



Environmental Appeal Board

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APPEAL NO. 2003-PES-011(a)

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

BETWEEN:	Nak'azdli Band Council	APPELLANT
AND:	Deputy Administrator, Pesticide Control Act	RESPONDENT
AND:	Canadian Forest Products Ltd.	THIRD PARTY
BEFORE:	A Panel of the Environmental Appeal Board Alan Anderson, Chair	
DATE OF HEARING:	Conducted by written submissions concluding on September 22, 2003	
APPEARING:	For the Appellant: Lawrence Fast, Counsel For the Respondent: Dean Cherkas For the Third Party: John J.L. Hunter, Q.C., Counsel	

STAY DECISION

APPLICATION

On July 30, 2003, Dean Cherkas, Deputy Administrator, *Pesticide Control Act*, for the Omineca-Peace Region, Ministry of Water, Land and Air Protection (the "Deputy Administrator"), issued an Approval for pesticide use (the "Approval") to Canadian Forest Products Ltd. ("Canfor"). The Approval authorizes Canfor to use pesticides to control vegetation on 7 cutblocks within its Carrier and Mossvale Operating Area in accordance with Pest Management Plan No. 124-340-99/04 (the "PMP"). The cutblocks to be treated are located near Fort St. James, B.C., and are within the traditional territory claimed by the Nak'azdli First Nation.

On August 28, 2003, the Nak'azdli Band Council (the "Nak'azdli Band") appealed the Approval and requested a stay pending a decision on the merits of the appeal.

This decision deals with the stay application. The application was conducted by way of written submissions.

BACKGROUND

On July 29, 1999, the Deputy Administrator approved the PMP, subject to certain terms and conditions. The PMP is valid for 5 years from that date, and describes integrated vegetation management processes that will be used to control vegetation competing with coniferous seedlings on cutblocks in Canfor's Prince George Regional Woodlands, which encompasses several Forest Licences held by Canfor. The PMP proposes both aerial and ground-based applications of the pesticide *Vision* (active ingredient glyphosate). Aerial treatments are applied using a helicopter, and treatments may be "broadcast" or "pilot discretion". Ground-based applications of the pesticide *Release* (active ingredient triclopyr) are also proposed in the PMP. The treatment method selected for a particular area depends on the site conditions and target species.

The PMP states that Canfor will submit a Notice of Intent to Treat ("NIT") to the Deputy Administrator, and the Band office of affected First Nations if treatment is proposed within their traditional territory, by March 31 of each year. NIT's include a treatment location map and a summary of the attributes of each cutblock proposed for treatment during that treatment season.

The Approval was issued on July 30, 2003, and states as follows:

The use of pesticides, in accordance with the Pesticide Control Act & Regulation, Pest Management Plan Approval, your PMP, and the conditions in this approval, is authorized for the following locations:

Site Description	Conditions for pesticide application
CP017-OCO174 Carrier	<ul style="list-style-type: none"> Proceed as proposed on the March 25, 2003 NIT.
CP809-MOS077 Carrier	<ul style="list-style-type: none"> Proceed as proposed on the March 25, 2003 NIT.
CP809-MOS081 Carrier	<ul style="list-style-type: none"> Proceed as proposed on the March 25, 2003 NIT.
CP811-001 Carrier	<ul style="list-style-type: none"> Proceed as proposed on the March 25, 2003 NIT.
CP828-MOS001 Mossvale	<ul style="list-style-type: none"> Proceed as proposed on the March 25, 2003 NIT.
CP858-001 Carrier	<ul style="list-style-type: none"> Proceed as proposed on the March 25, 2003 NIT.
CP858-002 Carrier	<ul style="list-style-type: none"> Proceed as proposed on the March 25, 2003 NIT.

Canfor's NIT dated March 25, 2003 proposes the application of *Release* using the basal bark method on the 7 cutblocks listed above. Basal bark applications involve

applying the pesticide directly to the lower bark or stems of the plant. Hand-held equipment or backpack sprayers are usually used for the application. According to Canfor's 2003 NIT and the detailed site assessments it prepared for the 7 cutblocks, Canfor intends to treat a total of 174.5 hectares within the cutblocks during 2003, and aspen is the target species in all treatment areas.

On July 25, 2003, the Nak'azdli Band appealed the Approval, on its own behalf and on behalf of the Nak'azdli First Nation and its members. The Nak'azdli Band's Notice of Appeal lists 24 grounds for appeal, which may be summarized as follows:

- The Nak'azdli Band claims aboriginal rights and title to a traditional territory that includes the cutblocks to be treated under the Approval, and those rights and title will be adversely affected, and effectively extinguished, by the pesticide uses authorized under the Approval;
- The use of pesticides under the Approval will adversely affect the livelihoods and health of members of the Nak'azdli Band who use trap lines, hunting grounds, salmon streams, and medicinal and food plants in the areas to be treated;
- The areas to be treated include sites of cultural and historical significance, including grave sites;
- The pesticides will be used without adequate identification and protection of trap lines, medicinal and food plants, salmon streams, water sources, seasonal residences, and traditional village sites;
- The aerial spraying of pesticides will occur while members of the Nak'azdli Band are occupying seasonal residences in or near the treatment areas;
- The Deputy Administrator failed to adequately consult and accommodate the Nak'azdli Band, and failed to confirm whether Canfor had done so, before issuing the Approval;
- The Approval was issued contrary to law, or alternatively, prematurely;
- All of the cutblocks to be treated are located in, near or on peoples' trap lines and other traditional use areas, and several of the cutblocks are located in environmentally sensitive areas used by important wildlife species, such as moose;
- The lands included within the ambit of the cutblocks are used by members of the Nak'azdli Band for trapping, fishing, hunting, and gathering berries, other foods, and traditional medicines, as they have done since time immemorial;
- The lands included within the ambit of the cutblocks contain seasonal residences that are used by members of the Nak'azdli Band, and those people will be resident on those lands when the treatments occur;
- The areas proposed for treatment include sites and areas of cultural and historical significance to the Nak'azdli Band and its members;

- The pesticides will contaminate drinking waters used by members of the Nak'azdli Band;
- The areas to be treated already contain heavy metals and other contamination, and are therefore more environmentally sensitive; and
- Because of the existing contamination, members of the Nak'azdli Band are at greater risk from the use of pesticides.

The Nak'azdli Band requests that the decision to issue the Approval be rescinded.

In their Notice of Appeal, the Nak'azdli Band also requested a stay of the Approval, pending a decision on the merits of the appeal.

The Deputy Administrator takes no position on the application for a stay.

Canfor opposes the stay application. In a letter dated September 8, 2003, counsel for Canfor stated that Canfor would not agree to a voluntary stay of the Approval. Canfor advised that its treatment program was scheduled to begin the week of September 8, 2003, and to be concluded by the end of September. Canfor advised that treatments could not be delayed beyond the end of September, and a stay would have the effect of ending the treatment program for 2003. Canfor also noted that the Appellant filed its Notice of Appeal and application for a stay on the last day before the expiry of the appeal period, putting all parties and the Board under unnecessary time pressure.

ISSUE

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

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.) ("*RJR-MacDonald*") 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 applicant, the Nak'azdli Band, to demonstrate good and sufficient reasons why a stay should be granted.

The Panel notes that the Nak'azdli Band's initial submissions on the stay application refer to aerial spraying of the pesticide *Vision*, which is not authorized by the Approval, rather than basal bark application of the pesticide *Release*, which is authorized by the Approval. Canfor also noted this and argued that the Nak'azdli Band's stay application is based upon a misconception. However, in its reply submissions, the Nak'azdli Band states that the second to final draft, rather than the final draft, of their initial submissions were inadvertently sent to the Board. The Nak'azdli Band advises that, in the final draft, the word "aerial" is not used and the phrase "Release and/or Vision" was used instead of "Vision." Consequently, the Panel has considered the Nak'azdli Band's initial stay submission based on the wording that would have been included if the final draft been submitted to the Board.

DISCUSSION AND ANALYSIS

Serious Issue

This branch of the test has the lowest threshold. As stated in *RJR-MacDonald* at pages 402-3, unless the case is frivolous or vexatious or is a pure question of law, as a general rule, the inquiry should proceed onto the next stage of the test.

The Nak'azdli Band argues that its appeal raises serious issues.

Counsel for Canfor did not directly address the question of whether there is a serious issue to be tried. However, Canfor submits that "This application can and should be decided on the test of irreparable harm."

The Panel has reviewed the Notice of Appeal, and finds that the Nak'azdli Band has raised serious issues to be tried. Among other things, the appeal raises questions about whether the use of pesticides under the Approval will adversely affect human health, the environment, and the aboriginal rights of members of the Nak'azdli Band. It also raises the issue of whether there was adequate consultation with the Nak'azdli Band. These issues are neither frivolous nor vexatious, nor pure questions of law.

Irreparable Harm

At this stage of the *RJR-MacDonald* test, the applicant must demonstrate that he or she 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 Nak'azdli Band submits that there will be irreparable harm to the interests and aboriginal rights of members of the Nak'azdli First Nation if pesticide treatments occur before the appeal is heard. Specifically, the Nak'azdli Band submits that:

- the proposed spraying will suppress plants such as raspberry, blueberry, willow, and birch/aspen/poplar that are central to the exercise of aboriginal rights and title by the Nak'azdli First Nation and its members;
- many of the proposed treatment areas are adjacent to creeks which are within watersheds that contain spawning grounds for salmon, and pesticides will be carried into these spawning grounds, resulting in irreparable harm to fish;
- most, if not all, of the wildlife used by members of the Nak'azdli First Nation will be adversely affected by the pesticide treatments, either through poisoning or by being forced to leave the area to find food. Moose use the area and feed extensively on willow, and grizzly bear also feed in the area;
- members of the Nak'azdli First Nation are already living in seasonal cabins in the areas that are to be treated, and requiring them to vacate those areas and stop living their traditional lifestyle without a full hearing of the appeal would constitute irreparable harm to their rights as Canadian citizens and their aboriginal rights guaranteed under section 35 of the *Constitution Act, 1982*;
- it is impossible, because of time constraints and the inability to determine the day-to-day location of people out on the land, for the Nak'azdli Band to inform those people of the proposed pesticide treatments, causing a risk of irreparable harm to their health and safety;
- given the terrain in the treatment areas, there is a "significant probability" that the spraying will directly contaminate the food and water supplies of members of the Nak'azdli First Nation, and indirectly contaminate their food supplies through the treatment of plants and water consumed by wildlife that form a substantial part of their traditional diet;
- the pesticide treatments will adversely affect the ability of members of the Nak'azdli First Nation to make their traditional livelihoods through fishing, trapping, hunting and gathering;
- denying a stay would negate the purpose of the appeal, since all of the treatments authorized in the Approval will be conducted if a stay is denied. Any infringement of the constitutionally guaranteed rights and title of the Nak'azdli First Nation should only occur after all of the facts and issues in question have been thoroughly canvassed in a hearing of the merits of the appeal; and
- the application of pesticides within the Nak'azdli First Nation's traditional territory in the absence of consultation and accommodation will cause an unjustifiable infringement of aboriginal rights and constitutes irreparable harm.

The Nak'azdli Band maintains that the harm to their rights and interests, if a stay is denied, could not be remedied in the event that their appeal succeeds. They submit that the interference of pesticides with their use of plants for food, medicines, and other cultural purposes is a significant infringement of their aboriginal rights that cannot be remedied through financial or other means. In addition, they submit that their freedom to choose pesticide-free foods and

medicines, which is a choice that other Canadians have, will be significantly impaired if a stay is denied.

Moreover, the Nak'azdli Band submits that irreparable harm will occur because it will take many years for treated plants to regenerate and for animals that rely on those plants to return. They note, for example, that willow patches are sources of food and shelter for bears, birds, and moose. During the period when plants are eradicated and animals are absent, members of the Nak'azdli First Nation will be unable to harvest plants and animals on which they rely, effectively extinguishing their aboriginal rights. The Nak'azdli Band submits that many people who live a traditional lifestyle are either elders or are unable to travel to find alternative resources. In addition, the traditional territory of the Nak'azdli First Nation is divided into "Keyohs" or areas that are used exclusively by one family group. Hunting and gathering outside of one's Keyoh without permission is prohibited. The Nak'azdli Band maintains that the Keyoh's of the Pius, Prince, Tylee, and A'huile families are located on the cutblocks to be treated, and those families will be especially affected by the pesticide treatments.

In support of those submissions, the Nak'azdli Band provided the affidavit of Leonard Thomas, the elected Chief of the Nak'azdli Band Council. Chief Thomas attests to the validity of the statements of facts asserted by the Nak'azdli Band. Appended to his affidavit are a number of documents including 4 reports prepared by Paul Blom, a registered professional forester and biologist employed by Northern Pacific Forestry Inc. To prepare those reports, Mr. Blom and various representatives of the Nak'azdli First Nation, including elders and Keyoh holders in the affected area, visited 5 of the 7 cutblocks to be treated; namely, numbers 017-OCO174, 809-MOS077, 828-MOS001, 858-001, and 858-002. Chief Thomas states that those cutblocks were chosen for financial reasons only, and there is no substantial difference in the use of the other 2 cutblocks by members of the Nak'azdli First Nation.

In Mr. Blom's reports, he describes the condition of seedlings and brush on the 5 cutblocks, and provides his opinion on the need for pesticide treatments in 2003. The reports also summarize comments provided by members of the Nak'azdli First Nation concerning the traditional use of areas in and around the 5 cutblocks by the Pius, Prince, Tylee, and A'huile families. According to Mr. Blom's reports, members of the Nak'azdli First Nation use the areas in and around the 5 cutblocks for berry picking, gathering rose hips and yarrow for medicinal purposes, and hunting bear, moose and grouse. In addition, the area in and around cutblock 809-MOS077 is important for trapping furbearing animals, and elk droppings were observed in the area that was ribboned for pesticide treatment. The reports also state that cutblocks 858-001 and 858-002 are adjacent to moose calving areas, and cutblock 017-OCO174 contains willow that is frequently browsed by moose.

In support of their submissions, the Nak'azdli Band also cite the Board's recent decision in *Nak'azdli Band Council v. Deputy Administrator, Pesticide Control Act* (Appeal No. 2003-PES-008(a), August 21, 2003), [2003] B.C.E.A. No. 28 (Q.L.) (hereinafter *Nak'azdli Band No. 1*), which dealt with a previous stay application by the Nak'azdli Band.

Canfor submits that the Nak'azdli Band has not shown that it will suffer irreparable harm if a stay is denied. Canfor maintains that the Nak'azdli Band has made no case that manual backpack treatment will have any of the consequences they have suggested. In addition, Canfor notes that the treatments will only target aspen, and not willow trees, berries, or vegetation that is used for medicinal purposes. Canfor submits that there is no evidence that aspen is used for medicinal purposes, or that wildlife feed on aspen.

Canfor also notes that there are several differences between the facts in the present case and those in *Nak'azdli Band No. 1*. Canfor notes that *Nak'azdli Band No. 1* involved aerial spraying of the pesticide *Vision*, while in the present case there will be no aerial spraying of pesticides and no use of *Vision*. Canfor notes that, in the present case, pesticides will be applied to the target plant using backpack equipment, in contrast to aerial spraying which is not plant-specific or site-specific.

In support of its submissions, Canfor provided the affidavit of Tanya Kruisselbrink, a Forestry Supervisor employed by Canfor. Attached to her affidavit are silviculture prescriptions and detailed site assessments for the 7 cutblocks.

Ms. Kruisselbrink attests that *Release* will be applied as follows:

The Application of herbicide for the seven cutblocks will not be by aerial spraying, but rather by what is termed basal bark application. Under this procedure, the herbicide is applied directly to individual stems using a low pressure backpack with a fan nozzle. The nozzle is used to apply a thin band of chemical to the stem of the vegetation which has been targeted. For the program challenged in this appeal, the vegetation being targeted is (*Populus tremuloides*) (trembling aspen).

...

The basal bark application is not a broadcast application like aerial spraying. It is a single stem treatment with very low potential for impacting vegetation other than the targeted aspen...

The question for the Panel at this stage is whether the Nak'azdli Band has shown that it will suffer irreparable harm if a stay of the Approval is denied. In assessing claims of irreparable harm, the Panel is guided by the following statement in *RJR-MacDonald*, at 405:

"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 Panel finds that the Nak'azdli Band has not established that it, or the people it represents, will suffer irreparable harm if a stay is denied. Mr. Blom's reports indicate that the areas in and around cutblocks 017-OCO174, 809-MOS077, 828-MOS001, 858-001, and 858-002 are used by the Pius, Prince, Tylee, and A'huile families for hunting, and gathering berries, rose hips and yarrow. In addition, the area in and around cutblock 809-MOS077 is important for trapping, one of the cutblocks contains willow that moose feed on, and 2 cutblocks are adjacent to moose calving grounds.

However, there is no evidence that the pesticide treatments authorized under the Approval will have any effect on the plants and animals that are used by members of the Nak'azdli First Nation. Under the Approval, aspen is the only plant to be treated with pesticides. Neither willow nor any of the plants used by members of the Nak'azdli First Nation for food or medicinal purposes are target species. The Approval authorizes only basal bark treatments, where the pesticide is applied to individual aspen plants. Consequently, the Panel finds that the Board's decision in *Nak'azdli Band No. 1* does not assist the Nak'azdli Band in this application. That case involved aerial spraying of pesticides, which, as Canfor states, is not plant-specific or site-specific. In that case, the Board was also concerned that people "out on the land" living a traditional lifestyle could be inadvertently exposed to pesticides, which posed a risk to their health. However, the present case involves no aerial spraying of pesticides. Therefore, the risk of people and non-target plants being inadvertently exposed to pesticides is much lower in this case than in *Nak'azdli Band No. 1*. In any event, the evidence in this case does not establish that any such risk, if present, would cause irreparable harm to the Nak'azdli Band.

Moreover, there is no evidence that the treatment of aspen will cause irreparable harm to members of the Nak'azdli First Nation, or the wildlife that they hunt and trap. Specifically, there is no evidence that aspen is used for food or medicinal purposes, or that wildlife feed on aspen. Furthermore, there is no evidence that treatments of aspen will affect the moose calving areas located adjacent to some of the cutblocks.

For these reasons, the Panel finds that the evidence provided by the Nak'azdli Band does not establish that the Nak'azdli Band, or the people it represents, will suffer irreparable harm if a stay is denied with respect to cutblocks 017-OCO174, 809-MOS077, 828-MOS001, 858-001, and 858-002.

In addition, the Nak'azdli Band did not provide site-specific evidence with regard to its use of the other 2 cutblocks. Although Chief Thomas attested that those cutblocks are used in a similar manner by members of the Nak'azdli First Nation, the Panel was provided with no site-specific evidence about their use of those areas. Therefore, the Panel finds that there is insufficient evidence to establish that the Nak'azdli Band, or any of the people it represents, will suffer irreparable harm if a stay is denied with respect to cutblocks 809-MOS081 and 811-001.

In summary, the Panel finds that the Nak'azdli Band has failed to establish that it, or the people it represents, will suffer irreparable harm if a stay is denied.

Balance of Convenience

At this stage of the test, the Panel must determine which of the parties will suffer greater harm from the granting of, or refusal to grant, the stay application pending a determination of the appeal on the merits. In this case, the potential for harm to the Nak'azdli Band, if a stay is denied, must be balanced against the harm that could be suffered by Canfor if a stay is granted.

The Nak'azdli Band submits that the balance of convenience favours granting a stay. Further to its submissions regarding the effects of the pesticides on plants and wildlife that are used by members of the Nak'azdli First Nation, the Nak'azdli Band argues that any actions which interfere with their traditional way of life should only be permitted after a full hearing of the appeal and full compliance with the Crown's legal obligation to consult before interfering with constitutionally protected aboriginal rights.

The Nak'azdli Band further submits that the public interest favours a stay of the Approval. In this regard, the Nak'azdli Band cites a number of judicial decisions in support of the proposition that allowing the matter under appeal to proceed before a full hearing of the merits would render the appeal meaningless and erode public confidence in the appeal process.

In addition, the Nak'azdli Band argues that there will be little if any long-term effect on coniferous seedlings if the proposed spraying is delayed until after the Board issues a decision on the merits of the appeal. In this regard, the Nak'azdli Band refers to Mr. Blom's reports, in which he states that the 5 blocks he visited could wait one more year before manual treatment, without compromising the free-growing status of the areas requiring vegetation control.

Counsel for Canfor did not directly address the balance of convenience. However, Ms. Kruisselbrink states in her affidavit that Canfor has legal obligation to ensure that reforested trees reach "free growing" status within a specified period of time. She also states:

Given our legal responsibility to successfully reforest these sites, Canfor felt that it was critical to proceed with the prescribed herbicide treatments in this case. As the window of opportunity for conducting basal bark treatment is relatively short, and is dependent upon weather and site conditions, it has been necessary to continue treatment this week in order to ensure that the work gets done before weather conditions create operational restrictions. As a result, work continues and I expect that the work will be complete by early next week.

The Panel has carefully considered the submissions before it, and the extraordinary nature of stays as an interlocutory remedy.

There is no dispute that Canfor has a statutory responsibility to achieve "free to grow" status on its cutblocks within a specific time frame. Ms. Kruisselbrink indicates that Canfor plans to be finished its treatments under the Approval by the

time this decision is released. If so, the stay would have no effect on Canfor's use of pesticides under the Approval.

The Panel has already found that the Nak'azdli Band will not suffer irreparable harm if a stay is denied. With respect to the applicant's argument that denying a stay would negate the purpose of the appeal because the treatments authorized in the Approval would be completed before the appeal was heard, the Panel notes that the Nak'azdli Band's appeal may already be moot, if pesticide treatments were completed as planned according to Ms. Kruisselbrink. If treatment were completed earlier this week, as planned, then a stay would not benefit the Nak'azdli Band.

With regard to the timing of this decision, the Panel notes that the Nak'azdli Band waited until the last possible day to file its appeal. The Approval was issued on July 30, 2003, and the Nak'azdli Band filed its Notice of Appeal on August 28, 2003, the last day before the 30-day appeal period expired. In addition, the Nak'azdli Band expressed no objection the schedule for submissions on the stay application, as set out in the Board's letter to the parties dated September 3, 2003. The Nak'azdli Band filed its final reply submission on Friday, September 19, 2003, which was before the Board's deadline of Monday, September 22, 2003, but was after Canfor had begun pesticide treatments and was only a few days before Canfor anticipated completing the treatments. In addition, the Nak'azdli Band states in their submissions that they met with Canfor on July 21, 2003, at which time Canfor advised that it would commence treatments after July 26, 2003. Consequently, it is evident that the Nak'azdli Band was aware of Canfor's plans for conducting pesticide treatments within a short time frame, and that those treatments would likely be completed by the week of September 22, 2003, yet the Nak'azdli Band stated no objection to the Board about the schedule for submitting submissions on the stay application.

In these circumstances, the Panel finds that the balance of convenience favours denying the application for a stay.

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 application for a stay is denied.

Alan Andison, Chair
Environmental Appeal Board

September 26, 2003