



# Environmental Appeal Board

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## **APPEALS NO. 2002-PES-009(a) & 2002-PES-010(a)**

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

<b>BETWEEN:</b>	Cowichan Valley Regional District Daniel Rubin on behalf of BC Pathways	<b>APPLICANTS</b>
<b>AND:</b>	Deputy Administrator, Pesticide Control Act	<b>RESPONDENT</b>
<b>AND:</b>	Lou Fasullo on behalf of Shawnigan Water.org TimberWest Forest Limited	<b>THIRD PARTIES</b>
<b>AND:</b>	Cowichan Tribes	<b>PARTICIPANT</b>
<b>BEFORE:</b>	A Panel of the Environmental Appeal Board Alan Andison, Chair	
<b>DATE:</b>	Conducted by way of written submissions concluding on January 14, 2003	
<b>APPEARING:</b>	For the Applicants: Cowichan Valley Regional District    Jennifer Forrest Daniel Rubin    Daniel Rubin For the Third Parties: Lou Fasullo    Lou Fasullo TimberWest Forest Limited    Nicholas Hughes, Counsel	

## **STAY DECISION**

### **APPLICATIONS**

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 Limited ("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), Daniel Rubin (on behalf of BC Pathways), and TimberWest

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.

This decision addresses the applications for a stay of the PMP. These applications were conducted by way of written submissions.

## **BACKGROUND**

In November 2000, TimberWest submitted an application to prepare a PMP to the Deputy Administrator. Notification of the development of the PMP and solicitation for public and stakeholder input was then done by means of advertising in local papers. The advertisement was published in two editions of the Alberni Valley Times, Campbell River Courier-Islander, Comox Valley Record, Nanaimo Daily News, Ladysmith-Chemainus Chronicle, Parksville-Qualicum Beach News Weekender, Sooke Mirror, The Cowichan News Leader, and The Lake Cowichan Gazette in December 2001. In addition, 17 First Nations, 6 Indian Bands, and 6 First Nations Groups were notified of the proposed PMP. On August 15, 2002, TimberWest submitted a final draft PMP to the Deputy Administrator for approval.

On September 15, 2002, the Deputy Administrator approved the PMP submitted by TimberWest, subject to a number of conditions that form a part of the approved PMP.

The term of the PMP is from August 15, 2002 to August 15, 2007. The PMP covers the operating area of TimberWest's Cowichan Woodlands Operations, which consists of TimberWest's private lands lying east of the E and N Railway Grant Boundary from Sooke to Upper Campbell Lake, including the communities of Sooke, Shawnigan Lake, Duncan, Lake Cowichan, Youbou, Chemainus, Ladysmith, Nanaimo, Qualicum Beach, Parksville, Port Alberni, Cumberland, Courtenay, Campbell River, within Managed Forest Units 7, 8, 65 (Cowichan Woodlands Operation), Woodlot Licence 085 – Union Bay. Also included in the PMP are fee simple real estate lands located in the same geographic area. The PMP authorizes TimberWest to use herbicides to control vegetation on those lands, subject to the terms of the PMP and the conditions imposed by the Deputy Administrator. The specific purposes of the PMP include vegetation management for site preparation, seed control, conifer release, plantation maintenance, maintenance of access roads, utilities, borrow pits and industrial yards. The Pest Management Plan also covers the use of deer repellents for browse control.

Four basic Operating Zones are recognized in the PMP, based on site characteristics and concerns identified in consultations during the PMP preparation. The Operating Zones are distinguished by the kind of treatments permitted or by the required pre-treatment notification. The following are the definitions of the four Operating Zones:

- **Operating Zone 1** – Herbicide treatments carried out as per the Integrated Pest Management strategies and practices in this plan.

- **Operating Zone 2**– Herbicide treatments carried out as per the Integrated Pest Management strategies and practices in this plan. Requires treatment notices to be provided to stakeholders.
- **Operating Zone 3** – Herbicide treatments carried out as per the Integrated Pest Management strategies and practices in this plan. Protection of cultural or historical values requires detailed notification to be submitted to the Ministry of Water, Land, & Air Protection. The PMP states that there is currently no Operating Zone 3 in the Cowichan Woodlands Operation.
- **Operating Zone 4** – No herbicides will be used.

The PMP outlines how TimberWest will decide if brushing treatments are required and which treatment methods it should select. Chemical treatment techniques are individual tree injection (i.e. hack and squirt), cut stump and swab, ground foliar with backpack or hose and gun, basal spray and thinline. Manual treatment techniques are girdling, powersaw, hand cutting, knockdown and pulling.

The potential target species are red alder, big-leaf maple, douglas maple, vine maple, bitter cherry, trembling aspen, black cottonwood, willow, sitka alder, arbutus, salmonberry, thimbleberry, elderberry, black raspberry, himilayan blackberry, trailing blackberry, bracken fern, fireweed, salal, scotch broom, gorse and Japanese knot weed. The herbicides used are Vision (*glyphosate*), Forza (*glyphosate*), and Release (*triclopyr*). The bio-herbicide *Chondrostereum purpureum*, a fungus, may be used in treating red alder. *Chondrostereum purpureum* is currently being tested as a bio-herbicide in Canada. It is not yet a registered pesticide in Canada and is currently being used on a trial basis. It is included in the PMP as an option when or if it becomes available for commercial use. Deer repellents Plantskydd and Tree Guard may be used to protect planted seedlings. The surfactant Sylgard 309 may be used in treating “late season” Scotch Broom.

Section 6 of the PMP contains a number of requirements intended to address environmental protection, including pesticide free zones and buffer zones around domestic water intakes and wells, lakes, streams, wetlands, and other water bodies. In addition, section 7 of the PMP contains specifications and standards concerning personnel qualifications, worker safety, pesticide handling, boundary layout, signs notifying of pesticide treatments, site monitoring, pesticide application procedures, project implementation, reporting, and maps. If TimberWest selects a chemical brushing method under the PMP, it must prepare a Detailed Site Assessment for each site proposed for pesticide treatment. Section 7.10 of the PMP stipulates that the Detailed Site Assessments must include, among other things, treatment method and timing, the herbicides to be used, site characteristics (where applicable), target species, and a field map showing features such as waterbodies, wetlands and watercourses, domestic water intakes and wells, and fish and wildlife values.

The conditions imposed by the Deputy Administrator address pesticide use, notification prior to treatment, and additional standards for pesticide use. In particular, the Deputy Administrator imposed additional pesticide free zones and designated all zones indicated on the map attached to the PMP that had not been harvested before September 13, 2002 as Operating Zone 3. He further required that TimberWest must apply for independent approvals before using pesticides on all sites within Operating Zone 3.

On October 7, 2002, Lou Fasullo filed an appeal, on behalf of Shawnigan Water.org, of the decision to approve the PMP.

On October 11, 2002, TimberWest filed an appeal of the decision to approve the PMP.

On October 15, 2002, the CVRD filed an appeal of the PMP.

On the same date, Daniel Rubin filed an appeal, on behalf of BC Pathways, of the PMP. In his Notice of Appeal, Mr. Rubin requested a stay of the PMP pending the Board's decision on the merits of the appeal.

In a letter dated October 29, 2002, the CVRD also requested a stay of the PMP.

In a letter dated October 23, 2002, the Cowichan Tribes requested full party status in the appeals of the PMP.

By a letter dated October 24, 2002, the Board invited the Cowichan Tribes to participate in the appeals as a Participant, and stated that their participation would be limited to the grounds of appeal submitted by the Appellants.

Neither Mr. Fasullo nor the Cowichan Tribes provided submissions on the stay applications.

TimberWest opposes the applications for a stay of the PMP.

In a letter dated December 5, 2002, the Deputy Administrator advised that he had no comments on the stay applications, except to state that he had no information that would lead him to alter his decision to approve the PMP subject to the existing terms.

## **ISSUE**

The sole issue arising from this application is whether the Panel should grant a stay of the PMP pending a decision on the merits of the appeals.

Section 15(8) of the *Pesticide Control Act* grants the Board the authority to order a stay. Section 15(8) states:

An appeal does not act 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 onus is on the Applicants 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.

The CVRD did not directly address this stage of the test. However, the CVRD raises issues in its submissions concerning the effects of the proposed pesticide use on downstream domestic water users and fish habitat.

Mr. Rubin submits that the appeals raise serious issues. In particular, he submits that the PMP contains very little site specific information, does not indicate where the pesticides will be applied, how much will be applied at each site, or the likelihood of damage to the health of downstream water users.

TimberWest submits that the Applicants have not established any serious issue to be decided. TimberWest argues that the Applicants have raised general concerns about the authorized pesticide use without providing any site-specific evidence of an adverse effect. TimberWest submits that the matters raised by the Applicants amount to concerned speculation, which do not establish the existence of a serious issue.

The Panel finds that the applicants have raised issues concerning the potential adverse effects on human health and the environment that may result from the authorized use of pesticides within the area covered by the PMP. The Panel finds that the Applicants have raised serious issues, which are not frivolous or vexatious, or pure questions of law.

Irreparable Harm

At this stage of the *RJR-MacDonald* test, the Applicants must demonstrate that they will suffer irreparable harm if a stay is not granted. As stated in *RJR-MacDonald*, at 405:

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicant's 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.

The CVRD submits that the PMP covers land in watersheds that provide water to "thousands" of households, and that drain into "some of the best fish-rearing habitat "in the world." The CVRD submits that some complex organic chemicals are "bio-accumulative." The CVRD argues that designated safe levels of exposure to certain chemical compounds are constantly being decreased as more field information is gathered, at the expense of environmental quality and, in some cases, public health. The CVRD maintains that the watersheds covered by the PMP are not a suitable venue for this "ongoing experimentation."

In support of its submissions, the CVRD refers to a report published in 2000 by the House of Commons Standing Committee on Environment and Sustainable Development, titled "Pesticides: Making the Right Choice for the Protection of Health and the Environment." The CVRD submits that this report cautions that risk-based exposure modeling does not apply to some groups in society, such as children. However, the CVRD did not provide a copy of this report. The CVRD also refers to a letter from Dr. Keith Martin, M.D., M.P., concerning aerial spraying of Vision and Release on the west coast of Vancouver Island by a company called Merrill & Ring. A copy of this letter was provided to the Panel. However, the Panel notes that the PMP covers a different area and does not authorize aerial spraying of pesticides.

Finally, the CVRD submits that the continued application of pesticides to lands in the Cowichan Valley undermines the legitimacy of the appeal process. The CVRD argues that procedural fairness appears to require that such activities be ceased pending the outcomes of the appeals.

Mr. Rubin submits that the PMP contains insufficient site-specific information and is weak on scientifically based public safety assurances. Mr. Rubin maintains that there is no way for the public to determine the level of health risk they are being asked to assume. He further argues that it is unwise to accept "generic" product approvals by the federal government as proof that a pesticide is safe. He submits that the compounds that result from glyphosate's degradation pose a potential health risk that has not been addressed. He also submits that glyphosate in stream run-off is "moderately toxic" to Pacific salmonids, and the destruction of ground cover by pesticides will cause increased amounts of soil to flow into streams and drinking water.

In support of his submissions, Mr. Rubin quotes from the Auditor General of Canada's "2002 Report of the Commissioner of the Environment and Sustainable Development" concerning the federal government's scientific investigation of existing industrial chemicals and pesticides and its management of their use. In addition, Mr. Rubin provided excerpts of several abstracts from scientific journals or articles. These abstracts discuss the behaviour of glyphosate and its metabolite in some coastal British Columbia streams, the behavior of glyphosate in certain soils, and the safety of Roundup (an agricultural pesticide with the same active ingredient as Vision) in relation to humans who eat foods treated with Roundup and in animals exposed to the pesticide under laboratory conditions.

TimberWest submits that the Applicants have presented no site-specific evidence to support a conclusion that irreparable harm will result if a stay is denied. TimberWest maintains that it, in contrast, has provided evidence from Dr. Frank Dost, Doctor of Veterinary Medicine, that no harm will result from the authorized use of the pesticides. In a report dated November 18, 2002, Dr. Dost states that the use of pesticides as described in the PMP "will not result in adverse effects on the health of humans, livestock, wildlife, fish or lower terrestrial or aquatic organisms," although he notes that adverse effects in this context do not include the "intended effect on vegetation." He also states that the 100-metre setback from domestic water sources is "more than adequate" to protect the integrity of the water source.

TimberWest argues that Mr. Rubin has only provided unverified excerpts of articles to support general allegations concerning the safety of Vision. TimberWest submits that many of Mr. Rubin's references lack context or are out of context, in that they are concerned with agricultural uses of glyphosate. Similarly, TimberWest argues that the CVRD makes highly generalized submissions about bio-accumulation without referring to a particular chemical.

TimberWest further argues that, although the Applicants raise concerns about domestic water supplies, they do not provide evidence that such water supplies are at risk from the use of pesticides under the PMP. TimberWest submits that the PMP incorporates a number of measures to protect community water supplies and domestic water intakes, including:

- 100-metre pesticide free zones for water supplies;
- mapping and delineation of all community water supplies and domestic water intakes prior to pesticide use;
- provision of notices before pesticide applications; and
- restrictions on the timing of applications (s. 5.4.2 of the PMP states that Vision cannot be applied during heavy rains when the individual tree injection method is used).

In addition, TimberWest submits that Mr. Rubin's submissions concerning the contamination of streams and creeks with soil (which may have pesticide residue)

are unsubstantiated by scientific evidence. TimberWest argues that the conditions imposed in the PMP and the Deputy Administrator's decision provide adequate protection through pesticide free zones, buffer zones, and the condition in section 5.4.2 prohibiting the use of Vision during heavy rains.

The Panel finds the Applicants have provided submissions regarding general health and environmental concerns with the use of pesticides. The Panel finds that the Applicants have provided no evidence to establish that the use of pesticides in accordance with the conditions in the PMP and the Deputy Administrator's decision will result in irreparable harm, if a stay is not granted.

In addition, the Panel has considered the conditions attached to the PMP to protect community drinking water supplies and domestic water intakes. These include the requirement for a 100-metre pesticide free zone around all community drinking water supplies and domestic water intakes, buffer zones to protect the integrity of the pesticide free zones, and the requirement to map all water supplies, intakes, and ground wells before applying pesticides. In addition, the Panel notes that under section 6.1 of the PMP, watersheds containing licensed water intakes and community water supply areas are mapped as Operating Zone 2. Section 6.1 of the PMP requires additional pesticide free zones and buffers in Operating Zone 2, including a minimum 10-metre pesticide free zone around all wet or dry streams, fisheries sensitive zones, classified wetlands, and lakes, as well as 5 metre pesticide free zones along all flowing ditches that are not fish habitat. Furthermore, a notification of intention to treat must be provided to all water purveyors at least 14 days prior to treatment.

With respect to the CVRD's argument that the legitimacy of the appeal process would be undermined if a stay is denied, the Panel notes that the PMP is valid until August 2007, and there is no indication that TimberWest intends to treat the entire area covered by the Plan during the 2002-2003 season. Therefore, the appeal process would not be rendered moot if any pesticide treatments occurred before the Board issues a decision on the merits of appeals, because only some areas covered by the PMP may have been treated with pesticides.

In conclusion, the Panel finds that the Applicants have not established that denying a stay would cause irreparable harm to their interests concerning human health or the environment, if a stay were denied.

#### Balance of Convenience

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

The CVRD submits that chemical treatments are not the only option for brush control, and, therefore, a stay of the PMP will not result in a cessation of brushing and weeding operations pending a decision on the merits of the appeals. The CVRD suggests that TimberWest could use manual brushing methods if a stay is granted. The CVRD maintains that a "highly precautionary approach" should be taken in light



of the importance of the treatment area to drinking water supplies and fish habitat, whereby all other methods should be comprehensively examined.

Mr. Rubin submits that the balance of convenience favours granting a stay of the permit. He submits that the risk of "poisoning" watersheds across southern Vancouver Island outweighs the benefits to TimberWest of a shortened growth cycle for second growth forests. In addition, Mr. Rubin refers to paragraphs 31-32 of the Supreme Court of Canada's decision in *114957 Canada Ltée. (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] S.C.J. 42 (Q.L.) (hereinafter "*Spraytech*"), which address the "precautionary principle."

TimberWest submits that the balance of convenience weighs in favour of denying a stay of the PMP.

With respect to the Applicants' arguments that the Panel should take a "precautionary approach" or consider the "precautionary principle" in considering vegetation control options, TimberWest notes that the Board recently considered the precautionary principle extensively in *Josette Wier v. Deputy Administrator, Pesticide Control Act* (Appeal No. 2001-Pes-003(a), July 23, 2002) (unreported) (hereinafter "*Wier*"). TimberWest cites the following findings in that decision:

In summary, the majority decision in *Spraytech* does not indicate that there should be a presumption that the legislature intended the *Act* or the *Regulation* to reflect the precautionary principle, and there is no clear indication of such intention in the statutory provisions themselves.

**Therefore, there is no basis for concluding that the administrator and the Board are obligated to consider or apply the precautionary principle in applying the two-step test...**

[emphasis added in TimberWest's submissions]

TimberWest notes that the "two-step test" referred to is the test applied when considering the merits of an appeal, i.e. whether the authorized pesticide use will cause an adverse effect and, if so, whether the adverse effect is unreasonable. TimberWest argues that, since there is no obligation to apply the "precautionary approach" when determining the merits of an appeal, the Applicants' argument that such an approach should be applied on a stay application cannot be maintained.

TimberWest notes that the PMP clearly states that TimberWest uses vegetation control methods other than pesticides, but argues that manual brushing methods are inherently more dangerous to field crews due to the risk of cuts from machetes or chain saws. TimberWest states that it and its contractors have sustained 5 such injuries over the past 2½ years resulting in lost work.

In addition, TimberWest argues that the following factors tip the balance of convenience in favour of denying a stay of the PMP:

- treatment is required for seedling survival;

- seedling mortality will jeopardize a statutory obligation to achieve Successfully Regenerated Stand ("SRS") status;
- failure to achieve SRS status will cause damage to TimberWest's environmental record and jeopardize its corporate SRS objectives;
- failure to achieve SRS status may jeopardize TimberWest's Sustainable Forestry Initiative environmental certification;
- further replanting may be required causing redisturbance to cutblocks and the access routes to those cutblocks;
- TimberWest may lose significant financial resources expended in relation to proposed treatments; and
- loss of growing potential and additional costs from ineffective and uneconomical vegetation control will make TimberWest less competitive globally.

In support of its submissions on the balance of convenience, TimberWest provided an affidavit sworn by James J. Maselj, a Registered Professional Forester and Forestry Supervisor with TimberWest.

The Panel has considered the Applicants' assertion that the Panel should take a "precautionary approach" or consider the "precautionary principle" in considering alternative treatment options. However, the Panel notes that the Applicants made no legal submissions regarding how the decision in *Spraytech* should be applied in interpreting section 15(8) of the *Act*, or how the decision may affect the legal test for a stay application as set out in *RJR-Macdonald*.

In this case, the Panel accepts TimberWest's submissions with respect to the Board's previous findings in *Wier*. Specifically, the Panel finds that, given the finding in *Wier* that there is no requirement to presume that the legislature intended the *Act* or the *Regulation* to reflect the precautionary principle, and that there is no clear indication of such intention in the relevant statutory provisions, the Panel is not required to apply or consider the precautionary principle in the context of a stay application under section 15(8) of the *Act*. Therefore, the precautionary principle will not be considered with respect to the consideration of different vegetation control options in weighing the balance of convenience.

The Panel has already found that the Applicants have failed to establish that there will be any irreparable harm to their interests if a stay is refused. While the Applicants indicate, and TimberWest acknowledges, that alternatives to pesticides are available to TimberWest, the Applicants have provided no evidence concerning whether these alternatives are practical, cost-effective, or safe for use in the area covered by the PMP. In contrast, TimberWest has provided evidence that manual brushing is less effective, more expensive, and poses a risk to worker safety.

With respect to the potential harm to TimberWest's interests if a stay is granted, the Panel notes that a stay would result in TimberWest being unable to apply

pesticides in accordance with the PMP during the period before the appeal is decided. It is uncertain at this time when a final decision on the merits of these appeals may be issued. Accordingly, it is possible that a stay could impact TimberWest's 2003 treatment program. If that occurred, the Panel accepts that TimberWest could suffer unrecoverable financial losses as a result of seedling mortality, loss of growing potential, and/or costs associated with using less effective and less economical vegetation control methods.

Having regard to all the evidence and arguments presented, the Panel finds that the Applicants have not established that the potential for harm to human health or the environment, if a stay is not granted, outweighs the potential harm to TimberWest's interests in applying pesticides for brushing, if a stay is granted.

### **DECISION**

The Panel has considered all the submissions and arguments made, whether or not they have been specifically referenced herein.

For the above reasons, the Panel finds that TimberWest may proceed with the pesticide use under the PMP prior to the issuance of a final decision on the appeal.

The applications for a stay are denied.

Alan Andison, Chair  
Environmental Appeal Board

January 16, 2003