jurisdiction to require such a plan.

The Panel finds that biodiversity is an important consideration in the development, approval and implementation of a PMP. The Deputy Administrator is required by section 6(3)(a)(ii) of the *Act* to consider adverse effects of the proposed pesticide use on the environment. An adverse effect on biodiversity would be an adverse effect on the environment.

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<sup>7</sup> "Seral stages" are the stages of ecological succession of a plant community. The early seral stage, known as the "shrub/herb" stage, occurs after wildfire or logging. In this stage, the area is colonized by deciduous and coniferous successional trees, shrubs (e.g. willow, alder, twinberry, red osier dogwood, and highbush cranberry), and herbaceous plants (e.g. fireweed, grasses- especially wild rye, the *poa* species, vetches, legumes and asters).

The Panel finds that the Deputy Administrator does have the jurisdiction, and the duty, to require conditions in a PMP to ensure that there will be no unreasonable adverse effects. There are restrictions in the PMP relating to habitat and measurable objectives designed to protect habitat features. The Panel does not find that the lack of stated biodiversity objectives in the PMP leads to the conclusion that the PMP is flawed. There was no evidence that the PMP contains provisions that conflict with biodiversity objectives and strategies set out in higher level plans.

The Panel has considered the issue of a potential adverse effect on biodiversity as part of the issue of whether there will be an unreasonable adverse effect on the environment if pesticide is applied as authorized by the PMP, under Issue #4.

The Coalition further submits that the PMP does not meet the goal of reducing pesticide use. MELP produced a fact sheet in 1992 to explain IPM. The basic principles of IPM are stated on page 4:

The basic principles of IPM are to **reduce** pesticide use by improving the timing of sprays, to **replace** pesticides with non-toxic alternatives and good management and to **redesign** the underlying management system to prevent pest problems and conserve beneficial species. (emphasis in original)

*Update on Integrated Pest Management - Implementing Pest Management Plans*, June 26, 1998, issued by MELP in 1998, states one of the four major goals of implementing PMPs as: To reduce, and eliminate where possible, pesticide impacts on the environment and to protect human health.

In support of its argument, the Coalition referred the Panel to Canfor's spray history from 1996 to 2000:

1996	206 hectares sprayed
1997	0 hectares sprayed
1998	202 hectares sprayed
1999	491 hectares sprayed
2000	771 hectares sprayed

In 2000 only 46 of the 80 NIT blocks were sprayed before Canfor voluntarily agreed to a stay.

The Deputy Administrator submits that the PMP contains clear preventative strategies that over time will reduce the need to use pesticides.

The Panel does not find that the figures for Canfor's spray history prove that the goal of reducing and eliminating, where possible, pesticide impacts on the environment will not be met under the PMP. The Panel notes that, in the past, Canfor has used aerial applications of pesticide. This method has been eliminated

in the PMP. As well, the PMP requires Canfor to use measures to prevent competing vegetation from becoming a problem, such as early replanting. The PMP also has restrictions such as pesticide free zones that have the effect of reducing the effect of pesticides on the environment.

However, the Panel is concerned that if there is a greater use of pesticides for brushing after the implementation of the PMP, the goal of IPM is undermined. This is something that the Deputy Administrator must take into account when conducting audits and reviewing follow-up reports relating to the annual spray program under the PMP. The Deputy Administrator should require, as a condition of the PMP that Canfor provide particulars of all annual brushing activities (chemical and non-chemical) in its yearly follow-up reports. The Deputy Administrator should monitor whether or not pesticide use is being reduced.

(b) Whether the PMP is based on IPM

The Appellants submit that the PMP is not based on IPM because it does not have the stated goal of "reducing, minimizing and ideally eliminating pesticide use."

The definition of IPM is set out in section 1 of the *Act*. It is this definition that the PMP must meet.

The Panel has reviewed the PMP to determine if it does meet the statutory definition of integrated pest management. The Panel finds the PMP is a plan that describes a program for controlling pests using integrated pest management. The PMP sets out a decision making process that uses a combination of techniques to suppress pests and contains elements of clauses (a) through (f) of the definition of IPM in the *Act*.

(c) Whether the PMP was prepared in accordance with the Fillier Report

The Appellants submit that the Fillier Report was not adequately used in the development of the PMP. Both the Deputy Administrator and Canfor submit that the Fillier Report was used to develop the PMP.

According to testimony from Mr. Brockley, he did not receive the Fillier Report until April 2000. It was not referred to at the March 27, 2000 meeting with the Forest Ecosystem Specialists.

The Deputy Administrator testified that in her review of the final PMP, she extracted pages 18 to 24, inclusive, from the Fillier Report, which were the pages she felt to be directly applicable. She used these pages as a checklist for her review of the PMP. It is these sections that she considered must be followed by Canfor.

The Deputy Administrator and Ms. Pressey had a lengthy telephone conference call on May 25, 2000, with Mr. Brockley, during which they reviewed the Fillier Report and the PMP. As a result of this discussion, some amendments were made to the PMP. For example, no spray areas were established around mineral licks, raptors nests and areas of beaver activity.



Condition 1.16 of the PMP Approval states:

- 1.16 Included in Addendum 1 to this Approval is the...[the Fillier Report]. This document shall be taken into consideration by the PMP holder, and where there is a deviation from the recommendations included in this document, the PMP holder is required to provide reasons for the deviation, and include those reasons within the detailed site assessment(s). Where there are conflicts between the habitat recommendations and the conditions of this approval, the conditions of the approval take precedence.

The Appellants argue that attaching the Fillier Report as a condition of the PMP does not cure flaws in the PMP.

The Panel heard a lot of evidence about the Fillier Report. In particular, the Deputy Administrator was questioned extensively about which parts of the Fillier Report must be followed by Canfor in carrying out pesticide treatments under the PMP.

Some of the Fillier Report is in the form of discussion, general comments, observations and opinions of its author. For example, page 3-Ecological Considerations states "[t]he following is intended for discussion only. It should be considered by Skeena Region PMP applicants." This section is followed by general comments regarding ecological considerations, with over 11 pages of site series correlation information quoted from Banner et al, a *Field Guide to Site Identification and Interpretation for the Prince Rupert Forest Region*. The Fillier Report states on page 17 that the Deputy Administrator may consider numerous factors in evaluating PMPs, and it provides options and approaches for consideration. It then goes on to analyze the PMP Guide and provide some general comments. One of these general comments is that PMP Operating Zones "should list approximate hectare estimates of the area queued for chemical treatment versus that to be treated by alternate means and that not to be treated within the following descriptors: at the landscape level the ecoregion classification, to the ecosection level, and seral classification; and at the stand level the site biogeoclimatic ecosystem classification (BEC), to the variant level." (page 19)

The Panel finds the Fillier Report to be an unfinished draft. It is difficult to understand because it contains a lot of technical information and because it incorporates large portions of other manuals and guidelines. The Panel finds that the Fillier Report was not meant to be a mandatory rulebook to be followed as a condition of a PMP. By attaching the Fillier Report to the PMP Approval, the Deputy Administrator has added another level of confusion to the process.

It is not clear how Canfor is to use the Fillier Report as a condition of the PMP. Mr. Brockley stated that he was surprised to find it attached as a condition of the PMP Approval.

The Panel finds that a PMP is a legal document and must be clearly written. It is supposed to be used by people working in the field. It should be a concise document that could be referred to by a spray contractor, for example.

The Panel finds that superimposing the PMP Approval on the PMP is “user unfriendly” and runs the risk that the additional conditions in the PMP Approval will be missed. Attaching the Fillier Report to the PMP Approval further confounds the matter. No explanation was offered as to why the amendments were not incorporated into the PMP itself. In a computerized office environment, it should be a relatively simple process and would avoid confusion.

The Panel refers the PMP back to the Deputy Administrator so that she can write into the PMP document all the amendments of her Approval, as well as those elements of the Fillier Report which are required to ensure that there will not be an unreasonable adverse effect on the environment as a result of pesticide applications under the PMP.

The Panel recommends that the Ministry, Habitat Protection Section, and the Deputy Administrator forthwith finalize the Fillier Report to provide clear and concise minimum wildlife habitat guidelines which would be useful to proponents in developing their PMPs. The Panel notes that the Quesnel Forest District, Wildlife Habitat Guidelines Regarding Vegetation Management have 5 pages of specific guidelines while the Fillier Report has 28 pages and 6 appendices.

**4. Whether the application of pesticides authorized by the PMP will have an adverse effect on human health or the environment and if so, whether that adverse effect is unreasonable in the circumstances.**

Under this issue, the Panel will consider if pesticide treatments are necessary for vegetation management, other methods of controlling competing vegetation and the “zonation” and other restrictions on pesticide treatments set out in the PMP and the PMP Approval.

Section 6(3)(a)(ii) of the *Act* provides that the Deputy Administrator may approve a PMP, if satisfied that the pesticide application authorized by the PMP will not cause an unreasonable adverse effect. Therefore, the issue to be decided by the Panel is whether the application of pesticides in accordance with the PMP and PMP Approval will result in an unreasonable adverse effect on human health or the environment.

The Board reviewed the relevant legislation and case law as referred to in *City of Port Moody et al v. Deputy Administrator, Pesticide Control Act* (Appeal 98-PES-05(b), January 13, 1999) (unreported).

In summary, at the federal level, the *Pest Control Products Act*, R.S.C. 1985, c.P-9 (the “*PCP Act*”), requires a pesticide to be registered before it can be sold in or imported into Canada. The onus is on the applicant for registration to submit all relevant studies to the federal Government to show that the product does not cause an “unacceptable risk of harm to public health, plants, animals and the environment” (*PCP Regulations*, section 18(d)(ii)). The *PCP Act* also provides that a pesticide must be used in accordance with its label.

The PMP authorizes the use of *Vision* and *Release*, both of which have been registered under the *PCP Act*, for use in silviculture vegetation management.

In *Canadian Earthcare Society v. Environmental Appeal Board* (1988), 3 C.E.L.R. (N.S.) 55, the B.C. Court of Appeal ruled that the Board can consider a registered pesticide to be generally safe when used in accordance with the label. However, this does not mean that a registered pesticide can never cause an unreasonable adverse effect.

In *Islands Protection Society v. British Columbia Environmental Appeal Board* (1988), 3 C.E.L.R. (N.S.) 185 (B.C. Supreme Court), the Court found that, in making its decision, the Board should engage in a two step process to determine whether the application of pesticides will cause an unreasonable adverse effect: first the Board must inquire whether there is any adverse effect, and secondly, if an adverse effect exists, then the Board must undertake a risk benefit analysis to ascertain if that adverse effect is reasonable or unreasonable. The Court of Appeal in the *Earthcare* decision stated that evidence of silviculture practices will be relevant to measure the extent of the anticipated benefit. Evidence of alternate methods will also be relevant to the issue of reasonableness. If the same benefits can be obtained by an alternate risk free method, then the use of the risk method would be unreasonable.

The PMP and PMP Approval describe a decision making process and set out rules or a "code of conduct" to be followed by Canfor when applying pesticides for vegetation management within its operating area. The Panel will use the above test from *Islands Protection* to consider, if the PMP is fully implemented, whether there will be an adverse effect on humans or the environment, and if so, whether the PMP contains sufficient provisions to ensure the adverse effect is not unreasonable.

#### (a) Human Health

The Appellants raised concerns about the health effects of the use of pesticides in general and the federal registration process. The *Earthcare* decision established that the Panel must consider a federally registered pesticide to be generally safe. However, the Panel can consider site specific information to determine if the application of the pesticides as authorized by the PMP will result in damage to humans.

A specific health concern raised by some of the Appellants related to plants that are harvested and consumed by humans. A number of witnesses testified that they and their families, like many other area residents, enjoy excursions to pick berries and gather native plants within Canfor's operating area.

Canfor retained Leonard Ritter, Ph.D., Executive Director of Canadian Network of Toxicology Centres, Department of Environmental Biology, University of Guelph, to prepare a Human and Ecological Safety Assessment of *Vision*. Dr. Ritter was qualified as an expert witness in the areas of herbicides in general, including the toxicology and environmental behaviour of *Vision*, the process of registration for the use of pesticides in Canada and the components of *Vision* and *Release*, including their chemical and physical characteristics.

Dr. Ritter was asked if there was likely to be an adverse effect upon human health, water quality, domestic water supply, aquatic species or wildlife as a result of the use of *Vision* in accordance with the PMP and the PMP Approval. Dr. Ritter responded that he is "certainly not concerned" with regard to the use of *Vision* in this context. He opined that it can be used "with a very large margin of safety" in the present context. Dr. Ritter explained that glyphosate (the active ingredient in *Vision*) acts by inhibiting a metabolic pathway in plants. Humans and animals do not have this metabolic pathway.

Canfor also retained Keith Solomon, Ph.D., Director of the Centre for Toxicology, Department of Environmental Biology, University of Guelph, to provide an Ecotoxicological Assessment of Triclopyr (*Release*). Dr. Solomon was qualified as an expert witness in the areas of herbicides in general, including the toxicological and environmental behaviour of the herbicide *Release*, the components of *Release* and the chemical and physical characteristics of *Release*.

Under the PMP, *Release* may be used on aspen, birch, alder, and cottonwood by ground backpack basal bark application (i.e. a strip of pesticide is sprayed on the base of the stem of each target plant). Condition 1.15 of the PMP Approval requires Canfor to obtain a separate approval from the Deputy Administrator for all proposed treatments of *Release*.

Dr. Solomon testified that triclopyr is an auxin mimic in plants. The same target system does not exist in mammals, birds, fish, or other aquatic animals. Dr. Solomon stated that triclopyr is only moderately toxic to mammals, birds and other terrestrial animals. He opined that there would be no long-term adverse effects on human health, water quality, domestic water supplies, aquatic species, wildlife and/or birds, or mycorrhizal fungi as a result of the use of *Release* in accordance with the PMP and the PMP Approval. Dr. Solomon also testified that there is no unacceptable risk to humans consuming animals that have consumed plants that have had basal bark triclopyr treatment.

Section 6.6 of the PMP states:

...Where critical areas of berry picking are identified during consultation, site specific plans will be developed with affected interests to meet specific needs.

The Deputy Administrator testified that if a member of the public raised a concern about the impact of treatment in an area of berry picking or plant gathering activity, she would request a Detailed Site Assessment from Canfor. This would invoke Condition 1.1 of the PMP Approval, which requires an independent approval before treatment of any location for which the Deputy Administrator has requested a Detailed Site Assessment.

The Panel finds that Canfor, as a condition of the PMP, should be required to provide a Detailed Site Assessment for separate approval whenever the Deputy Administrator is provided with credible information that identifies a critical area of berry picking or plant gathering for human use or consumption.

The Appellants have not satisfied the Panel that, on a balance of probabilities, there would be an adverse effect on human health if the pesticides are applied as authorized by the PMP and PMP Approval.

#### (b) The Environment

The Appellants submit that there will be adverse effects on the environment as a result of the chemical brushing authorized by the PMP and PMP Approval.

In its closing submission, the Coalition submits that the changes in vegetation resulting from pesticide treatments can be “pronounced, long-term, and undesirable not only for wildlife, wildlife habitat, and biodiversity in general, but also for crop trees.” It argues that much of Canfor’s brushing (both chemical and non-chemical) is unnecessary. It also takes issue with the zonation established by the PMP.

Mr. Fuhr explained that the early seral stage is very valuable wildlife habitat. Aspen provides cover and nesting habitat for birds including passerines (e.g. warblers, sparrows, and finches) and forage for small mammals and ungulates; alder also supports passerines, provides forage for ruffed grouse and is important for its “nitrogen fixing” properties; willows provide browse for ungulates and hares, as well as supporting a great number of insects. The abundant herbaceous vegetation and the diverse berries in the early seral forest are an important food source for grizzly and black bears. As a forest matures, the canopy closes and the productivity of the shrub/herb component declines.

Mr. Fuhr confirmed that there are habitat concerns about pesticide use in early seral vegetation complexes: it alters the natural ecosystem and changes the distribution and abundance of plant species, which, in turn, affects animals.

The purpose of brushing is to remove or retard vegetation competing with crop trees. Any brushing activity may negatively affect food sources and/or nesting habitat for some wildlife. Mr. Fuhr, as well as other witnesses, stated that after non-chemical brushing, vegetation resprouts or re-establishes. Chemical treatments, on the other hand, kill the target vegetation.

Canfor retained Richard A. Lautenschlager, Ph.D., to prepare a report on the “Consequences of Spray Solutions containing *Vision* and *Release* Herbicide in Short- and Longer-Term Vegetation Complexes in Northern Forest Stands and Landscapes.” Dr. Lautenschlager was qualified as an expert witness in the areas of silviculture, forest ecology and wildlife ecology.

Dr. Lautenschlager testified that herbicide treatments will reduce competition and put conifers at an advantage. The application of *Vision* typically reduces competing vegetation for one to five growing seasons. Based on his studies, including the extensive Fallingsnow Ecosystem Project in Ontario, Dr. Lautenschlager found that there was a short-term effect on some animals and birds. However, the impacts tend to level out after about two to four years.

Mr. Zimmerling (co-author of the AEM Report) testified for the Deputy Administrator, and was qualified as an expert witness in the area of integrated forestry wildlife management. He testified that the loss of habitat resulting from brushing will have an impact on the wildlife. Larger mammals, such as moose or bear, may be able to move to adjacent areas. However, others such as nesting birds, may not be able to move to nearby habitat because it is probably already occupied. Mr. Zimmerling stated that there will definitely be a reduction in the number of some wildlife due to the loss of habitat, but as long as wildlife populations as a whole have been maintained, they will eventually re-enter the site.

The Panel finds that there will be an adverse effect on the environment as a result of the application of pesticides as authorized by the PMP. The Panel must therefore decide if that adverse effect is unreasonable in the circumstances.

The Coalition submits that Canfor often overstates the need for brushing, and in fact, brushing is unnecessary in many instances. If there is no need to brush, then brushing with pesticides would have an unreasonable adverse effect on the environment.

Phillip Burton, Ph.D., R.P.Bio., testified for the Appellants, and was qualified as an expert witness in the area of plant ecology relating to forest ecology. Dr. Burton testified that brushing is often not necessary to achieve free growing trees, and from a biodiversity and silviculture point of view, it is not desirable to remove vegetation. He finds that brushing may be taking place too early and may be over-prescribed. In his opinion, legal free to grow status should be measured in terms of crop tree performance rather than by the quantity and size of vegetation in proximity to the crop tree.

There is a debate among experts and others involved in forestry, about whether the legal free to grow standard is appropriately set. The Panel notes that the legal free to grow standard was amended effective the year 2000 to allow more non-crop tree vegetation in proximity to a crop tree. However, the legal free to grow standard is beyond this Panel's jurisdiction.

Frederick Philpot, R.P.F., testified for the Appellants, and was qualified as an expert witness in the area of silviculture with respect to the need for brushing, but not as an expert in the use or efficacy of herbicides. Mr. Philpot prepared a report in which he concluded that on the 13 Canfor cutblocks he visited, 10% to 15% of the treated area needed brushing, 20% of the treated area had brush conditions that were suppressing growth and would benefit from brushing, but would not result in mortality, and 70% of the treated area did not require brushing. Mr. Philpot also found that 100% of the area scheduled to be treated in 2000, but not treated, required no brushing of any type.

In Mr. Philpot's experience, crop trees will grow through competing vegetation. He testified that it is possible to achieve free to grow status without brushing. In his opinion, Canfor is brushing early in order to meet its legal free to grow obligation as soon as possible.

Mr. Philpot's evidence was contradicted by Andrew Leffers, Forest Operations Supervisor for Canfor's Houston North operation. Mr. Leffers stated that Canfor does not undertake chemical brushing to achieve legal free to grow status at the earliest possible time. Canfor treats for crop tree establishment and survival and, in some instances, to achieve free growing. He stated that he did not think it would be wise to spend approximately \$400 per hectare on chemical brushing just to achieve early free to grow status. Under cross-examination, Mr. Philpot agreed that different foresters may make different assessments of the need to brush.

Robert Mitchell is Forest Practices Manager, Bulkley Forest District, MOF. The Bulkley Forest District adjoins the Morice Forest District and the two areas are comparable. Mr. Mitchell testified that there are no licensees in the Bulkley Forest District presently using pesticides for vegetation management. He stated that licensees in the Bulkley Forest District are proceeding according to their Silviculture Prescriptions and are expected to achieve free growing status on time.

The Coalition submits that the PMP promotes spraying before crop trees are established and before a determination can be made as to the extent other vegetation is impeding crop trees. It further submits that sites are sprayed even when fully stocked or have little competing vegetation. The Panel reviewed the Coalition's analysis of the Detailed Site Assessments and brushing surveys that it relies on to support its submissions. The Panel finds that the evidence is inconclusive.

Some of the Appellants submit that if brushing is required, it should be carried out by non-chemical methods. They submit that manual brushing and weeding would provide employment in the area.

The Panel heard evidence from Mr. Leffers that the average cost of brushing one hectare manually is \$500, although it can vary from \$300 to \$800 depending on the site. Vegetation regrows after manual brushing and, on average, a site must be brushed two times manually. The average cost of brushing one hectare with pesticides is \$425 and normally only one brushing is required.

The Panel heard evidence from many witnesses that brushing is necessary in forestry operations. If brushing is necessary on a particular site, then the Panel is of the view that it can be carried out with pesticides provided that there is no unreasonable effect on the environment.

In this case, the Panel finds that the Appellants have not shown, on a balance of probabilities, that brushing is unnecessary or overprescribed. The Appellants have also not shown that, using a cost benefit analysis, the same result could be achieved by an alternate method of vegetation management such as manual brushing.

Dr. McLennan testified that there is a potential for vegetation management to shift the composition of natural communities in a way that is detrimental to regional biodiversity. In his opinion the use of high concentrations of glyphosate early in the development of a plantation can cause an undesirable species shift.

Of particular concern to Dr. McLennan is the shift from the natural plant communities one expects to find on rich and moist sites, to grass swards. Grass creates a dense root mat that competes for nutrients and provides relatively little opportunity for other plant species to establish. Grassy sites are far less productive wildlife habitat than the natural shrub/herb complexes.

Dr. McLennan spent one day in the field as part of his assignment for the Coalition. He visited eight sites and surveyed vegetation in six plots. Dr. McLennan noted a shift to grass-dominated plant communities on a number of the sites. He was particularly alarmed by the predominance of grasses on Block 316-005 that had been treated with an aerial application of glyphosate in 1993. Dr. McLennan agreed that his report was not a scientific study, however he stated that if there is a widespread shift to a grass-dominated community on moist and rich sites, it would represent a serious loss of habitat for those species that normally use these areas.

In support of its submission that there will be a species shift resulting from the use of pesticides for vegetation management, the Coalition refers to two studies carried out by Ruth Lloyd, R.P.Bio., for MELP in 1990 and 1994. Ms. Lloyd studied vegetation on various cutblocks in the Skeena Region of MELP, including in the vicinity of Babine Lake within Canfor's operating area.

The purpose of Ms. Lloyd's 1994 study, titled *Implications for Wildlife of Past Herbicide Use in the Babine Lake Area* (the "Lloyd Report"), was to assess vegetation in an area of extensive herbicide use and to determine whether potentially serious impacts on wildlife habitat values have occurred at the landscape level. Ninety-seven per cent of the pesticides applied were *Vision*.

The three main conclusions of the Lloyd Report are: deciduous trees are rare or lacking in all treated site groups; diversity and abundance of deciduous shrubs are generally lower on treated sites than untreated; and cutblocks treated with *Vision* at a rate of 5-6 litres/ha lacked structural and species diversity and were mostly dominated by grasses and red raspberry rather than woody shrubs. Her findings for areas treated at a rate of 4 litres/ha were not conclusive because the treatment had occurred within the preceding 2 years, and therefore, the resulting vegetation complexes were unknown.

The Lloyd Report recommended that future vegetation management should incorporate minimum target levels for deciduous tree species, and for diversity and abundance of deciduous shrubs. In ungulate winter ranges, chemical brushing should selectively target deciduous species in order to avoid impact on browse species, and treatments that result in grass and red raspberry complexes should not occur.

Dr. McLennan testified that he found the Lloyd Report to be an "excellent report." He acknowledged that it was a retrospective study, not a scientific report.

The Deputy Administrator and Canfor submit that while Ms. Lloyd's reports may have been marked as exhibits at the hearing, the reports cannot be relied on by the



Panel for the truth of their contents. Ms. Lloyd was not a witness at the hearing and her reports were not adopted by any of the experts who testified.

Counsel cited *Privest Properties Ltd. v. Foundation Co. of Canada* (1995) 3 B.C.L.R. 1 (B.C. Supreme Court) in which Drost, J. held that textual opinions could not be admitted as evidence unless an expert witness adopted the opinions as his own.

The Panel has referred to the discussion of the rules of evidence in *Administrative Law in Canada*, (2nd Ed.) by Sara Blake, at page 50:

Unless expressly prescribed, the rules of evidence applied in court proceedings do not apply to proceedings before an administrative tribunal.

This is, in part, because tribunal members, being lay people, are not schooled in the rules of evidence and are expected to apply common sense to their consideration of evidence. It also reflects the public interest mandate of many tribunals.

The basic criterion for the admissibility of evidence is relevance. Relevant evidence is admissible; irrelevant evidence is inadmissible. ...

The Panel finds Ms. Lloyd's reports to be relevant to the issues before it and therefore admissible.

Blake goes on to state at page 51:

Not all relevant evidence is, however, of equal probative value. It is the task of the tribunal to determine the weight that should be given to evidence. In assessing weight, the tribunal should consider the extent to which the evidence is reliable and persuasive.

Ms. Lloyd did not testify and her observations and conclusions in the reports have not been tested by cross-examination. The Panel assigns a lesser weight to the Lloyd Report than to the *viva voce* evidence.

Jacob Boateng, Ph.D., R.P.Bio., Provincial Vegetation Management Specialist with the Forest Practices Branch, MOF, testified for the Deputy Administrator and was qualified as an expert witness in the area of forest vegetation management. Dr. Boateng co-authored a study titled "Boreal Plant Community Diversity 10 Years After Glyphosate Treatment," published in *Western Journal of Applied Forestry*, Vol. 15, No. 1, January 2000. The study examined 10 and 12-year post-treatment effects of broadcast and spot application of *Vision* on structural diversity, species richness, and crop tree growth at Iron Creek and Wonowon in northern B.C.

Iron Creek plots were broadcast sprayed with *Vision* in August 1986 and seedlings were planted in the spring of 1987. At Wonowon, seedlings were planted in June 1984 and a one-meter radius around each seedling was sprayed in September 1984. Control plots were established at both study areas.

Dr. Boateng testified that after 10 years at Iron Creek, there was a substantial structural shift from tall shrubs to low shrubs and herbs on the glyphosate treated sites. The delayed growth in the tall shrubs was the intended effect of the herbicide treatment. There was no statistically significant change in species richness or diversity. At Wonowon, after 12 years, there was no significant effect of glyphosate treatment on stand structure and diversity, or species richness and diversity. In both study areas, crop tree performance was enhanced on the treated plots.

In Dr. Boateng's opinion herbicides can be used for silviculture purposes without causing a long term adverse effect on biodiversity.

The Panel is not satisfied, on the evidence, that the application of pesticides in accordance with the PMP and PMP Approval will result in a permanent species shift over the long term.

The Deputy Administrator submits that there will be no unreasonable adverse effect on the environment because the PMP and the PMP Approval contain provisions that specifically protect sensitive habitat. These provisions include: zonation; minimum 10 metre Pesticide Free Zones (measured from the high water mark of all water bodies) and appropriate buffers; no treatment within the five metre machine free zone for non fish bearing streams without water present; no treatment within 90 metres (50 metres if slope is < 10%) of an active beaver habitat (dam, lodge, and beaver pond); no treatment, prior to August 1, within a 300 metre zone surrounding a raptor nest; 50 metre Pesticide Free Zone around mineral licks; no treatment of wildlife tree patches; and the use of MELP's "minimum efficacious" rate table for the application of *Vision*.

The PMP establishes four Operating Zones, which are set out under the heading "PMP and PMP Approval" above. Operating Zones OZ3 and OZ4 reflect those areas identified and previously mapped in higher level plans, namely the Lakes District LRMP and the Morice District Local Resource Use Plan.

The purpose of zonation is to identify areas in the landscape that are of particular concern for the protection of habitat values. The underlying premise of zonation is that the more sensitive the habitat, the greater scrutiny it must receive prior to pesticide treatment.

The concept of zonation was endorsed by many witnesses including Mr. Fuhr, Dr. McLennan, Mr. Philpot, Dr. Lautenschlager and Mr. Zimmerling. The Fillier Report contains a draft "Forest District Habitat Management Zone Guide" which proposes that habitat management zones be established by MELP within each Forest District. The habitat management zones would provide minimum standard conditions to be supplied to PMP proponents. No habitat management zones have been established in the Skeena Region in accordance with the Fillier Report.

The Panel finds that zonation is an acceptable method to identify areas requiring further examination prior to treatment. However, the Panel is concerned that MELP [Ministry], Habitat Protection Section, has not been adequately consulted in respect of the zonation established in the PMP. As noted in the discussion of Issue #2, Mr.

Witt did not provide his comments after the meeting on March 27, 2000 with Canfor.

At the March 27 meeting between Canfor and the Forest Ecosystem Specialists, there was a discussion about zonation, pre-harvest treatment of aspen, forage assessments and other habitat matters. There were negotiations regarding the OZ2 threshold that would trigger a habitat referral (100-ha/100 km<sup>2</sup> vs. 250-ha/100 km<sup>2</sup>). Canfor agreed to prepare a "referral impact analysis" for review by the Forest Ecosystem Specialists.

On April 20, 2000, Mr. Brockley sent an email to the Forest Ecosystem Specialists advising that Canfor had arrived at a figure of 200ha/10 km<sup>2</sup> for the OZ2 threshold. He attached an email from Jim McCormack, Planning Forester, Canfor's Houston Division, that recommended a treatment density of 200ha/10km<sup>2</sup>. The Panel notes that the threshold figure used in the PMP was 200ha/100km<sup>2</sup>. There appears to be a mistake in the Canfor emails. There was no evidence before the Panel that either Mr. Stadt or Mr. Witt approved the threshold figure used in the PMP.

The Panel noted an apparent inconsistency in the PMP relating to OZ4 – No pesticide treatment. In section 3.3.2 of the PMP, the Morice River Local Resource Use Plan is discussed. The final sentence of this section reads:

Management Guidelines [of the Morice LRUP] indicate herbicides will not be applied in Zone A or **within the special management areas of Zone B.** (emphasis added).

Mr. Brockley's email summary of the March 27th meeting with the Forest Ecosystem Specialists states:

#### Zonation

1) Zone 4 (Pesticide Free Zone) to include the following:

- a) Class I ungulate range
- c) Zone A of the Morice LRUP [Local Resource Use Plan]<sup>8</sup>

The special management areas of Zone B of the Morice Local Resource Use Plan are not mentioned in Mr. Brockley's email. OZ4 in the PMP does not include the special management areas of Zone B of the Morice Local Resource Use Plan.

In response to questions from the Panel, Mr. Brockley confirmed that all areas of no pesticide treatment should be within OZ4. He could not explain why the special management areas of Zone B of the Morice Local Resource Use Plan are not included. The Panel notes that OZ3, which requires approval from the Deputy Administrator before treatment, includes Morice Local Resource Use Plan Zone B. The Panel expects that Mr. Witt, as the Forest Ecosystem Specialist for the Morice Forest District, could have provided an explanation.

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<sup>8</sup> There is no sub paragraph 1(b).

Dr. Lautenschlager testified that, taking into account the amount of chemical brushing carried out by Canfor, there will be no long term adverse effects caused by the application of pesticides authorized by the PMP on populations of wildlife at the landscape level.

Thomas Watson, Ph.D., R.P.Bio., was qualified as an expert witness in the areas of fish and fish habitat, ecological risk assessment and the effects from the use of chemicals in general on aquatic organisms. Dr. Watson was retained by Canfor to provide an ecological risk assessment of the PMP. In Dr. Watson's opinion, the application of pesticides in accordance with the PMP will not result in any adverse impact on mammals, birds, insects, fish and amphibians.

The expert opinions provided to the Panel were based, in part, on the zonation in the PMP. The Panel finds that zonation is fundamental to the environmental protection afforded by the PMP. In the absence of evidence from MELP [Ministry], Habitat Protection Section, the Panel cannot be satisfied that the application of pesticides in accordance with the PMP and the PMP Approval will not result in an unreasonable adverse effect on the environment.

Habitat assessments are required for treatments under the NITs for OZ2 and OZ3. Although not expressly stated in the PMP or PMP Approval, the Deputy Administrator can require a habitat assessment for any location in OZ1 for which she has requested a copy of the Detailed Site Assessment.

The Panel is concerned about the adequacy of the habitat assessments carried out for the year 2000 NITs in the AEM Report. Mr. Zimmerling testified that he assessed the current, not the potential, wildlife value of the habitat. Mr. Fuhr expressed concern about the methodology and content of the AEM Report. MELP, Habitat Protection Section, Skeena Region, has prepared a Habitat Assessment Methodology for PUP Applications which is attached to and referred to in the Fillier Report. Neither the Fillier Report nor the Habitat Protection Section's methodology was used in the preparation of the AEM Report.

The Panel finds that the Deputy Administrator should consult with MELP [Ministry], Habitat Protection Section, to determine the information that should be included in the habitat assessments that must be prepared under the PMP. The Panel finds that the habitat assessment requirements should be clearly set out in the PMP.

The Panel notes that under the PMP, there is no requirement to provide completed habitat assessments to MELP [Ministry], Habitat Protection Section, for review. The Panel finds the Habitat Protection Section should be consulted to determine if they want the opportunity to review or comment on the results of the habitat assessments before the Deputy Administrator makes a decision on the NITs.

The Panel is also concerned that there is not adequate monitoring required by the Deputy Administrator to ensure compliance with the commitments and conditions in the PMP and PMP Approval.

The PMP, section 7.9, sets out Site Monitoring Procedures. It requires all herbicide treatment to be conducted under “the direct supervision of a Canfor supervisor, either employee or contractor.” The monitor is to be on the treatment block for all spray operations.

Mr. Leffers, on behalf of Canfor, testified that the monitor is an employee of the spray contractor. The Panel notes that there is no requirement in the PMP for the monitor to report any violations of the conditions of the PMP. The follow-up report required by section 7.13 of the PMP does not contemplate any comments with respect to violations of the PMP. The Panel finds that the monitor should be required to report any breach of the PMP conditions to the Deputy Administrator within 48 hours. However, it may be impractical to expect an employee of a spray contractor to monitor the contractor’s adherence to the PMP conditions.

Carl Vandermark, Planning Superintendent for Canfor, testified at length about the company’s Environmental Management System (“EMS”) and International Standards Organization (“ISO”) certification. Under the EMS/ISO, independent audits are carried out on all aspects of the company’s operation including pesticide use. The audits are not provided to the Deputy Administrator as EMS is not part of the PMP. The Panel notes that Canfor did not receive ISO certification until after the PMP was submitted to the Deputy Administrator. EMS/ISO is not referred to in the PMP and the Deputy Administrator did not refer to EMS/ISO as part of her decision-making process.

The Deputy Administrator testified that as a result of the “administrative efficiencies” achieved through the PMP process, she anticipates more time for her staff to conduct audits. The audits usually take place in the spring or summer following an application of *Vision*. The Panel notes that the Deputy Administrator is responsible for all pesticide matters, including permitting and licensing, education and compliance for all of interior British Columbia north of 73 Mile House. This represents approximately 2/3 of the geographic area of the Province. The Deputy Administrator has a staff of three.

The Panel finds that the Deputy Administrator should consider requiring Canfor to retain an independent monitor as a condition of the PMP. The monitor should report directly to the Deputy Administrator. The monitor should conduct random site inspections during spraying and provide post spray compliance reports for a representative sample of the treatment locations.

The Panel finds that in the absence of evidence from MELP [Ministry], Habitat Protection Section, Skeena Region, it cannot be satisfied, and the Deputy Administrator could not have been satisfied, that the application of pesticides in accordance with the PMP will not cause an unreasonable adverse effect on the environment. The Panel has decided that the PMP should be sent back to the Deputy Administrator so that she can refer the PMP to MELP [Ministry], Habitat Protection Section, Skeena Region. The Deputy Administrator should satisfy herself that the PMP adequately addresses any recommendations that the Habitat Protection Section may have in respect to zonation, biodiversity, monitoring and other measures for the protection of the environment.

**5. Whether the Deputy Administrator erred in approving NITs for the year 2000 that were developed prior to the PMP Approval.**

The Coalition submits that the following conditions of the PMP and PMP Approval have not been met in respect to the year 2000 NITs and treatments:

- (a) The NITs were not advertised by March 31, 2000;
- (b) The NITs were not delivered to Mr. Glover and Mr. Wadley by March 31, 2000;
- (c) The Detailed Site Assessments were not delivered to Mr. Glover by March 31, 2000;
- (d) The Detailed Site Assessments did not contain the information required by the PMP and PMP Approval;
- (e) Forage assessments were not prepared as required by the decision-making matrix.

Section 7.12 of the PMP and Part 3 of the PMP Approval set out the process for NITs. The consultation and annual advertising requirements for NITs are found in the draft Guide titled *Forest Pest Management Plans Annual Consultation Procedures for the Notification of Intent to Treat (NIT), April 2000*.

In summary, Canfor is required to provide the NITs to the Deputy Administrator, Paul Glover, Gordon Wadley and Pius Charlie of the Burns Lake Band by March 31st. Mr. Glover is also to be supplied with the Detailed Site Assessments for OZ2 and OZ3. The NITs must be advertised one time in the newspapers identified during the PMP development. The advertisements must be published prior to submission of the NITs to the Deputy Administrator, and no later than March 31.

The NIT ads for treatments under the PMP in the year 2000 were published in three local newspapers on June 14, 2000. The NITs were submitted to the Deputy Administrator together with the final version of the PMP on June 22, 2000. Mr. Glover and Mr. Wadley were provided with copies under cover of letters dated June 22 and 27, 2000, respectively.

The PMP was approved on August 10, 2000, the first NIT approval was on August 17, 2000, and spraying commenced on August 18, 2000.

The Coalition submits that the Detailed Site Assessments are inherently deficient because the information they contain was gathered prior to the PMP being finalized. The Detailed Site Assessment information was collected in the fall of 1999 and the Detailed Site Assessments were prepared in May of 2000. The Deputy Administrator and Mr. Brockley testified that additional provisions to protect the environment were incorporated into the PMP following a telephone conference on May 25, 2000 and meetings on July 4, 2000. The requirements for the Detailed Site Assessments in the PMP changed as a result of the additional environmental protection provisions added to the PMP.

The Panel finds that the Detailed Site Assessments for the year 2000 NITs do not meet all of the requirements of the PMP and PMP Approval. For example, the Detailed Site Assessment proposed site treatment maps do not clearly indicate treatment areas with Pesticide Free Zones, buffer zones and water bodies with *Code* classifications.

The PMP, section 5.3.5, requires a forage assessment to be prepared for the mixed shrub/wet alder vegetation complex as part of the decision-making matrix. Mr. Leffers testified that forage assessments were not done for the year 2000, and the format for this assessment needs to be developed.

The Deputy Administrator submits that compliance with the PMP and PMP Approval with respect to notification and delivery of documents is not required in the first year of the PMP. She testified that a "parallel process" is acceptable during the year that the PMP is being developed. Presumably anyone interested in the development of the PMP would be aware that the proponent planned to commence pesticide treatment in the same year the PMP was approved.

Both the Deputy Administrator and Canfor rely on the PMP Guide which states at page 26:

#### **Implementation Phase of PMPs**

It is appreciated that most proponents will have collected data to support the first annual Notification of Intent to Treat (NIT) prior to the submission of their PMP. This may result in the absence of some survey information and/or procedure that has been committed to in the PMP being absent from the first NIT. This will be permitted during the first year implementation phase, as long as there is a commitment to the following minimum standard data collection for each site proposed for treatment.

1. Data collection must meet the standards required for Pesticide Use Permit Applications as outlined in Appendix I of the Guide to Applicants for Pesticide Use Permits and Special Use Permits for the Omineca-Peace and Cariboo Regions (Draft), also referred to as Additional Information Required for Forestry Applications.
2. An on-site assessment of all areas proposed for treatment must be completed by the proponent within 18 months prior to the proposed date of herbicide application.

There was no evidence that the data collected for the Detailed Site Assessments met the standards required for PUPs as outlined in paragraph (1) above.

The Panel accepts that much of the field work for the first NITs is carried out the season before a PMP is finalized. The Panel finds that the PMP Guide with respect to data collection for Detailed Site Assessments during the implementation phase of the PMP is satisfactory.

However, the Panel is concerned that there has been substantially less notice of the NITs in the first year. People who may have site specific concerns about an area where they hunt, trap and recreate should not receive any less notice during the first year of the PMP. The Panel notes that the PMP Guide does not expressly contemplate a shortened NIT notice period. The Panel recommends that provisions for advertising annually by March 31 of each year should also apply to NITs in the first year of the PMP.

The Panel also recommends that PMPs should be approved before NITs are advertised and submitted to the Deputy Administrator.

**6. Whether the application of pesticides in accordance with the NITs for the year 2000 will have an adverse effect on human health or the environment and if so, whether that adverse effect is unreasonable in the circumstances.**

Many of the Appellants appealed the NIT Approvals in addition to the PMP Approval.

Canfor treated 711 hectares under the PMP before voluntarily suspending spraying for the year 2000. The Panel finds that the issue of the spraying conducted under the year 2000 NITs is moot. NITs must be prepared and approved in accordance with the PMP before any more treatments may take place. Therefore the Panel will not make any findings with respect to Issue #6.

**OTHER MATTERS**

Other matters that came to the Panel's attention during the course of the hearing or in the closing submissions are addressed in this section.

Canfor has PUPs that remain in effect for part of the term of the PMP. In the year 2000 pesticide treatments were carried out under the PUPs on 70 hectares. The PMP and NITs do not mention the PUPs, although treatments planned under the PUPs were included in the NITs for the year 2000. The Panel finds that particulars of the unexpired PUPs should be stated in the PMP. The PMP should also require that areas planned for treatment under the PUPs are included in the calculation of the threshold for OZ2.

The Panel also heard evidence about difficulty reading NIT maps and locating areas proposed for treatment. The NIT map scale is 1:250,000. Some of the cutblocks in the year 2000 NITs were not labelled on the NIT map. Further, the NITs do not state the common name of the pesticide to be applied. They only state the *PCP Act* Registration number, which would not be helpful to a member of the public reviewing a NIT to see if an area of interest would be potentially affected.

The Panel finds that the PMP is not clear as to whether pesticide treatments must occur within the term of the PMP. The Deputy Administrator approved the PMP for a term expiring August 11, 2005. During the hearing, one of the Appellants queried whether NITs approved prior to August 11, 2005 authorized pesticide treatments to



be carried out after that date. The Panel finds that the PMP should be amended to ensure that pesticide treatments are carried out within the term of the PMP.

Canfor requested that the term of the PMP be extended by one year from the date of the decision of the Panel. The Panel has decided that the PMP, as amended in accordance with this decision, may be extended by the Deputy Administrator to December 31, 2006. The extension of the expiry date of the PMP to the year-end will ensure that all annual pesticide treatments are completed within the term of the PMP.

In his closing submission on behalf of the Coalition, Mr. Buri requested leave to speak to the matter of costs following a decision on the merits of the appeal. The Board's policy, as set out in its Procedure Manual, is not to follow the civil court practice of "loser pays the winner's costs", but rather is to award costs only in special circumstances. The Panel finds that there are no special circumstances in this case which would warrant an order for costs against the Deputy Administrator or Canfor.

## **DECISION**

In making this decision, the Panel has carefully considered all the documents, evidence and arguments presented by the parties, whether or not they have been specifically reiterated herein.

The Panel finds that the Deputy Administrator has the jurisdiction to approve a PMP in the absence of regulations dealing with the PMPs and did not exceed her jurisdiction to approve a PMP by establishing procedures and requirements regarding the approval of PMPs in the absence of regulations.

However, for the reasons set out above, the Panel has decided to send the PMP back to the Deputy Administrator with the following directions:

- (a) Refer the PMP, as amended by the PMP Approval, to Brian Fuhr, Ministry Habitat Protection Section Head, in his capacity as the Ministry representative on the RPRC.

The Deputy Administrator is to consult with Mr. Fuhr to ensure that any concerns and recommendations of the Habitat Protection Section are adequately addressed in the PMP, including concerns with respect to zonation, biodiversity, monitoring and other measures for the protection of the environment.

The Deputy Administrator should determine if the PMP requires amendments in respect of information to be included in habitat assessments, and whether the Habitat Protection Section wants to receive, review and/or comment on habitat assessments before the Deputy Administrator makes a decision on a NIT approval.

The Panel recommends that the Ministry, Habitat Protection Section and the Deputy Administrator forthwith finalize the Fillier Report to provide clear and

concise minimum wildlife habitat guidelines that would be useful to proponents in developing PMPs.

- (b) Refer the PMP, as amended by the PMP Approval, to Lou Tromp, Stand Tending Forester, MOF, in his capacity as the MOF representative on the RPRC. The Deputy Administrator is to consult with Mr. Tromp to ensure that any recommendations of MOF have been adequately addressed.
- (c) Require Canfor to send written notice to those stakeholders identified on the Canfor Referral List who did not receive either written notice or a copy of the draft PMP during the development of the PMP. It is sufficient for Canfor to send a letter to these parties giving notice of the PMP and containing information about the PMP similar to that contained in its original advertisement of January 2000, with appropriate modifications. The Parties shall have an opportunity to provide comments on the PMP to Canfor and the Deputy Administrator within 30 days. The Deputy Administrator shall consider if the PMP requires any amendments as a result of additional information provided to her by any of these Parties.
- (d) Consider requiring Canfor to retain an independent monitor to conduct random site inspections during spraying and provide post spray compliance reports for a representative sample of the treatment locations. The monitor would report directly to the Deputy Administrator.
- (e) Require, as a condition of the PMP, that Canfor provides particulars of all annual brushing activities (chemical and non-chemical).
- (f) Require, as a condition of the PMP, that Canfor provides a Detailed Site Assessment for separate approval whenever the Deputy Administrator is satisfied that **credible** information identifying a **critical** area of berry picking or plant gathering for human use or consumption has been provided to her.
- (g) Amend the PMP as follows:
  - i) Add to section 7.9 a requirement that the monitor must report a breach of the PMP conditions to the Deputy Administrator within 48 hours, or such other period as she determines appropriate.
  - ii) Add particulars of unexpired PUPs and stipulate that areas planned for treatment under the PUPs are to be included in the calculation of the area which defines OZ2 (i.e. 200 ha/100 km<sup>2</sup>).
  - iii) Stipulate that pesticide treatments must occur before the expiry of the term of the PMP.
  - iv) Extend the expiry of the term of the PMP to December 31, 2006.
  - v) Incorporate into the PMP all the provisions of the PMP Approval (including those portions of the Fillier Report considered to be

conditions of the PMP) and amendments required in accordance with the Panel's decision. The PMP should be a single document.

Cindy Derkaz, Panel Chair,  
Environmental Appeal Board

December 4, 2001