



Province of
British Columbia

Environmental Appeal Board

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APPEAL NOS. 2000-PES-017(b), 2000-PES-018(b), 2000-PES-019(b), 2000-PES-020(b)

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

BETWEEN: Resort Municipality of Whistler **APPELLANT #1**
Corporation of the District of North Vancouver **APPELLANT #2**
Squamish-Lillooet Regional District **APPELLANT #3**
C-Dar World Forest Foundation **APPELLANT #4**

AND: Deputy Administrator, Pesticide Control Act **RESPONDENT**

AND: BC Rail Ltd. **PERMIT HOLDER**

BEFORE: A Panel of the Environmental Appeal Board
Alan Anderson, Chair

DATE OF HEARING: Conducted by written submissions
concluding on September 8, 2000

APPEARING: For Appellant #1: Brian Barnett
For Appellant #3: Susan Gimse
For the Respondent: Dennis Doyle, Counsel
For the Permit Holder: Clifford G. Proudfoot, Counsel

STAY DECISION

APPLICATION

On June 30, 2000, H.G. Maxwell, Deputy Administrator, Pesticide Control Act, issued Pesticide Use Permit No. 134-123-00/02 to BC Rail Ltd. authorizing the application of specified pesticides to vegetation within the railway right-of-way between and including Mile 0 (North Vancouver) and Mile 100 (five miles north of Pemberton).

The Resort Municipality of Whistler ("Whistler"), the Corporation of the District of North Vancouver ("North Vancouver"), the Squamish – Lillooet Regional District

("SLRD"), and C-Dar World Forest Foundation ("C-Dar") each appealed the issuance of the permit. Whistler requested a stay of the permit as it applied to the area within its municipal boundaries, pending a decision on the merits of the appeal. SLRD requested a stay of the permit in its entirety, pending a decision on the merits.

On August 25, 2000, the Board issued an interim stay of the permit, valid until the issuance of the Board's decision on the merits of the stay application (Appeal No. 2000-PES-017 to 020). The following decision deals with the merits of the stay application.

BACKGROUND

The permit authorizes the application of Roundup (glyphosate) and Garlon 4 (triclopyr) to the "B.C. Rail railway right-of-way between and including Mile 0 (North Vancouver) and Mile 100 (five miles north of Pemberton)....". The total treatment area comprises 300 hectares. The stated purpose of the spraying is "to control only deciduous brush species and conifers in the railway right-of-way that could pose a risk to safe operation of the railway." The permit states that the spraying may be conducted from July 31, 2000 to December 31, 2002.

The permit puts several conditions on BC Rail's use of the authorized pesticides. Conditions A through E of the permit relate to public notification of the pesticide use. Within 15 days of permit issuance, BC Rail must post a copy of the permit and relevant maps at the BC Rail Centre in North Vancouver, as well as BC Rail's stations in North Vancouver, Squamish, and Pemberton. This must remain posted until one week after all of the permitted pesticide use has ceased. Within 15 days of issuance of the permit or "as soon as practicable", BC Rail must publish notices in the following newspapers: The Squamish Chief, Whistler Question, and Pemberton Valley News. Among other things, these notices must describe the pesticides and application methods to be used, treatment sites, date of project commencement and completion, and where copies of the permit and maps may be examined. Signs advertising the pesticide use must be posted at all "well-defined pedestrian crossings" and at all road crossings prior to any "local" pesticide use. These signs must be maintained for at least one week following local treatment, and must be of sufficient size and clarity to be easily read.

Conditions H and I require that contractors conducting the project possess a current B.C. Pest Control Service Licence, and that all pesticide use be carried out by or under the direct supervision of a person with a valid B.C. Pesticide Applicator Certificate in the Noxious Weed and Industrial Vegetation category.

Other relevant conditions found in the permit are set out below:

- G. Prior to pesticide use, all personnel involved with the project shall be provided with and have a clear understanding of the terms and conditions of the permit, any amendments and detailed maps of the of [sic] areas to be treated.

...

- N. A 10 metre pesticide-free zone, measured from the high water mark, shall be maintained along all waterbodies, wet streams, surface water seepage areas and dry streams that may be seasonally fish bearing.
- O. A 30 meter pesticide-free zone shall be maintained around surface water intakes or wells used for domestic or irrigation purposes. The point(s) where Newman Creek intersects the right-of-way (at Mile 15.7) shall be treated as a water intake location.
- P. Adequate buffers shall be provided to ensure that all pesticide-free zones are maintained. The boundaries of all pesticide-free zones shall be clearly marked before any pesticide use.
- Q. Pesticide use shall not be applied to *Rubus spp.* (raspberries and blackberries) from time of flower until berries predominantly off the vines.
- R. Pesticide use in non-crossing areas shall focus on the right-of-way area that extends from the edge of the ballast area to a point approximately 10 metres out from the railway centerline. Pesticides may be used in right-of-way areas beyond 10 metres out from the railway centerline to address sight line related safety issues as described in the *Railway Safety Code – Railway Act*.

...

- T. Prior to commencement of the project, BC Rail shall provide their contractors with detailed maps indicating locations of all creeks, streams, bridges, and wetland areas that intersect, originate from or directly abut against the railway right-of-way. The maps shall also include the locations of all wells that are within 30 metres of where pesticide use may occur. Anyone using pesticides shall have the maps in their possession during the application.
- U. Equipment pressure/operation shall be restricted to the following:
- rail mounted boom sprayer that controls spray droplet size and uses nozzle pressure less than 275 kPa.,
 - backpack and hand gun devices that utilize spray nozzle pressure less than 275 kPa.,
 - wick or similar type of wipe-on applicator devices.
- V. A railroad employee, familiar with the treatment area, shall be in continuous attendance during the treatment and shall ride ahead and maintain radio contact with the spray vehicle.
- W. All pesticide use shall be conducted during daylight hours, when wind conditions are 8km/h or less. During pesticide use, the speed of the spray vehicle shall not exceed 16 km/hr.

- X. Pesticide use in the railway right-of-way section directly parallel to the fence line of the *Tenderfoot Fish Hatchery*, shall be restricted to use of glyphosate applied using a wick applicator or other "wipe-on" type of technique. Pesticide applications in this section of right-of-way shall not commence until after June 1st of each year of the permit.
- Y. Where possible, spot treatments will be employed rather than broadcast treatments. In residential areas, hand-held spray guns or backpack sprayers shall be used to apply pesticide where physical conditions do not compromise worker safety.
- Z. All pesticide drift shall be restricted to the BC Rail right-of-way.

Finally, condition AA requires that follow-up reports be provided to the appropriate Deputy Administrator at the end of each year that the permit is in effect. These reports must include the quantities of pesticide used (kg), the area treated (ha), and maps of the actual treatment sites.

In their appeal notices, the applicants all raised concerns regarding the potential harmful effects of the authorized pesticide use, including the effects on nearby surface and ground water sources, the environment, and human health. In addition, Whistler and SLRD raised concerns that alternatives to pesticides had not been adequately considered, and that the permit relaxes some conditions that were set out in an earlier permit, as amended by the Board's decision in *BC Rail v. Deputy Administrator, Pesticide Control Act* (Appeal No. 96/26, May 30, 1997) (unreported). Whistler also raised concerns about the notice requirements in the permit. Whistler and SLRD request that the interim stay be upheld pending a decision on the merits of the appeal.

No submissions regarding the stay were received from C-Dar or North Vancouver.

The Deputy Administrator takes no position on the question of balance of convenience, but disputes two aspects of the submissions by Whistler and SLRD on the question of irreparable harm.

BC Rail opposes the stay application.

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 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.

Although SLRD does not specifically address whether there is a serious issue to be heard on this appeal, it raises concerns over the potential for harm to human health, property, and the environment arising from contamination by pesticides that may be applied near surface and ground water sources. SLRD is concerned that the permit does not provide for adequate buffer zones or seasonal restrictions on spraying.

Whistler asserts that there is a serious issue to be tried. Whistler submits that herbicide use in the Whistler valley poses a significant risk to the health and safety of the environment and the public. Whistler submits that it could suffer irreparable harm due to the risk of pesticides contaminating its water supply. Furthermore, Whistler says that the permit is inconsistent with Whistler's environmental strategies and BC Environment's Freshwater Strategy. Whistler argues that the possible effects of the permitted pesticide use are neither frivolous nor vexatious matters.

The Deputy Administrator does not address the question of whether there is a serious issue to be heard.

BC Rail submits that there is no evidence that the permitted pesticide use poses a risk to the health or safety of the public or the environment. BC Rail submits, therefore, that there is no serious issue to be tried.

The question for the Panel at this stage is whether the applicants' submissions, on their face, raise a serious issue to be heard when the Board assesses the merits of the parties' respective cases at the appeal hearing. The Panel finds that Whistler and SLRD have raised issues concerning the potential adverse effects of the permitted pesticide use on human health and the environment. The Panel finds these issues are neither frivolous nor vexatious, and are serious issues to be heard.

Having made this finding, the Panel will consider the next stage of the *RJR Macdonald* test.

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.

Whistler submits that the authorized pesticide use has a high potential to adversely affect human health and cause irreparable harm through the contamination of drinking water supplies. Whistler states that a large portion of its municipal water supply originates from sources near the BC Rail right-of-way. Whistler submits that BC Rail does not use a precautionary approach, and there is no indication that BC Rail's inventories of groundwater sources are accurate. Noting that its population of 9,000 residents can expand to over 50,000 during weekends, Whistler maintains that a significant number of people would be affected if its water supply were contaminated.

Whistler also submits that the permit is inconsistent with the Board's previous decision in the *BC Rail* appeal, cited above. Whistler notes that in that decision, the Board required a 50 metre buffer zone around domestic water sources and a 30 metre buffer around identifiable streams or watercourses, and restricted spraying to the period between June 1 and August 31. The present permit requires only a 30 metre buffer around surface water intakes and wells, a 10 metre buffer around streams and watercourses, and places no seasonal restrictions on spraying. Whistler argues that the reduced buffers and lack of seasonal restrictions in the present permit create unnecessary risks.

Whistler contends that if BC Rail's use of pesticides impairs Whistler's ability to provide clean, safe drinking water, Whistler will bear the costs, not BC Rail. Whistler submits that water supply contamination may expose it to long term liabilities. Whistler estimates that a water filtration plant would cost over \$16 million to build and \$0.5 million per year to operate. Whistler says that although its long-term water management strategy involves seeking new groundwater sources, many of the proposed locations for new wells are also near the BC Rail right-of-way.

Whistler argues that the pesticide applications also have a high potential to adversely affect the natural environment, which is critical to residential and tourism values in the municipality. Whistler notes that, as the rail line runs through the Whistler valley, it passes near lakes, sensitive wetlands, golf courses, and other sites frequented by wildlife and the public. Whistler says that the perception that it has a clean, natural environment is world-renowned and is essential to its tourism-

based economy. Thus, even a perceived risk that its water supply or environment may be contaminated could result in "permanent and irrevocable damage" to Whistler's reputation in the global marketplace.

In conclusion, Whistler submits that the permit does not adequately protect the environment or municipal ground water supplies, on which Whistler depends for economic success. Whistler says that should BC Rail conduct spraying between now and when the appeal is scheduled to be heard in November 2000, and should contamination result, the damage cannot be "undone". As a result, the municipality, its residents, and guests will suffer irreparable harm.

SLRD submits that irreparable harm could result from the fact that the *BC Rail* decision is not reflected in the permit. SLRD submits that the permit conflicts with the "spirit and intent" of the Board's *BC Rail* decision, which dealt with an appeal over herbicide use north of Mile 59. SLRD submits that the conclusions in *BC Rail* remain valid and should not be "effectively overturned" by the Deputy Administrator. SLRD also notes that in *BC Rail*, the Board indicated that an independent evaluation should be done by a party chosen by MELP. In a letter dated May 4, 2000, SLRD requested that MELP require BC Rail to identify and quantify all risks to the health and property of SLRD constituents and the environment. SLRD states that MELP responded by stating that technical experts from Environment Canada, Department of Fisheries and Oceans, and Health Units, among others, sit on the Regional Pesticide Review Committee. However, SLRD argues that this should not be considered an "independent evaluation" as recommended in *BC Rail*.

SLRD is also concerned that not all water sources in the spray area have been mapped. It submits, therefore, that a cautious approach should be taken.

Finally, SLRD argues that irreparable harm to the environment may result if spraying occurs before the appeal hearing because the permit contains no seasonal restrictions. SLRD states that in *BC Rail*, the Board limited spraying to the period from June 1 and August 31, presumably to reduce the potential for runoff and/or ground water infiltration of pesticides. Given that the merits of the appeal are scheduled to be heard in the winter months, SLRD is concerned that spraying could occur during heavy rainfall, thereby increasing the possibility of harm to surface and ground waters.

In response to the allegation that the permit conflicts with the Board's decision in *BC Rail*, the Deputy Administrator submits that an inventory of domestic wells and water courses in the treatment area has been completed and was considered prior to issuance of the permit. The Deputy Director notes that the permit imposes a 30 metre pesticide-free zone around wells and water intakes.

BC Rail submits that Whistler and SLRD have failed to show that the failure to grant a stay will result in irreparable harm. BC Rail argues that they make assertions but provide no evidence of the possible effects that the pesticide use may have. BC Rail submits that the permit contains all necessary conditions to ensure protection

of the environment and public health, and there is no legitimate basis for their allegations.

BC Rail argues that the inventory required by the *BC Rail* decision has been completed. BC Rail asserts that it has inventoried and mapped the wells and water intakes (licenced or not) in close proximity to the right-of-way. BC Rail maintains that it polled all residents suspected of using private water systems near the right-of-way and asked them to reveal any water sources. BC Rail states that the inventory shows that south of Mile 100, private water systems exist only at Cheakamus (approximately Mile 50).

BC Rail submits that Whistler's own information confirms that within the municipality, there are no private water systems within 50 metres of BC Rail's right-of-way. BC Rail submits that the pesticide-free zones applied in *BC Rail* do not apply to the present permit because BC Rail has done detailed mapping of water sources, and tests for migration of the proposed pesticides reveal that they are undetectable in the groundwater of monitoring wells located in pervious soils as close as 5 and 10 metres from the track. In support, BC Rail submitted a chart showing the dates, locations, and results for these monitoring wells.

Regarding the alleged lack of independent evaluation of health and property risks associated with the permit, BC Rail notes that it was reviewed by the Chief Environmental Health Officer of the Coast Garibaldi Community Health Service Society, and, as a result, various conditions were imposed in the permit to address health concerns. BC Rail further notes that it was reviewed by the Regional Pesticide Review Committee, which includes experts from various federal and provincial agencies. BC Rail asserts that this review would identify any potential health or environmental effects.

Regarding the possible health or environmental effects arising from the permitted pesticide use, BC Rail submits a report by Dr. Frank Dost, a toxicologist with knowledge of pesticides. In his report, Dr. Dost concludes that the probability of an adverse effect on public health from the application of Roundup and Garlon 4 to the railway right-of-way is "virtually zero". He also states that these pesticides will cause "no direct effect" on any forms of wildlife.

Regarding the possible effects of the pesticides on any domestic water sources within 30 metres of the railway corridor, Dr. Dost states the 30 metre pesticide-free zone will prevent these pesticides from moving into domestic water sources due to their limited mobility in soil. The pesticides will also have no effect on aquifers because of their limited mobility in soils.

BC Rail submits that Dr. Dost's evidence confirms that application of the pesticides in accordance with the permit will result in no adverse effect on human health, the environment, or domestic water supplies.

Regarding the lack of seasonal restrictions on spraying, BC Rail submits that "generally" these pesticides "would only be applied when conditions are dry and the target vegetation is growing and has not hardened off due to the fall weather."

In response to the applicants' concerns about drinking water contamination, BC Rail provided a report by Dr. Allister Brown, an environmental chemist, who reviewed four reports concerning water sources and supplies that were commissioned by Whistler. Dr. Brown's report lists the locations of existing and potential surface and ground water sources suitable for municipal water supply, with their elevation and approximate distance from the right-of-way. BC Rail submits that according to Dr. Brown's report, the nearest surface water source is approximately 300 metres from the right-of-way, while the nearest test well is 73 metres from the right-of-way. In addition, Dr. Brown notes that after the installation of three test wells, Whistler's own consultant (Pacific Hydrology Consultants Ltd.) found that:

[s]ilty sand to a depth of just over 6 m ...[at two sites], and silty sand to a depth of 15.8 m... [at the other well] apparently 'confine' the aquifer zone(s) in these wells and, as such, provide natural protection to the aquifers and to wells completed within them.

Dr. Brown concludes that contamination of Whistler's groundwater sources via the permitted pesticide use is "extremely unlikely" due to this natural protection of the aquifer.

Finally, BC Rail submits that its maps show that only 50 percent of the rail line within Whistler's municipal limits can be treated as permitted because of the proximity of watercourses.

In reply, Whistler submits that there is conflicting scientific evidence on the effects of herbicide use, and cites the Board's findings in the *BC Rail* decision as well as the Board's stay decision in *City of Parksville et al. v. Deputy Administrator, Pesticide Control Act* (Appeal No. 98-PES-07(a), October 5, 1998) (unreported). Whistler submits that in the *City of Parksville* stay decision, the Board granted a stay of a pesticide use permit despite testimony from Dr. Dost as to the safety of Roundup and Garlon 4 for use on the track ballast.

Whistler submits that little is known about the long-term effects of herbicide use, and the BC Rail cannot provide conclusive evidence that the natural environment and ground water sources are not at risk under the permit. Whistler notes that if herbicides contaminate its water supply, either from spraying or a spill, it does not have a water treatment facility to assist in removing the contaminants.

In response to BC Rail's assertion that the nearest groundwater source for Whistler is 73 metres from the right-of-way, Whistler submits that it has plans to examine other groundwater sources that are within the right-of-way, commencing this year. Whistler notes that Dr. Brown's report confirms that "[t]hree of the areas recommended but untested by [Pacific Hydrology Consultants Ltd.], lie within close proximity to the [right-of-way]". Whistler urges that a precautionary approach be taken to herbicide use around current and future drinking water sources.

In sur-reply, BC Rail submits that although a stay was granted in the *City of Parksville* appeal, the permit was ultimately upheld subject to some "minor" amendments which were unique to the facts of that case (Appeal No. 98-PES-07(c), April 8, 1999) (unreported). BC Rail also argues that Whistler's concerns regarding

the use of Garlon 4 are irrelevant to the present stay because BC Rail does not intend to use Garlon 4 within the spray area before the appeal is heard. In addition, BC Rail submits that concerns about potential groundwater sources should not be a basis for granting a stay, and notes that the effect of herbicide applications on those wells should be evaluated when and if they are developed.

The question for the Panel at this stage is whether the applicants have shown that their respective interests in protecting the concerns they have listed would be irreparably harmed by not granting a stay. The Panel notes that Whistler's primary interest is the protection of water supplies and the natural environment within its municipal boundaries. SLRD's primary interest is the protection of water supplies and the environment throughout the area of the permit.

With respect to the application by SLRD, the Panel finds that SLRD has provided insufficient evidence to conclude that use of the pesticides according to the permit before the merits of the appeal are decided will cause SLRD to suffer irreparable harm. Although the permit contains no seasonal or weather related restrictions, the Panel accepts that it would be very unlikely that BC Rail would apply these pesticides during the fall or winter months, when the target vegetation has hardened off. The Panel also accepts that BC Rail has no intention of applying Garlon 4 during the period preceding the appeal hearing. In any event, SLRD has provided no evidence that it or any of its constituents obtain their domestic water from any of part of the area covered by the permit.

With respect to the Board's 1997 decision, the Panel accepts that BC Rail has completed an inventory of the wells and water intakes along the right-of-way, and has submitted the permit to at least two different bodies for independent review. The Panel has also considered that according to Dr. Brown's report, all of the surface water sources listed are at least 250 metres away from the right-of-way, and all of the wells (including test wells) are at least 50 metres from the right-of-way. These distances are greater than or equal to the 50 metre distance imposed by the Board in its 1997 decision. In any event, this Panel is not bound by previous decisions of the Board, and the 1997 decision did not involve the same section of rail line as this appeal.

The Panel finds that SLRD has not established that it will suffer irreparable harm if the requested stay is not granted.

With respect to Whistler's application, the Panel is not in a position to determine the merits of the parties' technical or expert submissions regarding the potential adverse effects of Garlon 4 or Roundup. That is better decided after the Board has the benefit of the evidence presented during the hearing of the merits of the appeal. In this respect, the Panel finds the following portion of the Board's stay decision in the *City of Parksville* to be relevant:

While the evidence from CP Rail suggests that any effects on water quality, human health, wildlife or food should be minimal if this occurred, the Board notes that it is in no position at this time to assess the credibility of CP Rail's

expert, nor, for that matter, the validity of the studies which the Appellants have cited in their respective submissions. The Board finds it sufficient to note that experts disagree on the potential effects of exposure to these chemicals, and points out again, that the Roundup label implies that the chemical may affect water quality. Moreover, the label on Garlon 4 cautions that the product is "highly toxic to fish, aquatic plants and aquatic invertebrates" and warns that the product must be kept out of lakes, ponds, and streams and wildlife habitats at the edge of bodies of water.

For these reasons, the Board finds that if the restrictions on the Permit are inadequate, there could be harm to water quality, human health, and any organisms within affected waterbodies. This harm is of the sort that may be neither reparable nor compensable.

This Panel agrees that, while there is disagreement between the parties as to the adverse effects of Roundup and Garlon 4, the labels of those pesticides clearly warn against applying them to water bodies, suggesting that they may adversely affect water quality and aquatic life.

The Panel does not consider the possible effects on water sources that Whistler may develop in the future to be relevant to this application. However, the evidence clearly shows that Whistler relies on several surface and ground water sources located along the right-of-way. Although all wells appear to be greater than 50 metres from the track centreline, the permit allows for pesticides to be used in "right-of-way areas beyond 10 metres out from the railway centreline" to clear the sight line. The adequacy of the permit conditions on application near water bodies and wells is in issue, and if the permit conditions are inadequate to protect these water sources, there is a risk that Whistler's water supply could be contaminated. Although it is unclear what effect any contamination of these water supplies may have on humans consuming the water, it is also unclear whether any damage to human health arising from consumption of contaminated water would be reparable or compensable, if the outcome of the appeal does not accord with the result of this application.

For these reasons, the Panel concludes that the interests of Whistler could be harmed irreparably if a stay is not granted. Therefore, the Panel will consider whether the balance of convenience favours Whistler or BC Rail.

Having found that SLRD will not suffer irreparable harm if its request for a stay is not granted, the Panel does not find it necessary to consider the balance of convenience with respect to SLRD. However, the Panel will proceed to do so for greater certainty.

Balance of Convenience

At this stage of the *RJR Macdonald* test, the Panel 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 applicants, as outlined above,

must be balanced against the harm that could be suffered by BC Rail if the stay is granted.

Whistler submits that the permit has the potential to undermine its Environmental Strategy, Official Community Plan, and municipal practices, which attempt to minimize pesticide use within the municipality in order to protect the environment and water sources. Whistler submits that BC Environment's Freshwater Strategy and the *Pesticide Control Act* also encourage the development of vegetation control strategies that do not rely solely on pesticides; yet, BC Rail plans to use pesticides when non-chemical alternatives would be equally effective. Whistler maintains that manual or mechanical brushing are the primary methods used by BC Hydro and the Ministry of Transportation and Highways to control vegetation within Whistler's boundaries due to the potential negative impacts of pesticides on the community and the environment.

SLRD submits that it will suffer greater harm if a stay is refused than BC Rail will suffer if a stay is granted. SLRD refers to the *BC Rail* decision, where it states that:

(a) It is not essential that the Appellant [BC Rail] use pesticides to rid the right of way of unwelcome vegetation. The Appellant can use a mechanical method as it has done for the previous many years it has been operating this railway.

SLRD submits that the potential harm to the water quality of aquifers and unmapped surface sources of domestic water, and the resulting risks to human health and the environment, "clearly outweigh" the benefit to BC Rail of commencing spraying before the appeal is decided.

BC Rail argues that although it integrates non-chemical vegetation control methods to the extent possible, pesticides are still necessary. BC Rail submits that while it uses a mechanical cutter in addition to pesticides, mechanical cutting does not kill plants and may encourage a profusion of new shoots in species such as maple. This may increase the amount of time and labour required to control vegetation. Furthermore, the machine releases fumes into the air and creates jagged stalks that increase the risk of worker injury.

BC Rail argues that it and the public face a significant risk of irreparable harm if spraying does not commence, and that the danger to public safety arising from unchecked vegetation in the spray area outweighs any potential risk to human health or the environment. BC Rail asserts that vegetation hinders track safety inspections, restricts movement of switches, presents a tripping hazard to employees, increases the risk of fire along tracks, and restricts visibility at crossings and of railway signs and signals. BC Rail notes that these concerns are addressed in the *Railway Safety Code*, passed pursuant to the *Railway Act* of B.C. In conclusion, BC Rail submits that the balance of convenience favours its interests in public and worker safety.

Accordingly, BC Rail submits that the stay application ought to be refused.

In reply, Whistler submits that a stay would not prevent BC Rail from using alternative vegetation control methods, and argues that BC Rail is unclear as to whether there are any significant impediments to using these alternatives within Whistler's municipal boundaries. Whistler submits that the irreparable harm its community could suffer if a stay is not granted is far greater than the potential for harm to BC Rail from employing alternative vegetation strategies.

In sur-reply, BC Rail submits that Whistler has provided no evidence as to what alternative vegetation control methods may be used by BC Rail. In addition, BC Rail submits that Whistler has not used alternatives to herbicides within its own boundaries. It provided copies of the annual pesticide use summaries of Whistler and the Whistler Golf Course for 1999, as evidence that the permit allows BC Rail to apply a smaller amount of herbicide on the right-of-way within Whistler's boundaries than was applied within Whistler last year.

The Panel finds that determining the balance of convenience in this matter requires weighing the potential harm to each applicant if a stay is not granted versus the potential harm to BC Rail if a stay is granted. Respecting Whistler, this requires weighing the potential harm to water quality, the environment, and human health within Whistler's boundaries against the potential hazards of fire safety, derailment and railway worker injury in that area as a result of not spraying.

It is not necessary to consider the balance of convenience with respect to SLRD since the Panel has found that SLRD will not suffer irreparable harm if a stay is not granted. However, the Panel will consider whether any harm that SLRD may suffer if a stay is not granted outweighs the harm that BC Rail may suffer if the entire permit is stayed.

The Panel has found that Whistler may suffer irreparable harm as a result of contamination of its water supply if a stay is not granted.

Concerning the potential for harm to BC Rail, the Panel finds that, as the rainy winter season approaches, the danger of fire will become less significant. Furthermore, BC Rail has not established to the Panel's satisfaction that the other dangers associated with vegetation on the tracks are imminent. That is, the Panel does not have enough evidence before it to demonstrate that derailment and injury resulting from vegetation on the tracks is a real possibility if the tracks are not cleared this season, prior to the appeal being heard.

The Panel also notes that only 50 percent of the rail line within Whistler's municipal limits can be treated as permitted because of the right-of-way's proximity to watercourses, according to BC Rail's submissions. Additionally, BC Rail states that it does not intend to use Garlon 4 before the appeal is decided, and that it will only apply the permitted pesticides when conditions are dry and before the vegetation has hardened off due to the autumn weather. Thus, it appears to the Panel that the pesticide that BC Rail intends to apply before the appeal is decided will have limited impact on the vegetation within Whistler's boundaries.

When balancing the limited positive results of the planned spray program against the potential for harm to human health and Whistler's water supply, the Panel finds that the balance of convenience favours the issuance of a stay of the permit as it applies to the municipal boundaries of Whistler, pending a decision on the merits of the appeal.

The Panel has found that SLRD will not suffer irreparable harm if BC Rail is permitted to spray according to the permit before the appeal is decided. At this stage the Panel is not prepared to accept BC Rail's evidence as conclusive that there will be no negative effects whatsoever on human health or the environment from the permitted pesticide use if a stay is not granted. As noted above, the Panel is not presently in a position to assess the credibility of BC Rail's expert and technical evidence. However, the Panel finds that SLRD has not demonstrated that the potential for harm to its interests if a stay is not granted outweighs the potential for derailment or injury arising from an inability to apply pesticides over the entire 100 miles of rail line, if a stay is granted.

DECISION

The Panel has carefully considered all of the evidence before it, whether or not specifically reiterated here. The application by SLRD for a stay of the permit in its entirety is denied. The application by Whistler for a stay within its municipal boundaries is granted.

Alan Andison, Chair
Environmental Appeal Board

September , 2000