



Environmental Appeal Board

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APPEAL NOS. 2002-PES-007, 2002-PES-009(b), 2002-PES-010(b)

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

BETWEEN:	Cowichan Valley Regional District Daniel Rubin on behalf of BC Pathways Lou Fasullo on behalf of Shawnigan Water.org	APPELLANTS
AND:	Deputy Administrator, Pesticide Control Act	RESPONDENT
AND:	TimberWest Forest Corporation	PLAN HOLDER
AND:	Cowichan Tribes	PARTICIPANT
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair David Ormerod, Member Lorraine Shore, Member	
DATE:	February 17, 2003	
PLACE:	Nanaimo, B.C.	
APPEARING:	For the Appellant: Cowichan Valley Regional District: Jennifer Forrest BC Pathways Daniel Rubin Shawnigan Water.org Lou Fasullo For the Respondent: Dennis Doyle, Counsel For the Plan Holder: Nicholas Hughes, Counsel For the Participant: Gregory J. McDade, Q.C., Counsel Heather Smillie, Articled Student	

APPEAL

On September 15, 2002, Conrad Bérubé, Deputy Administrator, *Pesticide Control Act*, for the Vancouver Island Region, Ministry of Water, Land and Air Protection (the "Deputy Administrator"), approved Pest Management Plan No. 103-597-02/07 (the "PMP") subject to certain conditions. The PMP was submitted by TimberWest Forest Corporation ("TimberWest"), and covers approximately 119,500 hectares of land owned by TimberWest, primarily on the east side of Vancouver Island. It

authorizes the use of *Vision* (active ingredient glyphosate) and *Release* (active ingredient triclopyr) to manage vegetation competing with crop trees.

The Cowichan Valley Regional District ("CVRD"), Lou Fasullo (on behalf of Shawnigan Water.org) and Daniel Rubin (on behalf of BC Pathways) appealed the Deputy Administrator's decision to approve the PMP. Further, the CVRD and Mr. Rubin each requested a stay of the Approval, pending the Board's decision on the merits of the appeal.

TimberWest also appealed the PMP, however, that matter will be the subject of a separate decision from the Board.

The Environmental Appeal Board has the authority to hear these appeals 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.

Mr. Rubin and the CVRD both requested that the PMP be rescinded. The CVRD also asked that alternative brush control methods be considered as a means of managing vegetation. Mr. Fasullo requested that the PMP be amended to exclude the Shawnigan Lake Watershed from the area under pesticide control.

BACKGROUND

Following a notification and consultation process, the Deputy Administrator approved TimberWest's final draft of the PMP on September 15, 2002, subject to a number of conditions that form part of the approved PMP.

The term of the PMP is from August 15, 2002 to August 15, 2007. The PMP was proposed by TimberWest's Cowichan Woodlands Operations, from their Meschie Lake office. The proposed PMP covers operating areas of TimberWest's private properties on Vancouver Island that lie within the E&N Railway Grant area between Sooke and Upper Campbell Lake. These private properties include Managed Forest Units 7, 8 and 65, the private portion of Woodlot Licence 85, and fee simple real estate lands located in the same geographic area. Subject to the terms and conditions of the PMP, TimberWest is authorised to use herbicides to control vegetation on those lands and to use deer repellents for browse control. The PMP outlines how TimberWest will decide if brushing treatments are required and which methods should be selected. The conditions imposed by the Deputy Administrator

address pesticide use, notification prior to treatment, and additional standards for pesticide use.

On October 7, 2002, Mr. Fasullo appealed the decision of the Deputy Administrator to approve the PMP. Mr. Fasullo requested that the Shawnigan Lake Watershed be removed from the area covered under the PMP because the PMP will "put over 12,000 local residents at added risk due to contamination of our drinking water."

On October 15, 2002, Mr. Rubin appealed the decision to approve the PMP. Mr. Rubin submitted that "the approved chemical treatments present a grave and dangerous risk to the health of the inhabitants in the areas adjacent to and downstream from the application sites." In particular, Mr. Rubin expressed concern about the application of herbicides within the watersheds of various South-Island communities. Mr. Rubin requested that the appeal be heard by way of an oral hearing and that the PMP be rescinded. Mr. Rubin also requested a stay of the PMP pending a decision on the merits of the appeal.

Also on October 15, 2002, the CVRD appealed the decision to approve the PMP. The CVRD's grounds for appeal are as follows:

- potential impacts on surface and groundwater quality fish-bearing streams and lakes, many of which are domestic water sources;
- alternative brush control methods (manual brushing for example) were not considered as alternatives to herbicides;
- protection of human and environmental health should be the absolute priority in pest management decisions;
- the precautionary principle should be applied in all pest management cases - not asking "why not?", but instead asking "why?";
- pollution prevention strategies should be of the highest priority;
- public confidence is not established unless the foregoing issues and principles are adhered to or addressed.

The CVRD requested delegation status at the hearing of the appeal. It further requested that the approval of the PMP be rescinded and that the Deputy Administrator consider alternative methods of brush control.

On October 29, 2002, the CVRD requested a stay of the approved PMP pending a final decision of the Board.

On January 16, 2003, the Board denied the application for a stay of the PMP by Mr. Rubin and the CVRD. (*Cowichan Valley Regional District et al. v. Deputy Administrator, Pesticide Control Act*, Appeal No. 2002-PES-009(a) & 2002-PES-010(a), January 16, 2003) (unreported).

On February 4, 2003, the CVRD filed its statement of points in which it repeated its grounds of appeal and advised that it would rely on its written submissions as its sole representation at the hearing.

On February 4, 2003, Mr. Rubin filed his statement of points with the Board. Mr. Rubin expanded on his grounds of appeal and, in particular, expressed general concerns about the use of *Vision* and *Release* under the PMP. He further advised that he would not be attending the hearing in person, but that he would be providing a further written submission "well in advance of the hearing." (A written submission was received by the Board from Mr. Rubin after his appeal had been dismissed).

On February 7, 2003, Mr. Fasullo filed his statement of points with the Board. He expanded on his Notice of Appeal regarding his concerns for the use of pesticides and *Vision* and *Release* in particular, in the vicinity of Shawnigan Lake.

On February 6, 2003, the Board issued a Notice of Hearing advising that the appeals would be heard in Nanaimo, B.C., commencing on February 17, 2003 at 9 a.m.

The oral hearing commenced on February 17, 2003. Counsel for the Deputy Administrator, the Cowichan Valley Tribes and TimberWest were in attendance when the hearing commenced. As noted in their statements of points, neither the CVRD nor Mr. Rubin were in attendance. In addition, Mr. Fasullo did not appear although he did contact the Board office later that day (and after his appeal had been dismissed) to advise that his failure to attend was the result of an illness in his family.

As none of these Appellants were in attendance, the Panel reviewed their written submissions. The Panel considered the merits of their appeals and concluded that their written submissions did not establish that the use of pesticides under the PMP would cause an unreasonable "adverse effect" as defined by the *Pesticide Control Act*. The Panel then dismissed the appeals and gave oral reasons for the dismissal.

Pursuant to section 6 of the *Environmental Appeal Board Procedure Regulation*, BC Reg. 1/82, where the Panel issues an oral decision, written reasons are to be given for the decision. This decision constitutes the written reasons for the Panel's oral decision to dismiss the appeals by Mr. Rubin, Mr. Fasullo and the CVRD.

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 authorised 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."

Under the federal *Pest Control Products Act*, R.S.C. 1985, P.-9, 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.) (hereinafter "*Islands Protection Society*") 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 authorised by the PMP, will cause an adverse effect on human health or the environment.
2. If so, whether the adverse effect is unreasonable.

DISCUSSION AND ANALYSIS

The first step in the process of determining if pesticide use will cause an “unreasonable adverse effect,” as defined in the *Act*, is to determine whether the use of pesticides under the PMP will cause any adverse effect at all. If satisfied that the pesticide application under the PMP will not cause an adverse effect, the Deputy Administrator may approve a PMP under section 6(3)(a)(ii) of the *Act*. In the matter of *Northwest BC Coalition for Alternatives to Pesticides, Lake Districts Friends of the Environment, Tony Harris, Christoph Dietzfelbinger, John Smith, and Dave Stevens v. Deputy Administrator, Pesticide Control Act*, (2001) B.C.E.A. No. 47, (Appeal No. 2000-PES-025(b) to 042(b); 044(b) to 049(b) 052(b); 053(b), December 4, 2001), (QL), the Board dealt with an appeal of a PMP and commented on the PMP approval and review process:

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.

Hence, the onus is on the person claiming an adverse effect to show on the balance of probabilities that the PMP allows the use of herbicides in a manner that will cause an adverse effect on human health or the environment.

Indeed, it was the task of Mr. Fasullo, Mr. Rubin, and the CVRD to show that the use of herbicides in accordance with the PMP will cause an adverse effect on the environment or humans. The demonstration of a mere concern that pesticide use will create adverse effects is not sufficient. For instance, in *Ingmar Lee v. Deputy*

Administrator, Pesticide Control Act (University of Victoria, Third Party), (hereinafter "*Lee*"), (2002) B.C.E.A. No. 69, (Appeal No. 2002-PES-003(b), November 20, 2002), (QL) the Appellant demonstrated a general concern surrounding the health risks to humans and other non-target species by various pesticides, but failed to show that the pest control licence in particular would create adverse effects:

...the Appellant is genuinely concerned about pesticide use in our society, but he has failed to fulfil the burden of showing that pesticide use at UVic, under the Licence, will cause an adverse effect on human health or the environment.

Similarly, in the matter of *Sunshine Coast Regional District v. Deputy Administrator, Pesticide Control Act (BC Power and Hydro Authority, Permit Holder)*, (2002) B.C.E.A. No. 46, (Appeal No. 2001-PES-012, July 2, 2002), (QL), the Board ruled that the evidentiary requirement was not met by the Appellant, who did not adduce any evidence showing that the pesticide use permit in particular would create an adverse risk, and the appeal was dismissed:

At the hearing of this appeal the Sunshine Coast Regional District 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.

In the present matter, these Appellants merely demonstrated a general concern surrounding the use of herbicides within the watersheds of various South Island communities. The Panel finds that, at the hearing of this appeal, the Appellants did not produce site-specific evidence showing that the use of herbicides in accordance with the terms and conditions of the PMP will create an adverse effect on human health or the environment. Hence, these Appellants have provided insufficient evidence to meet the first stage of the test set out in *Canadian Earthcare* and *Islands Protection Society*. Consequently, as stated by the Honourable Justice Legg in *Islands Protection Society*, "that is the end of the inquiry," and there is no need for the Panel to undertake a risk-benefit analysis to ascertain whether any adverse effect is "unreasonable."

DECISION

For the reasons stated at the hearing and confirmed above, the appeals of Mr. Rubin, Mr. Fasullo and the CVRD are dismissed.

Alan Andison, Chair
Environmental Appeal Board

March 3, 2003