



Environmental Appeal Board

APPEAL NO. 99-PES-03(a) through 08(a)

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

BETWEEN:	Fort Nelson First Nation	APPELLANTS
AND:	Deputy Administrator, Pesticide Control Act	RESPONDENT
AND:	Slocan Forest Products Ltd.	PERMIT HOLDER
BEFORE:	A Panel of the Environmental Appeal Board Toby Vigod, Chair	
DATE OF HEARING:	Conducted by written submissions concluding on June 24, 1999	
APPEARING:	For the Appellant: Carole Corcoran, Counsel Lawrence R. Fast, Counsel	
	For the Respondent: Darlene A. Leavitt, Counsel	
	For the Permit Holder: Clifford G. Proudfoot, Counsel	

STAY APPLICATION

Slocan Forest Products Ltd. ("Slocan") was issued six Pesticide Use Permits (the "Permits") for the use of the herbicide glyphosate ("Vision") on various cutblocks scattered throughout the Fort Nelson area in northeastern British Columbia. R.W. Girard, Deputy Administrator for the Omineca-Peace, Cariboo and Skeena Regions, granted the Permits in late March 1999. Permit No. 312-041-99/01 was issued on March 26, 1999. Permits No. 312-037-99/01, 312-038-99/01, 312-039-99/01, 312-040-99/01, and 312-042-99/01 were issued on March 29, 1999.

On April 26, 1999, the Fort Nelson First Nation (the "First Nation") appealed the decision to issue the Permits. In its Notice of Appeal, the First Nation requested a stay of the Permits, pending the Board's decision on the merits of the appeal.

BACKGROUND

Slocan proposes to use Vision on cutblocks to clear grasses, brush, and young deciduous trees that compete with planted and naturally regenerated young coniferous trees. The target species in the Permits include grass, fireweed, rose, alder, willow, aspen, cottonwood, birch, raspberry, cranberry, dogwood and *rubus* spp. The six Permits propose treatment on approximately 3,178 hectares of forest land, which are within the area subject to Treaty No. 8. The First Nation claims

that it has treaty rights under Treaty No. 8, which was signed by the Slaves and the Sicanees of Fort Nelson in 1910. Treaty No. 8 protects the right of Indians to "pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered ... saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."

As issued, each of the Permits puts several conditions on Slocan's use of the herbicide. The Permits allow either aerial-rotary or a combination of aerial-rotary and backpack application of the herbicide. Spraying is permitted during the period beginning on May 20, 1999, except for Permit No. 312-037-99/01, which begins on July 15, 1999, and ending on September 15, 2001. A total of 30 cutblocks are scheduled for treatment starting in 1999, with 19 more cutblocks scheduled for treatment starting the following year. Of the blocks scheduled for treatment beginning in 1999, 11 must undergo site inspections by the Ministry of Environment, Lands and Parks before spraying may occur, and 15 are approved for spot applications only. All Permits require public notification by posting signs at each of the main access points to the treatment areas that shall be maintained for one month following treatment.

Other conditions found in all of the Permits that are relevant to this application for a stay are summarized below. The letters identifying each paragraph are taken from Permit No. 312-037-99/01, and may be different in other Permits.

- J. All pesticide use shall be carried out by and under the direct supervision of an individual with a valid British Columbia Pesticide Applicator Certificate in the forestry category.
- K. The pilot responsible for the application of the pesticide shall possess a valid British Columbia Pesticide Applicator Certificate in the forestry category...
- ...
- Q. A minimum 10-metre pesticide free zone shall be established and maintained adjacent to the high water perimeter of all stream courses and waterbodies. The pesticide free zone shall be clearly marked prior to treatment. Applicators shall establish and maintain whatever size buffer zone that the topography and climate conditions require to ensure that the minimum 10-metre pesticide free zone is achieved. For aerial applications using a rotary wing aircraft, a 100-metre buffer zone is suggested.
- ...
- U. Spray drift shall be monitored during the aerial applications of the herbicide with test cards or moisture sensitive tape to help ensure the accuracy of the buffer zone establishment and the integrity of the pesticide free zones.
- ...

- W. For aerial applications, no pesticides shall be applied within a 30-metre radius around water intakes or wells used for domestic purposes.
- ...
- Y. When not in competition with conifers, direct treatment of the following wildlife (ungulate) forage species shall be avoided: ceanothus spp., douglas maple, red osier dogwood, saskatoon, mountain ash, rosa spp., salix spp. (Willows), and vaccinium spp.
- ...
- AA. For those blocks harvested prior to June 15, 1995 (implementation of the Forest Practices Code), having deciduous trees left as wildlife habitat, no clumps of trees shall be treated with herbicides or felled. A clump of trees is defined as 8 residual stems with 50% canopy closure within a 50 metre square area (1/4 hectare). Treatment may be conducted under the residuals. For blocks, harvested post June 15, 1995, if deciduous trees are part of the wildlife tree component, then no falling is permitted.... No herbicide treatment is authorized within the Wildlife Tree Patch.
- AB. A dry S6 stream or portions of a dry S6 stream located within 500 metres of a waterbody, containing or deemed to be fish habitat for Red or Blue listed fish species including arctic grayling, require the establishment and maintenance of a 10 metre pesticide free zone, unless otherwise specified by the Deputy Administrator. All other dry S6 streams may be treated/oversprayed with glyphosate.

The First Nation has raised concerns over the potential harmful effects of Vision on wildlife habitat and the treaty rights of First Nation members. They are particularly concerned that any negative effects on fish and wildlife would adversely affect their ability to pursue fishing, trapping and hunting rights that are protected in Treaty No. 8. The First Nation also submits that they were not properly and adequately consulted to ensure that their treaty rights would not be unjustifiably infringed by the proposed herbicide treatments.

The First Nation requests a stay of the Permits to ensure that no spraying occurs prior to a decision on the merits of the appeal. Alternatively, the First Nation asks that the Board request Slocan give an undertaking not to proceed with the permitted spraying. However, the Board has no statutory authority to require a party to give an undertaking.

Slocan opposes a stay of the Permits.

The Respondent takes no position on the issuance of a stay.

ISSUE

The sole issue before the Board on this preliminary application is whether a stay should be issued.

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.

DISCUSSION

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 First Nation claims that there are serious issues to be tried. The First Nation raises concerns about the lack of adequate consultation regarding their Treaty rights, and the adverse effects of herbicide spraying on human health and wildlife. They submit the spraying may affect their ability to conduct their livelihood and obtain food by hunting, trapping and fishing.

In response, Slocan argues that the First Nation has failed to demonstrate that there is a serious issue to be tried. Slocan submits that there is no duty to consult with the First Nation because the cutblocks to be sprayed are lands taken up for "lumbering", and are therefore exempt from any aboriginal hunting, trapping, and fishing rights protected by the Treaty. Slocan further submits that the First Nation's claims about possible irreparable harm arising from use of the herbicides are unsupported by technical or scientific evidence.

While it is neither appropriate nor possible to judge the merits of the parties' submissions at this preliminary stage, the Board finds that the Appellant's claims, if true, raise some issues concerning the potential effects of the herbicide spraying on wildlife and aboriginal treaty rights. Aboriginal treaty rights are protected under the Constitution. The Board finds that these issues are neither frivolous nor vexatious, and that there are serious issues to be tried in this appeal.

Irreparable Harm

At this stage of the *RJR MacDonald* test, the Appellants 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 First Nation has argued that it and its members will suffer irreparable harm should the spraying go ahead. It submits that Treaty rights continue to exist throughout the land surrendered, and that the Permits violate their constitutionally protected rights and title. Any impacts on these rights and title would constitute an irreparable harm, according to the First Nation. The First Nation submits that spraying will negatively impact upon the health and safety of its members as well as their ability to hunt and trap. Specifically, the First Nation argues that spraying will suppress vegetation that wildlife feed upon, resulting in adverse effects on wildlife that First Nation members rely on for hunting and trapping.

Although the First Nation says that it lacks the resources to assess the actual impacts that herbicide spraying may have on its members, the First Nation submits that in a previous appeal, the Board found that the herbicide Vision has negative affects on wildlife. The First Nation cites *Treaty 8 Tribal Association v. British Columbia Minister of Forests* (Environmental Appeal Board, Appeal No. 92/27, May 2, 1994)(unreported), in which the Board held that:

... the areas addressed by the permits include areas traditionally used by the local First Nation members to hunt, fish and trap, and to gather foods and medicines. Although there was no evidence presented regarding the specifics of medicinal plant collection, a map of the critical community use areas showed that many of the traditional use areas are included in the areas covered by the permits. As was discussed earlier, VISION is a broad spectrum herbicide that affects most deciduous plants and grasses.

Therefore, the Panel finds that use of VISION will impact the vegetation in sprayed areas, and that this will negatively affect plants that are sources of traditional foods and medicines for Treaty 8 Tribal Association members, and the wildlife that use those areas.

Finally, the First Nation points out that if spraying is allowed prior to the appeal hearing, the issues on appeal will be moot.

The Deputy Administrator takes no position on the stay application.

Slocan argues that the First Nation has not shown that irreparable harm will result from application of the herbicides according to the Permits. Regarding the First Nation's concerns about adverse effects on human health and wildlife, Slocan submits that the First Nation has submitted no evidence to support their claims.

Slocan submits the testimony of Dr. Leonard Ritter, an expert in pesticide toxicology, as evidence that the conditions and proposed application practices prescribed in the Permits "provide for acceptable safeguards" for the protection of fish and wildlife. Dr. Ritter states that he is unaware of any literature which supports the view that vegetation suppression from the use of glyphosate results in adverse effects on wildlife which may be feeding in the area when the application took place. Furthermore, he states that a 1994 review of glyphosate by the World Health Organization opined that wildlife may actually do better in areas that have been treated with glyphosate. Also, according to Dr. Ritter, glyphosate is well known to break down very rapidly in the environment and to have no residual soil activity. Dr. Ritter says that he is at a loss to understand the First Nation's assertion of adverse health effects relating to the proposed use of the herbicide.

In response, the First Nation submits that "[n]one of Dr. Ritter's findings are based on the unique ecosystems that the Fort Nelson First Nation relies upon to exercise its special and unique mode of life;".

Slocan also submits the testimony of Brian Churchill, a wildlife biologist familiar with the area to be treated, who echoes the testimony of Dr. Ritter. In addition, he states that the effects of treatment:

... will only have short term and localized impacts ... These impacts on wildlife habitat will not have measurable impacts on large mammal populations due to their mobility.

The question for the Board at this stage is whether the Appellants have shown that their interests would be irreparably harmed by not granting a stay. The Board notes that the Permits do provide some measures for the protection of fish, wildlife and human health. The Permits require a 10 metre pesticide-free zone along all streams and water bodies, and dry "S6" streams that contain or are deemed to be habitat for Blue or Red listed fish species, including arctic grayling. These pesticide free zones are to be marked and monitored, and protected by buffer zones. The Permits also provide that no herbicides may be sprayed within Wildlife Tree Patches, and that direct treatment of certain plant species which ungulates feed upon is to be avoided where these plants are not in direct competition with conifers. In addition, a number of cutblocks must undergo site inspections by the Ministry of Environment, Lands and Parks before any spraying may occur.

Regarding direct effects on human health, the Permits require that a 30 metre pesticide free zone around any wells or intakes for domestic water, and that public notice advising of the spraying shall be posted at the main access points to the treated areas. Finally, the spraying is to be carried out by trained professionals.

It is also an accepted fact that application of glyphosate will suppress the growth of deciduous vegetation, and that the target species for spraying under these Permits include plants which wildlife feed upon.

Although the Board is not bound to follow its previous decisions, the Board notes that it considered a similar issue in the case of *Port Coquitlam, Coquitlam, and Port Moody v. Canadian Pacific Railway* (Environmental Appeal Board, Appeal No. 98-PES-05(a), July 16, 1998) (unreported). In that case, the lower mainland

municipalities had appealed CP Rail's Pesticide Use Permit, which authorized the application of a herbicide containing glyphosate (Roundup) and other herbicides on some of CP Rail's tracks and yards. The Appellants requested a stay and raised concerns about potential harm to wildlife. The Board's finding with respect to the question of irreparable harm was as follows:

Without prejudicing the merits of the appeal, the Board notes that if the area is sprayed, it is possible that the geese that frequent the yard could eat grain exposed to the herbicides. Although it is unclear what effect this consumption would have on the geese, the Board finds that if there was a poisoning of the geese, this would be difficult to remedy if the eventual decision on the merits does not accord with the result of this interlocutory application. As a result, the Board finds that this could constitute irreparable harm to the Appellant's interest.

As for the harm to the watercourses and any organisms within, the Board notes that the label for Roundup warns to avoid direct applications of the product to water. The implication is that such an application would be harmful to the water quality and, presumably, the organisms within. Although the Permit at issue clearly does not allow for such an application, the adequacy of the restrictions on application near waterbodies is at issue. Thus, the Board finds that if the restrictions are inadequate there could be harm to the water and any organisms within.

Similarly, the Board concluded that the use of glyphosate (Vision) on plants which wildlife feed upon would adversely affect wildlife, and, furthermore, would affect aboriginal rights under Treaty 8 in *Treaty 8 Tribal Association v. British Columbia Minister of Forests*, as noted above. However, the Board notes that in reaching its decision in that appeal, it had the benefit of a map showing critical community use areas, and that many of the traditional use areas were included in the areas covered by the permits. To date, the First Nation has not presented information concerning what areas it uses for hunting, trapping, fishing, or other traditional uses.

The Board finds that while the evidence from Slocan suggests that any effects on water quality, human health, or wildlife should be non-existent or minimal if spraying occurs, the Board is unable at this time to thoroughly assess the credibility of that evidence, or, for that matter, the validity of the claims which the First Nation has made. The Board finds it sufficient to note that the parties agree that Vision will suppress the growth of some vegetation, and that the primary target species for spraying include plants that are listed in the Permits as being forage for wildlife.

For these reasons, the Board finds that despite conditions in the Permits to protect human health, fish, and wildlife habitat, spraying as approved under the Permits may result in harm to plants which wildlife feed upon. This may adversely affect wildlife which First Nation members rely upon for their livelihood, and may adversely affect their aboriginal treaty rights. These sorts of harm may be neither repairable nor compensable.

Balance of Convenience

At this stage of the test, the Board must determine which of the parties will suffer greater harm from the granting of, or refusal to grant, the stay application. The

potential for irreparable harm to the First Nation, as outlined above, must be balanced against the harm that could be suffered by Slocan if the stay is granted.

Slocan submits that the prime reason for seeking to control deciduous vegetation in the cutblocks is to protect crop tree seedlings from damage and death. These seedlings were planted by Slocan, or naturally regenerated, in accordance with permitted and statutory requirements for post-harvest silviculture. Slocan submits that if a stay is granted, it will be unable to spray herbicide this year because this would only be effective in these areas until mid-August. This would jeopardize the young conifers, violating provisions of the *Forest Practices Code of British Columbia* and Silviculture Prescriptions concerning the achievement of "Free to Grow" status. Slocan states that it must ensure regeneration on the cutblocks is "free to grow" within 9 to 15 years, depending on the ecosystem type. A "Free-growing stand" is defined in section 1 of the *Code* as "a stand of healthy trees of a commercially valuable species, the growth of which is not impeded by competition from plants, shrubs or other trees." Slocan asserts that these contraventions of the *Code* or Silviculture Prescriptions could result in the Ministry of Forests imposing fines or reducing Slocan's Annual Allowable Cut, and could make it difficult for Slocan to obtain cutting permits in the future. This, in turn, could affect its "environmental record," which is considered by potential company investors.

In addition, Slocan submits that the death of young conifers will result in lost productivity that cannot be recovered. Contrary to the First Nation's submission that only one year of growth would be lost if a stay is granted, Slocan states that if trees die, up to ten years of growth will be lost. According to Slocan, that will likely result in the Ministry of Forests requiring Slocan to replant new conifers, which would require herbicide treatment to clear brush and re-establishing access to many cutblocks, resulting in increased impacts on the forest.

Based on site surveys in 1996, 1997, and 1998, Lowell Ritchey, an expert in aerial application of pesticides, states that crop tree mortality and damage has already occurred in many areas covered by the Permits, and that further crop tree failure is imminent if no spraying occurs in 1999. He further states that aerial treatment is the only available method in most sites given the terrain, limited access, and extent of the problems. He states that the areas proposed for treatment under Permit No. 312-039-99/01 are accessible by helicopter only. The other Permit areas are primarily accessible by helicopter, although some areas may be accessed by road, 4x4 quad, or boat. He further states that the loss of young conifers is irreparable because some have been growing for several years, and that growth time will be lost.

In summary, Slocan submits that if young conifer trees die, there will be "significant irreparable harm" to Slocan and the environment that outweighs any harm alleged by the First Nation.

In response, the First Nation submits that a delay of one year in applying the herbicide will have limited financial impact on Slocan. The First Nation states that northern coniferous forests require decades of growth to achieve merchantable value, and that Slocan's obligations to the Crown concerning "Free to Grow" status would also be subject to a stay if issued by the Board.

The First Nation further asserts that its Treaty rights “continue to exist throughout the tract surrendered,” and that Treaty 8 must be interpreted such that members of First Nations that are party to the Treaty are free to hunt and fish as if they would never have entered into the Treaty. Specifically, the First Nations submits that the words “excepting such tracts as may be required or taken up by ... lumbering ...” must be interpreted so as to give effect to “the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered.” The First Nation argues that the alleged loss of conifer regeneration is unproven, and that, in any case, the impact of the permitted spraying would be much greater on the First Nation members’ aboriginal rights.

The Board finds that determining the balance of convenience in this case requires weighing the potential harm to fish, wildlife, and aboriginal rights of the First Nation against the potential harm to Slokan of damage to or loss of tree regeneration as a result of not spraying.

The issues of whether land taken up for “lumbering” is subject to aboriginal hunting, trapping and fishing rights protected under Treaty 8, and if so whether that may preclude the issuance of a Pesticide Use Permit, are primary issues in this appeal. The Board cannot decide those issues at this preliminary stage. However, even if land used for “lumbering” is subject to aboriginal hunting, trapping and fishing rights, the First Nation has not provided evidence as to how the proposed spraying will preclude their ability to exercise those rights. The First Nation has not provided evidence that members of any of the local First Nations use any of the Permit areas for hunting, trapping, fishing, or other protected aboriginal uses. Nor has the First Nation provided specific evidence as to how the availability of wildlife and fish for those aboriginal purposes will be affected by the proposed spraying.

The First Nation maintains that it lacks the capacity to prepare evidence because of the denial of resources. However, this does not explain why the First Nation did not attempt to supply at least some specific information, to the best of its ability, on its customs and practices relating to the resources and locations in the areas in question. The Board accepts that wildlife may be adversely affected by herbicide spraying. The Board also accepts that because wildlife are mobile, even if spraying occurs only in areas where the First Nation does not conduct hunting, fishing or trapping, adverse effects on wildlife populations may adversely affect the First Nation’s ability to exercise those rights. However, adverse effects on wildlife populations in the treated areas may be offset to some extent because wildlife, especially large mammals, are mobile and can move to new food sources.

While the Board accepts that the First Nation may suffer **some** irreparable harm should spraying proceed, the Board is not prepared to assume that spraying in the areas proposed for 1999 will **completely** preclude the exercise of aboriginal hunting, trapping or fishing rights by the First Nation, given the relatively small area of land to be sprayed in relation to the area covered by the Treaty. Also, the Board notes that the granting of a stay only applies to the application of herbicides, and that Slokan may still use other alternative methods to clear grasses and deciduous growth.

Regarding potential harm to Slokan, the Board finds that it has not established to the Board’s satisfaction that the losses associated with crowding of conifer

regeneration are completely irreparable. The Board accepts that Slocan has a statutory responsibility to achieve "Free to Grow" status on the cutblocks in question. However, conifer damage has already occurred, and replanting is already necessary in many areas. The Board also notes that Slocan is willing to voluntarily delay spraying in 19 of the cutblocks in question because Slocan had not planned to treat those blocks until next year.

The Board notes that, according to Mr. Ritchie, the areas subject to the six Permits have different degrees of need for treatment, and varying levels of accessibility. The Board also notes that according to a map provided by Slocan, the areas in question are varying distances from either the Fort Nelson First Nation Reserve or the Prophet River First Nation Reserve.

In the absence of evidence from the First Nation as to what areas its members have traditionally used for hunting, trapping, fishing, and other uses protected as aboriginal rights, the Board finds that the balance of convenience supports denying a stay of Permit No. 312-039-99/01. These cutblocks are accessible only by helicopter and are located 60 kilometres or more, by air, from the Fort Nelson First Nation Reserve. These blocks are even farther from the Prophet River First Nation Reserve. According to Mr. Ritchie, extensive fill planting will be required due to "further and extensive tree mortality" if no herbicide treatment occurs in 1999. He states that these areas are mainly higher elevation, and are composed of mixed spruce and pine, or pine only. Relative to other conifer species, pine is particularly intolerant of shading. Because tree growth also tends to be slower in higher elevation sites, it may also take longer to regain losses in these areas. Therefore, the risk of harm to Slocan of not spraying is greater than the risk of harm to the First Nation if spraying proceeds in these areas.

The Board also finds that the balance of convenience supports denying a stay of Permit No. 312-037-99/01. The cutblocks under this Permit are approximately 140 kilometres or more, by air, from the Fort Nelson First Nation Reserve, and even further from the Prophet River First Nation Reserve. These areas are primarily accessible by helicopter only, although some blocks are near an all weather road that is accessible by barge. In addition, this area "has a very high priority for treatment," according to Mr. Ritchie. He states that "herbicide treatment was planned for August 1998 to reduce impact prior to failure to the point where extensive fill planting will not be required."

The Board finds that regarding the remaining Permits, Slocan has not demonstrated that if a stay is granted, the potential for conifer loss by not spraying outweighs the potential for irreparable harm to the First Nation if spraying occurs.

The cutblocks covered by Permit No. 312-038-99/01 are virtually adjacent to the Fort Nelson First Nation Reserve or the river which flows through the Reserve, and are accessible, at least in part, by boat. According to Mr. Ritchie, crop tree failure has occurred in several areas, and "treatment of these areas would provide planting spots for fill planting and reduce further failure." The Board concludes that if replanting is an important reason for spraying under this Permit, a delay of one year will not cause much further harm to Slocan. Mr. Ritchie states these cut blocks are "river bottom or slope areas with very fertile soil," which leads the Board

to believe that once replanted, trees will grow more quickly here than in less fertile or higher elevation sites.

The cutblocks to be treated under Permit No. 312-040-99/01 are, at least in part, relatively close to river access, and most blocks are within 10 kilometres or less of the Prophet River First Nation Reserve. Since 1995, inspections of these areas have indicated "wide spread crop tree mortality," according to Mr. Ritchie. This leads the Board to conclude that, although only spot treatment is permitted in these areas, extensive planting is already necessary here, and a one-year delay in treatment will be less significant for saving crop trees here than it might in other areas. In addition, many blocks were under previous permits but were not treated due to wet ground. The Board notes that 1999 has also been a very wet year, and that spraying may not have been possible in such areas regardless of a stay. Furthermore, since Mr. Ritchie states that "[m]ost of these cut blocks are river bottom or slope areas with very high fertile soil," the Board concludes that once replanted, trees will be more rapid here than in higher elevation or less fertile areas.

Road access is available for all blocks within Permit No. 312-041-99/01, which are within 40 kilometres or less (by air) of the Fort Nelson First Nation Reserve. Mr. Ritchie states that "high mortality of the crop trees is prevalent throughout the cut blocks," but areas treated in 1996 "show good survival and vigorous growth." However, he further states that a dry year is required to treat the areas showing highest competition with brush. This leads the Board to conclude that such areas may not have been treated this year regardless of a stay, given the wet conditions in 1999.

The blocks scheduled for spraying in 1999 under Permit No. 312-042-99/01 are less than 2.5 kilometres from the Liard Highway, and are accessible by a 4x4 quad in dry conditions. These blocks are within 40 kilometres or less of the Fort Nelson First Nation Reserve. According to Mr. Ritchie, although inspections in 1997 and 1998 indicated "crop tree regression and some mortality... [s]ome areas of these blocks, where the competition is light, showed good survival and vigorous growth."

Based on accessibility or proximity to Reserve lands, the Board finds that there is generally a greater likelihood that areas in Permits No. 312-038-99/01, 312-040-99/01, 312-041-99/01, and 312-042-99/01 would be used by the First Nation, or members of other First Nations, for aboriginal hunting, trapping or fishing purposes. This leads the Board to conclude that adverse effects on wildlife from herbicide use in these areas could have a greater potential to adversely affect those aboriginal rights, or could affect those rights to a greater degree, than spraying in more distant and remote areas. In addition, many of the areas under these Permits already require replanting, cannot be sprayed during wet ground conditions, will regenerate relatively quickly once planted, or do not show extensive tree mortality compared to the areas where the Board has decided to deny a stay. Consequently, the Board concludes that the potential harm to the First Nation if spraying occurs in these areas in 1999 outweighs the potential harm to Slokan of delaying spraying until a decision on the merits of the appeal is rendered.

DECISION

The Board has carefully considered all of the evidence before it, whether or not specifically reiterated here.

For the above reasons, the Board refuses to grant a stay of Permits No. 312-037-99/01 and 312-039-99/01. The Board is satisfied that Permits No. 312-038-99/01, 312-040-99/01, 312-041-99/01 and 312-042-99/01 should be stayed pending a final decision from the Board on the merits of the appeal. The application for a stay is granted, in part.

Toby Vigod, Chair
Environmental Appeal Board

July 13, 1999