BRITISH COLUMBIA

Environmental Appeal Board

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APPEAL NO. 2001-PES-012

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

BETWEEN:	Sunshine Coast Regional District	**APPELLANT**
AND:	Deputy Administrator, Pesticide Control Act	**RESPONDENT**
AND:	British Columbia Power and Hydro Authority	**PERMIT HOLDER**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	June 11, 2002	
PLACE:	Sechelt, B.C.	
APPEARING:	For the Appellant: Don Murray For the Permit Holder: Clifford Proudfoot, Counsel	

APPEAL

The Sunshine Coast Regional District ("SCRD") appealed the decision of H.G. Maxwell, Deputy Administrator, Pesticide Control Act (the "Deputy Administrator") to issue Pesticide Use Permit No. 105-958-01/03 (the "Permit") to British Columbia Power and Hydro Authority ("BC Hydro") on September 20, 2001. The Permit authorizes the application of Cobra Wrap (active ingredient copper napthenate), Cop-R-Plastic (active ingredient copper napthenate and sodium fluoride), Post and Pole Fumigant (active ingredient metam) and Impel (Boron) Rods II or equivalent (active ingredient anhydrous disodium octaborate) (the "Pesticides") for utility pole preservation at various locations, including locations within the SCRD.

The Environmental Appeal Board has the authority to hear this appeal under section 11 of the *Environment Management Act* and section 15 of the *Pesticide Control Act* (the "*Act*"). The Board's authority under section 15(7) of the *Act* is as follows:

> 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 SCRD requested that the Board reverse the decision to issue the Permit for locations in community watersheds within the SCRD.

By letter dated April 18, 2002, the Deputy Administrator provided the Board and the other parties with his statement of points. The Deputy Administrator also advised that he would not be appearing at the hearing.

BACKGROUND

BC Hydro uses wooden power poles to carry its transmission lines. On September 8, 2001, BC Hydro applied for a pesticide use permit for the treatment of these poles in the areas of Squamish to North Vancouver, Sechelt to Gibsons, Malaspina to Powell River, downtown Vancouver, Richmond, Ladner, Delta, Tsawwassen, Cloverdale, Port Moody, Chilliwack and Agazziz (the "Application"). The Application is for the purpose of remedial wood pole treatment, commonly referred to as the "test and treat program." The purpose of the test and treat program is to manage, protect and preserve wood power poles by targeting wood rot and wood boring insects. The Application indicates that of the approximately 5672 poles that will be inspected, 90% may receive full treatment and approximately 10% will not receive treatment either because of environmental constraints or because they are sufficiently preserved. Notice of the Application was published in several local newspapers.

On September 20, 2001, the Ministry of Water, Land and Air Protection ("WLAP") issued the Permit to BC Hydro. The Permit authorizes BC Hydro to apply the pesticides to a maximum of 5,672 wood power poles within the Sunshine Coast, Greater Vancouver, Chilliwack and Agassiz areas. The Permit was issued subject to various restrictions including the following:

M. Pesticides shall not be applied to poles that are located in permanent standing water.

N. Only Impel (Boron) Rods II may be used on poles that stand in water that is temporary and free-standing and that does not drain into some stream, water bodies, wetlands or areas that provide fish habitat.

O. Post and Pole Fumigant shall not be applied to poles located within 3.0 metres (measured horizontally from the high water mark) of streams, water bodies, wetlands or areas that provide fish habitat; or to poles within 1.0 metre of temporary free-standing water. [Note: free-standing water must not drain into streams, water bodies, wetlands, or areas that provide fish habitat.]

P. CobraWrap or Cop-R-Plastic shall not be applied to poles located within 5.0 metres (measured horizontally from the high water mark) of streams, water bodies, wetlands or areas that provide fish habitat, or to poles within 1.0 metre of temporary free standing water.

Q. Except as specified above, a minimum 10 metre pesticide-free-zone, measured horizontally from the high water mark, shall be maintained around all streams, water bodies, wetlands or areas of fish habitat.

R. A 30 metre pesticide-free-zone shall be maintained around domestic and agricultural well water intakes.

S. Cop-R-Plastic shall be limited to dry sites and only be applied to groundline or below ground portion of poles and are wrapped in plastic-backed kraft paper bandages and shall be fully buried after pesticide application.

T. Bandages shall be protected with metal flashing in livestock grazing areas and areas adjacent to schools, daycares and parks.

U. Pesticides shall not be used in the District of Squamish watersheds (Stawamus, Mashiter Creek)

V. Adequate buffer zones shall be established to protect all pesticide-free zones.

W. Pesticide use shall be in accordance with the respective pesticide label.

The Permit authorizes pesticides to be applied from the date of issuance until the Permit expires on December 31, 2003.

On October 19, 2001, the SCRD appealed the issuance of the Permit to the Board on the following grounds.

1. The inequitable and inconsistent standards for the application of pesticides in community watersheds.

2. The Permit conditions for pesticide free zones are inadequate to provide a level of assurance for the community that the water supply will be not be harmed. In particular, the Permit contains no provisions to protect water quality in community watersheds.

3. The SCRD opposes the application of pesticides in SCRD. This policy has been in place for 11 years. Granting the Permit undermines the efforts of the SCRD to create a pesticide-free zone on the Sunshine Coast.

On October 26, 2001, the SCRD amended the Notice of Appeal to request a stay of the Permit for the treatment locations within the West Lake, Haslam Creek, and

Gray Creek community watersheds. The SCRD also requested that the Board amend the Permit to exclude pesticide applications in all community watersheds in the district

By a letter dated November 8, 2001, BC Hydro voluntarily agreed to postpone the scheduled treatment and not treat poles within the West Lake, Haslam Creek, and Gray Creek community watersheds, pending the hearing of the appeal.

The oral hearing was held on June 11, 2002. At the commencement of the hearing, the Appellant advised that it would be providing no evidence in support of its appeal. The Permit Holder then requested that the appeal be dismissed. After hearing the parties' opening statements, the Panel dismissed the appeal and gave oral reasons for the dismissal.

Pursuant to section 6 of the *Environmental Appeal Board Procedure Regulation*, where the Panel issues an oral decision, written reasons are to be given for the decision.

RELEVANT LEGISLATION AND CASE LAW

The relevant provisions of the *Act* are as follows:

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

6 (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.

Powers of administrator

12 (2) The administrator has the powers necessary to carry out this Act and the regulations and, without limiting those powers, may do any of the following:

(a) determine in a particular instance what constitutes an unreasonable adverse effect;

...

In addition, section 2(1) of the *Pesticide Control Act Regulation* states that "no person shall use a pesticide in a manner that would cause an unreasonable adverse

effect." Section 1 of the *Act* defines "adverse effect" as "an effect that results in damage to humans or the environment."

The Permit allows for the use of pesticides that are registered under the federal *Pest Control Products Act*, R.S.C. 1985, P.-9. Under that *Act*, a pesticide must be registered before it can be sold, used, or imported into Canada, and a registered pesticide must be used in accordance with its label.

The British Columbia Court of Appeal has ruled that the Environmental Appeal Board can consider a registered pesticide to be generally safe when used in accordance with the label (*Canadian Earthcare Society* v. *Environmental Appeal Board* (1988), 3 C.E.L.R. (N.S.) 55) (hereinafter *Canadian Earthcare Society*). However, it is also clear that the fact that a pesticide is federally registered does not mean that it can never cause an unreasonable adverse effect.

Justice Legg, in *Islands Protection Society* v. *British Columbia Environmental Appeal Board* (1988), 3 C.E.L.R. (N.S.) 185 (B.C.S.C.) found that the Board should engage in a two-step process to determine whether a pesticide application would cause an unreasonable adverse effect. The first stage is to inquire whether there is any adverse effect at all. The second stage is, if the Board decides that an adverse effect exists, then the Board must undertake a risk-benefit analysis to ascertain whether that adverse effect is reasonable.

The Court of Appeal in *Canadian Earthcare Society* agreed with the following comments of the Supreme Court:

> Should the Board find an adverse effect (i.e. some risk) it must weigh that adverse effect against the intended benefit. Only by making a comparison of risk and benefit can the Board determine if the anticipated risk is reasonable or unreasonable. Evidence of silvicultural practices will be relevant to measure the extent of the anticipated benefit. Evidence of alternative methods will also be relevant to the issue of reasonableness. If the same benefits could be achieved by an alternative risk free method then surely the use of the risk method would be considered unreasonable.

It is clear that the test for "unreasonable adverse effect" is site specific and application specific.

ISSUES

This appeal raises the following issues:

1. Whether the use of pesticides, as authorized by the Permit, will cause an adverse effect on human health or the environment, and if so, whether the adverse effect is unreasonable.

2. Whether the Deputy Administrator uses inequitable and inconsistent standards for the application of pesticides in community watersheds.

DISCUSSION AND ANALYSIS

1. Whether the use of the pesticides, as authorized by the Permit, will cause an adverse effect on human health or the environment, and if so, whether the adverse effect is unreasonable.

The onus is on the SCRD, on a balance of probabilities, to show that the use of pesticides in accordance with the Permit will cause an adverse effect on the environment or humans. At the hearing of this appeal the SCRD did not introduce any evidence to show an adverse effect. What the Appellant intended to show was a general community concern about the use of pesticides within the regional district and within watersheds, in particular.

The Panel finds that the SCRD failed to show that the use of the pesticides in accordance with the Permit will cause an adverse effect on the environment or humans. Because the SCRD failed to show an adverse effect, as stated by the Honourable Justice Legg in *Islands Protection Society*, "that is the end of the inquiry." There is no need, therefore, for the Panel to undertake a risk-benefit analysis to ascertain whether any adverse effect is "unreasonable," including determining whether alternatives to pesticide use are available in this case.

Accordingly, the appeal on this ground is dismissed.

2. Whether the Deputy Administrator uses inequitable and inconsistent standards for the application of pesticides in community watersheds.

The Appellant submits that the Deputy Administrator was inequitable when he exempted the use of pesticides under the Permit in the District of Squamish watersheds, but did not do so in the SCRD watersheds.

In particular, the Permit states that pesticides shall not be used in the District of Squamish watersheds. In addition, BC Hydro's application for the Permit stated that BC Hydro would not be applying pesticides in the Greater Vancouver Regional District watersheds, in particular, in the Capilano watershed. The SCRD requests that the same standards be applied to the Sunshine Coast Regional District watersheds.

BC Hydro pointed out that the transmissions structures within the District of Squamish watersheds are made of concrete and steel, as opposed to wood, and therefore do not require treatment to prevent wood rot or protection against wood boring insects. BC Hydro further advised that the Greater Vancouver Water District owns a portion of the Capilano watershed and leases the remaining portion from the Province under a 999 year lease. BC Hydro, therefore, requires the permission of the Greater Vancouver Water District before applying pesticides on private land and historically this permission has been refused.

Based on the information before the Panel and the lack of evidence to the contrary, the Panel finds that the Deputy Administrator considered the Application on its merits, and did not fetter his discretion. The Deputy Administrator considered

whether there would be any unreasonable adverse effects within the watershed as a result of the pesticide application. He then placed restrictions on the Permit to further ensure the protection of the environment and humans.

DECISION

For the reasons stated at the hearing and confirmed above, the appeal is dismissed.

Alan Andison, Chair
Environmental Appeal Board

July 2, 2002