Province of British Columbia

Environmental Appeal Board

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APPEAL NOS. 2000-WAS-05(a), 2000-WAS-06(a)

In the matter of appeals under section 44 of the *Waste Management Act*, R.S.B.C. 1996, c. 482.

BETWEEN:	R.T. Newton	**APPELLANT #1**
	Maurice Bailey, Porrah Development Ltd., and Harrop Environmental Services Inc.	**APPELLANT #2**
AND:	Regional Waste Manager	**RESPONDENT**
AND:	Pacific Regeneration Technologies Inc.	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board Toby Vigod, Chair	
DATE:	Conducted by way of written submissions concluding on April 7, 2000	
APPEARING:	For the Appellants: R.T. Newton:	R.T. Newton
	Maurice Bailey Porrah Development Ltd. and Harrop Environmental Services Inc.:	Brian Bailey
	For the Respondent:	Dennis A. Doyle, Counsel
	For the Third Party:	Matthew S. Bingham, Counsel

STAY APPLICATION

APPLICATION

On January 19, 2000, R.J. Crozier, the Regional Waste Manager ("RWM") for the Kootenay Region, issued Waste Permit PE-15183 (the "Permit") to Pacific Regeneration Technologies Inc. ("PRT"), authorizing the discharge of effluent from a spray irrigation system onto a hybrid poplar plantation near Harrop, British Columbia.

Two appeals were filed against this decision: one by R.T. Newton; the other by Maurice Bailey and his companies, Porrah Development Ltd. and Harrop Environmental Services Inc. The Board decided that the two appeals would be heard together.

In their Notice of Appeal, Mr. Bailey and his companies also applied for a stay of the Permit pending a decision on the merits of their appeal. This application was conducted by way of written submissions.

Mr. Newton did not apply for a stay or make submissions with respect to this application.

BACKGROUND

In 1988, PRT purchased the Harrop tree nursery which is situated on two properties located along the Harrop-Procter highway, legally described as Lot A, Plan NEP20096 and Lot 4, Block 20, Plan 718A, Kootenay District. The nursery grows a full range of standard seedlings used for reforestation including spruce, western redcedar, western white pine and balsam. Some seedlings are grown in greenhouses, while others are grown in outdoor growing areas. The nursery operation is located on both the north and south side of the highway.

The Permit at issue in the appeal was granted to deal with wastewater generated on the site. The nursery applies fertilizer to its seedlings, not all of which is taken up by the seedlings. Storm water and the water applied to the seedlings (irrigation) carries the excess fertilizer into the nursery's storm/drainage system resulting in high concentrations of nitrate within the water collected. The water collection system on the nursery properties consists of catch basins, storm sewers and ditches that discharge the effluent into two effluent collection (storage) ponds. These ponds are not lined and, according to a report by Summit Environmental Consultants Ltd. (August 1999), have "proven inadequate to store stormwater runoff, and hence occasional overtopping has occurred."

In or about October of 1996, the Ministry of Environment, Lands and Parks ("MELP") notified PRT that it had been operating in a manner contrary to the requirements of the *Agricultural Waste Control Regulation*, B.C. Reg. 131/92 and the *Waste Management Act*. Specifically, PRT was causing pollution of ground water due to the discharge of nitrate contained in agricultural waste (e.g. fertilizers) from the nursery operation. The allegation was based upon ground water samples taken from a neighbouring well which showed concentrations of 12 mg/L nitrate-N on two consecutive days in August of 1996, which is 2 mg/L higher than provincial water quality criteria for nitrate-N (10 mg/L). Accordingly, PRT was directed to develop a plan proposing works that would result in PRT operating in a manner that did not create pollution.

PRT retained Summit Environmental Consultants Ltd. to develop the required plan. In December of 1996, it submitted a plan in a document titled *Poplar Plantation & Constructed Wetland System Plan: PRT Harrop Nursery*, written by Hugh Hamilton. The report outlined a plan to treat the nursery waste through the use of two natural treatment systems; namely, spray irrigation of a fast-growth hybrid poplar plantation and a constructed wetland.

In May of 1997, PRT installed approximately 3,000 poplar trees.

On September 12, 1997, PRT applied to the RWM for an authorization under the *Waste Management Act* to permit the installation of treatment works to collect and treat effluent from the nursery using spray irrigation and constructed wetlands.

This application was the subject of considerable discussion and several amendments over the years. The subject Permit was ultimately issued to PRT on January 19, 2000. Section 1 of the Permit authorizes the discharge of the effluent from the nursery via a spray irrigation system for the purposes of treating the effluent and irrigating the poplar plantation.

The Applicants own two properties located on the north side of the Harrop-Proctor highway, down-slope from PRT's nursery properties. Harrop Environmental Services Inc. is a salvage and recycling business located on one of the properties. Mr. Bailey operates the salvage and recycling business and resides on the same property. On February 18, 2000, the Applicants appealed the issuance of the Permit and requested a stay. Both the RWM and PRT oppose the granting of a stay. The other Appellant, Mr. Newton, did not make submissions on this application.

ISSUE

The sole issue arising from this application is whether the Board should stay the operation of the Permit, pending a decision on the merits of the appeal.

The authority of the Board to grant a stay in an appeal brought under the *Waste Management Act* is derived from section 48, which provides:

> An appeal taken under this Act does not operate as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.

In *North Fraser Harbour Commission et al*. v. *Deputy Director of Waste Management* (Environmental Appeal Board, Appeal No. 97-WAS-05(a), June 5, 1997) (unreported), the Board concluded that the test set out in *RJR-MacDonald Inc.* v. *Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.) applies to applications for stays before the Board. That test requires an applicant to demonstrate the following:

1. there is a serious issue to be tried;

2. irreparable harm will result if the stay is not granted; and

3. the balance of convenience favours granting the stay.

The Board notes that the onus is on the applicant to demonstrate good and sufficient reasons why a stay should be granted.

DISCUSSION AND ANALYSIS

Serious Issue

In *RJR MacDonald*, the Court stated that unless the case is frivolous or vexatious, or is a pure question of law, the inquiry generally should proceed onto the next stage of the test.

In their Notice of Appeal, the Applicants submit that the nursery has been discharging its effluent wastewater containing "dangerous and toxic levels of nitrates, nitrites, fungicides containing organochlorines such as captan and other chemicals" into the ground water and into the surrounding water table since 1985, and has contaminated the Applicant Bailey's well water. They argue that the effluent fits the legal description of "special waste." They also allege that the overflow from one of the ponds has been contributing to flooding on their property for a number of years, but it worsened in 1992 when they say that the nursery "illegally" rerouted a "spring freshet drainage channel."

The Applicants contend that the Permit will allow the nursery to increase its discharge rate and volume, thereby further exacerbating the contamination levels in the water table and the flooding of their property, business and residence contrary to the *Waste Management Act*. The Applicants also allege that:

- the RWM lacks the jurisdiction to issue the Permit because the "unnamed creek" to which overflow may be diverted during extreme weather events (section 2.4 of the Permit) is actually a private drainage ditch created by Mr. Bailey on his property;

- the Permit was issued without proper notification and without providing a sufficient opportunity for the Applicants to be heard;

- the RWM took into account extraneous evidence when he issued the Permit; and

- the RWM was biased against the Applicants.

For the purposes of this application, the RWM accepts that there is a serious question to be tried.

Although PRT says that there are no serious issues raised in the appeal, it is clear from its submissions that there are factual issues and legal questions that will need to be decided by the Board. Both PRT and the Applicants provided affidavit evidence in support of their respective positions. From their affidavit evidence, it is apparent that the parties disagree on some of the facts that form the basis of the Permit, and the consequences that will flow from the activities authorized by the Permit. Further, there are questions of procedural fairness/natural justice that have been raised by the Applicants. The Board finds that there are serious issues raised by the appeal which are neither frivolous, vexatious, nor pure questions of law.

Irreparable Harm

The second factor to be considered is whether the Applicants will suffer irreparable harm if the stay is not granted. As stated in *RJR- MacDonald* at page 405:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interest that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision; where one party will suffer permanent market loss or irrevocable damage to its business reputation; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined.

The Applicant Bailey states that his residence and business has been threatened with flooding solely as a result of PRT concentrating large amounts of effluent and water where it did not naturally occur before. The Applicants submit that irreparable harm would be done to the Applicant Bailey if his residence and/or business were to be flooded. They state that the harm to Mr. Bailey would be in the nature of financial harm due to the inability to run his business with some level of efficiency, which would also harm the businesses themselves. They submit that flooding would cause emotional harm to the relationship between the Applicant Bailey and his three-year-old son if he has no place to maintain a relationship with his son or for his son to play. The Applicants submit that the risk of flooding is not improbable as it almost happened in 1997 and, more recently, in March of 2000. They argue that the danger of flooding continues to be an immediate threat, and that the Permit amounts to a legal sanction for PRT to continue activities that are creating this threat.

The Applicants also allege that the operation of the Permit will result in irreparable environmental harm due to contamination of the ground water. They submit that, although the recycling of the effluent is a sound concept in principle, the manner in which it is being done under the terms of the Permit will exacerbate the alleged ground water contamination problem already created by PRT. They submit that the irrigation treatment system authorized by the Permit will allow nitrate-bearing effluent to percolate into the water table at a faster rate than occurred when the effluent was directed into storage ponds. The Applicants submit that this increase in the rate of percolation will further set back the eventual cleansing of the local water table by natural means of underground flow. They submit that the operator of a water-testing laboratory advised the Applicant Bailey that it could take 50 years for the water table contamination caused to date to clear itself.

The Applicants also submit that Mr. Bailey's domestic wells were the source of his drinking water supply until the contamination of the local water table became evident to him. For several years he has had to transport drinking water to his home from a water source some distance away. They note that the Permit does not require monitoring of his well water, despite the previous problems with higher than recommended nitrate levels in his water in 1996.

The RWM submits that no irreparable harm will result if rights are exercised under the Permit pending the hearing of the appeal on the merits. In an affidavit sworn on March 31, 2000 by Carl Johnson, Assistant Regional Waste Manager, Mr. Johnson states that the Permit does not authorize any increases in the previously authorized levels of water utilization at the PRT nursery, it only authorizes the collection and discharge of effluent through a spray irrigation system to irrigate a hybrid poplar plantation.

PRT submits that, contrary to the Applicants' belief that a stay would reduce the flow and address the Applicants' concerns regarding flooding, a stay of the Permit will actually result in an increase in the flow of water. In an affidavit sworn by Hugh Hamilton, Senior Environmental Scientist with Summit Environmental, on March 29, 2000, Mr. Hamilton states that the initial planting of 3000 poplar trees in May of 1997 enabled the facility to reduce the volume of water in the irrigation ponds. If it is not able to irrigate the poplars pursuant to the Permit, water overflow in the storage ponds will increase.

PRT submits further that the harm to the Applicants is not irreparable, as PRT has previously offered to construct works on the properties that would deal with the flooding problem, but the Applicants have refused these offers. The Applicants say that this is because the offers were not satisfactory for various reasons.

With respect to the issue of nitrate contamination in the ground water, both the RWM and PRT take issue with the Applicants' submission that the irrigation operation will increase the contamination problem. To the contrary, they submit that the spray irrigation authorized by the Permit will reduce total nitrate levels in the water, bringing well water samples within permissible levels under the Canada drinking water guidelines. Mr. Johnson explains at page 2 of his affidavit that, prior to the Permit being issued, "nursery effluent was simply allowed to collect and discharge through a series of settling ponds from where it would ultimately flow naturally to the ground. Without spray irrigation there is little opportunity for nitrates to be taken up by plants before reaching the ground water table."

The RWM submits that the spray irrigation program has already been shown to be effective at reducing total nitrate levels in water. He cites sampling results obtained from Environment Canada from two wells located in close proximity to the plantation discharge location, which indicate that the highest nitrate levels occurred in 1996, and that the levels have been in steady decline since then. He argues that this supports a conclusion that a smaller effluent spray irrigation program begun on the PRT property prior to 1998 was effective in reducing total nitrate levels in the ground water, bringing well water samples within permissible levels under both the provincial drinking water criteria and the Canada drinking water guidelines. He argues that there is no evidence of nitrate levels exceeding the guidelines under current conditions and while the Permit has been in effect.

PRT points out that the primary motivation for the effluent collection and irrigation system was to address concerns raised by MELP relating to nitrates in the ground water. It submits that there is no evidence to suggest that there is currently a problem with the Applicants' ground water, and no evidence that there will be contamination as a result of PRT's activities under the Permit. Rather, it agrees

with the Respondent that a stay of the Permit would increase, rather than decrease nitrate concentrations as, according to Hugh Hamilton, "the nitrates were taken up by the poplars."

With respect to the Applicant Bailey hauling in his drinking water, PRT notes that the Applicants have said that this has been going on for "a number of years." PRT submits that Mr. Bailey has not suggested that he cannot continue to bring water in if it is required, or that he could not recover the expense of doing so if he is successful in the appeal on the merits. Nevertheless, PRT states that "if there are studies showing that the nitrate levels are below drinking water requirements for whatever reason, PRT remains willing to pay the cost of Mr. Bailey obtaining alternate sources of water." It notes that no such studies have yet been adduced by the Applicants.

The Board finds that the Applicants have not established that a refusal to grant a stay could so adversely affect their interests that the harm could not be remedied if the Board decides in their favour in the appeal. According to the Applicants, its properties have been subject to flooding since at least 1996, which is years before the Permit was issued. There is some indication that a 1996 *Water Act* approval to install a culvert system on the PRT property may have caused some increase in the volume of water and effluent flow on the surface. However, this approval was not appealed by the Applicants, and will not be cured by a stay of the Permit.

The Board accepts the affidavit evidence of the RWM that the Permit does not authorize any increase in the water utilization of the PRT nursery, and finds that a stay of the Permit would, therefore, not reduce the flow of mixed water and effluent on PRT's property; only the method and route of discharge would be affected. The Board notes that even the Applicants acknowledge that the irrigation may reduce the flooding problem. However, they argue that the result is simply a trade-off of the flooding problem for a further ground and water table contamination problem.

Regarding the latter, there is no evidence before the Board that the Applicant Bailey's well water has nitrate levels higher than those recommended by the drinking water guidelines. In 1996, his well water had a concentration of 11.3 mg/L of "nitrate + nitrite" which is 1.3 mg/L higher than the Canada drinking water guidelines. Since that time, the preliminary evidence before the Board is that nitrate levels have declined as a result of the actions of PRT and the Board accepts that the purpose of the Permit is to ensure that the levels are safe.

Regarding the harm associated with bringing in drinking water, the Board is unable to conclude that this is in any way linked to the Permit at issue. The Applicant Bailey has been bringing in water for a number of years and, whether or not the Permit is stayed, there is every indication that he will continue to do so given the evidence that he expects the ground water to remain contaminated for a number of years. While there is no evidence that his well water is currently "contaminated," if a study confirms that it is, PRT has offered to pay for an alternate source of water.

The Board finds that the Applicants have not made a prima facie case that they or the environment will suffer irreparable harm if the Permit is not stayed. However, in the event that the Board is incorrect, it will consider the final branch of the test.

Balance of Convenience

This stage of the test requires the Board to determine whether greater harm will result from the granting of, or refusal to grant the stay application.

PRT submits it may suffer irreparable harm if the Permit is stayed. It submits that a stay may cause the loss of the poplar plantation, in which some of the trees have been growing for almost three years. PRT also submits that a stay would raise the risk of action being taken against it if MELP finds that nitrate levels in the ground water begin to rise while the stay is in effect. PRT states that, if it is forced to partially or fully curtail the nursery's operations as a result of a stay, this would result in extensive harm to PRT in the form of direct financial losses, loss of existing contracts, loss of employment for PRT employees, and the loss of all or part of a crop of approximately 14 million tree seedlings. If this were to occur, PRT is concerned that it will not be able to obtain compensation from the Applicants if their appeal is dismissed.

It also argues that a stay of the Permit will not have the result sought by the Applicants: it would not reduce nitrate concentrations in the ground water, or flooding. It points out that a stay of the Permit would not prevent PRT from operating the nursery; it would only prevent it from spray irrigating the poplars. Thus, the operation would continue, but without the beneficial effects of the spray irrigation process. Conversely, PRT submits that if it is allowed to exercise its rights under the Permit, it can continue to operate the irrigation system which will prevent the release of excess nitrates and moderate potential overflows resulting from extreme rainfall or snow melt events.

The RWM takes no position on the financial or operational consequences to PRT if a stay is granted at this time. He does, however, submit that the collection of the nursery effluent and its processing according to the terms of the Permit does provide an extra measure of safety, as it will allow for a controlled discharge and provide records of the volumes and characteristics of the effluent that will be spray irrigated onto the poplar plantation. The RWM also submits that the Permit includes monitoring and sampling requirements for the protection of the environment and that it would, therefore, be advantageous to allow the Permit to remain in effect pending the decision of the Board on the merits.

The Applicants submit that the only detrimental effect that a stay of the Permit would have would be a delay of the implementation of the poplar plantation irrigation operation. They submit that this plantation is "not a money making operation" for PRT, but that it is only a way for PRT to dispose of the nursery effluent. They note that, even if the irrigation operation reduces the risk of flooding of the Applicants' properties, it is unlikely that it will be implemented in time to have any effect this spring. The Applicants further question whether a stay will have an impact on the existing poplar trees this spring when the ground is already wet from melting snow, spring runoff and spring rains.

The Board agrees with PRT that a stay of the Permit would not address the primary concerns raised by the Applicants. Most of these problems existed before the

Permit was issued. If a stay is granted, PRT would be forced to revert to its original method of effluent disposal by directing it to the effluent ponds on its property.

While it is not in a position to adjudicate on the merits of the spray irrigation system authorized by the Permit, the Board finds that it appears to be better for the environment, pending a decision of the appeal, than a reversion to the old method of simply storing the wastewater in the unlined ponds. As well, the Permit includes monitoring and sampling requirements for the protection of the environment. Further, section 2.1 of the Permit states that "in the event of an emergency or condition beyond the control of the permittee which prevents effective operation of the approved method of pollution control", the permittee must notify the RWM immediately and the RWM "may reduce or suspend the operation of the permittee to protect the environment until the approved method of pollution control has been restored."

The Board finds further that a stay of the operation of the Permit could have a negative impact on PRT. The Board accepts PRT's submission that a stay of the operation of the treatment and irrigation system authorized by the Permit could jeopardize its poplar crop, and could lead to a rise in nitrate levels in the local ground water.

The Board finds that the balance of convenience does not weigh in favour of a stay of the Permit.

DECISION

The Board has carefully considered all of the parties' submissions on the stay application, whether or not they have been referred to in this decision.

The application for a stay of Waste Permit PE-15183, pending a decision of the Board on the merits of this appeal, is denied.

When reviewing the submissions made in relation to this application, the Board notes that the Applicants have raised a variety of concerns regarding historical flooding, changes to a watercourse and a new culvert on PRT's property. While it is premature to make a determination on the relevance of some of these matters without receiving argument from all of the parties, to ensure that the hearing of the appeal proceeds in an efficient and timely manner, the Board wishes to emphasize that its jurisdiction is limited to issues relating to the Permit only. As the Permit was issued under the *Waste Management Act*, the Board does not have jurisdiction to address alleged errors regarding approvals under the *Water Act*, illegal diversions of water courses or compensation for easements.

Toby Vigod, Chair
Environmental Appeal Board

April 28, 2000