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Environmental Appeal Board

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DECISION NO. 2007-EMA-003(a)

In the matter of appeals under section 100 of the *Environmental Management Act*, S.B.C. 2003, c. 53.

BETWEEN:	Treaty 8 Tribal Association	**APPELLANT**
AND:	Director, *Environmental Management Act*	**RESPONDENT**
AND:	CCS Inc. doing business as CCS Energy Services	**THIRD PARTIES**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on April 10, 2007	
APPEARING:	For the Association: Allisun Rana, Counsel For the Respondent: Dennis Doyle, Counsel For the Third Party: A.W. Carpenter, Counsel	

STAY DECISION

APPLICATION

Amended permit PR-17150 was issued to CCS Inc. doing business as CCS Energy Services ("CCS") on February 2, 2007. The amended permit allows CCS to discharge refuse to the ground at its Silverberry secure landfill, located north of Fort St. John, British Columbia, subject to a number of conditions. It was approved by Del Reinheimer, P.Eng., for the Director, *Environmental Management Act*.

The Treaty 8 Tribal Association (the "Association") appealed the inclusion of one section in the amended permit, section 6.4, and requested a stay of that section pending a decision on the merits of the appeal. Section 6.4 authorizes CCS to handle and dispose of naturally occurring radioactive materials ("NORM"). If granted a stay, CCS would be prevented from accepting NORM at the landfill.

The stay application was conducted by way of written submissions.

BACKGROUND

The Silverberry secure landfill is a relatively new landfill, located approximately 50 kilometres north of Fort St. John, within Block A, Section 8, Township 88 Range 20, west of the 6th Meridian.

From the permit documents provided to the Panel, it appears that CCS' proposal for the landfill underwent an environmental assessment in 2002. The Panel received a copy of an unsigned "Project Approval Certificate" issued under the *Environmental Assessment Act* in which the project is described as follows:

> C. The Project is a 25 hectare secure landfill … to store wastes associated with the oil and gas industry and includes:
>
> - up to sixteen cells of approximately 1.5 hectares each
> - liner system
> - leachate collection system
> - stormwater management system
> - final cover system.

Also in 2002, the then Ministry of Water, Land and Air Protection issued the original waste permit PR-17150 to CCS.

At some point, CCS decided that it wanted the ability to receive NORM at the landfill. It retained D.R. Novitsky Enterprises to perform a radiological assessment to determine the potential risks to the public and to the environment associated with the acceptance of low-level NORM waste. In its submissions to the Panel on the stay application, CCS states that the results of this assessment were contained in a report titled "Radiological Assessment, Proposed Silverberry Landfill NORM Waste Management Facility" (the "Novitsky Report"). CCS also states that representatives from the Ministry of Environment and the Centre for Disease Control were asked to provide their comments and input into the Novitsky Report to ensure that the report addressed any potential issues. The Panel was not provided with a copy of the Novitsky Report, or any comments or input into the report by these agencies.

CCS submits that, prior to the Director's approval of the amended permit, CCS notified and consulted with the six First Nations represented by the Association, as well as with the general public. Those six First Nations are the Doig River First Nation, the Fort Nelson First Nation, the Halfway River First Nation, the Prophet River First Nation, the Salteau First Nation and the West Moberly First Nations. The adequacy of the consultation with these First Nations is one of the main issues raised in the appeal.

On February 2, 2007, Mr. Reinheimer, for the Director, *Environmental Management Act*, issued the amended permit. The preamble to the amended permit states that "This permit supersedes and amends all previous versions of Permit PR-17150 issued under Part 2 Section 16 of the *Environmental Management Act*."

The amended permit authorizes the discharges of a variety of substances at the Silverberry landfill, including certain hazardous wastes. The only material of concern to the Association is NORM, which the CCS site can now accept in accordance with section 6.4 of the amendment which states:

6.4 Naturally Occurring Radioactive Materials (NORMs)

The following handling and disposal practices shall be followed for the acceptance of NORMs. In addition, the OPERATING PLAN shall be updated to include NORM handling procedures prior to any acceptance of NORMS.

For the purposes of this section, the following definition applies:

non-NORM waste:

waste material with concentrations below the limits specified in Tables 5.1, 5.2 or 5.3 of the Canadian Guidelines for the Management of NORMS;

a) prepared by the Canadian NORM Working Group of the Federal Provincial Territorial Radiation Protection Committee;

b) published by authority of the Ministry of Health (Canada); and,

c) as amended from time to time.

6.4.1. All loads entering the CCS Silverberry facilities shall be screened at the gate for NORM by screening procedures developed by a qualified professional.

6.4.2. Any loads with radioactive emission exceeding twice background shall be sampled for and meet acceptable concentrations for parameters outlined in 6.4.4. prior to being landfilled.

6.4.3. At no time shall the incremental public radiation dose constraint of 0.3 millisievert per year (mSv/yr), set by Health Canada, be exceeded at the property boundary of the CCS Silverberry landfill.

6.4.4. The maximum acceptable concentration for NORM is 70 Bq/g [becquerel per gram], with a maximum radioactive concentration due to Radium 226 of 5 Bq/g.

Any load exceeding these concentrations shall not be accepted for disposal.

6.4.5. All NORM waste shall be co-disposed with non-NORM waste to 1 part NORM, by mass.

[emphasis in permit]

Additionally, the amended permit sets out general requirements for monitoring, analyses, recording and reporting effluent discharge for all wastes allowed by the amended permit.

There is little information in the amended permit about the Silverberry facility itself or the structure or works to contain the NORM. Some of that information is to be outlined in an updated Operating Plan. No Operating Plan has been provided to the Panel. The only information about this plan comes from CCS. It states that the Silverberry facility will only take low level NORM waste generated from British Columbia and from processing of both British Columbia and Alberta generated waste at the NORMCAN treatment facility in Standard, Alberta, and that this has been incorporated into the "Silverberry Secure Landfill Operating Plan".

As with the information provided above, most of the information before the Panel about the storage and treatment of NORM at the facility comes from the unsworn evidence provided by CCS. It states as follows:

- the Silverberry landfill facility is designed and constructed to the highest standards of any waste facility in BC;
- The site is monitored 24 hours a day, seven days per week, is enclosed by a two meter high fence, and is covered with barbed wire;
- all solid waste received at the facility is placed using a three-dimensional grid system for tracking purposes;
- the waste is placed into engineered landfill cells with an artificial compacted clay and high-density polyethylene liner system, underlain by a secondary liner with a leak detection system located between the two liner systems;
- NORM waste is then contained securely to keep the waste materials from exposure to the environment;
- all moisture collected in the waste cells is direct pipelined to a CCS disposal well and injected into a disposal zone located at approximately 1500 metres below the surface;
- the facility is also equipped with a network of groundwater monitoring wells located up gradient, down gradient and cross gradient from operational areas of the facility;

- the wells are sampled twice yearly, in the spring and fall, and the samples are sent for laboratory analysis; and

- the analysis is compared to applicable drinking water quality guidelines as well as historical and background data to ensure that on-site activities are not impacting groundwater quality.

CSS submits that "NORM levels approved for the Silverberry facility are not classified as hazardous or 'radioactive' under Canada's *Transportation of Dangerous Goods Regulations*, SOR 2001/286."

According to its submissions on the stay, CCS received its first NORM waste under the amended permit on February 16, 2007. It states that the facility received and secured 3,512 tonnes of NORM wastes from an open flare pit operated by one of CCS' customers. It also has tentative plans to receive at least an additional 14,750 tonnes of NORM wastes from its customers "over the upcoming period", subject to authorization for expenditure approvals.

On March 2, 2007, the Association filed its appeal against the amended permit on behalf of six First Nations and the members of these First Nations, who are also members of the Association. The members of these First Nations hold treaty rights pursuant to Treaty 8, which covers a large territory in northeastern British Columbia, northern Alberta and into both northwestern Saskatchewan and the Northwest Territories. It appears from the map provided by the Association that the Silverberry landfill is located entirely within Treaty 8 territory. CCS states that the facility is located on "private land".

The Association provides three main grounds for the appeal:

1. The Province of British Columbia is required to consult and accommodate First Nations' concerns before authorizing any activity that could adversely affect its treaty or aboriginal rights (established or asserted) and failed to do either.

2. There is a lack of acceptable guidelines in the amended permit for NORMs.

3. The Minister failed to exercise his discretion when he failed to require an environmental impact assessment under section 78 of the *Environmental Management Act*.

Under each of these main grounds, the Association has provided particulars.

The Association asks the Panel to quash the approval of section 6.4 of the amended permit or, in the alternative, send the matter back with directions to consult with the member First Nations and to adequately address and accommodate their concerns. In addition, they ask the Panel to order completion of an environmental impact assessment which specifically addresses the impact of the receipt and disposal of NORMs on the rights of Treaty 8 First Nations.

When the Association filed its appeal, it also applied for a stay of section 6.4 of the amended permit pending the Board's decision on the merits of its appeal. The Association provided its initial submissions in support of its stay application at that time. In its reply submissions on the stay, it provided four affidavits in support of its application. It submits that the Panel should grant the stay in the circumstances.

CCS asks that the stay be denied. It also objects to the introduction of the affidavits on the grounds that they go beyond the scope of a proper reply.

The Panel has reviewed the affidavits and notes that three of the affidavits address the CCS consultation process, providing evidence that directly contradicts the information that CCS provided to the Ministry in support of its amendment. The affidavits have not been subject to cross-examination by the other parties, nor has CCS had an opportunity to properly reply to them. In addition, this consultation issue is one of the main issues to be decided in the appeal itself and that is the appropriate time to resolve the conflicting evidence on the issue, not during this preliminary application.

The Panel has considered the map attached to the fourth affidavit, sworn by Leeanna Rhodes. As this was the only legible map provided to the Panel showing the general location of the Silverberry facility, it has been reviewed and considered for general orientation purposes only.

Under these circumstances, the Panel has given the affidavits little or no weight in deciding this preliminary matter.

The Respondent takes no position on the stay application.

ISSUE

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

The authority of the Environmental Appeal Board to grant a stay in an *Environmental Management Act* appeal is found in section 104 of that *Act*, which provides:

> The commencement of an appeal under this Division does not operate as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.

In *North Fraser Harbor Commission et al. v. Deputy Director of Waste Management* (Environmental Appeal Board, Appeal No. 97-WAS-05(a), June 5, 1997), [1997] B.C.E.A. No. 42 (Q.L.), 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 for a stay 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 favors granting the stay.

Although this test was adopted when the *Waste Management Act* was in force, the Panel finds that the powers of the Board under the *Environmental Management Act* are the same, and there is no reason to change the test in the circumstances.

Finally, as was previously the case, the onus is on the applicant to demonstrate good and sufficient reasons why a stay should be granted.

DISCUSSION AND ANALYSIS

Serious Issue

In *RJR MacDonald*, the Court stated that unless the case is frivolous or vexatious, or is a pure question of law, the inquiry generally should proceed onto the next stage of the test.

The Association submits that there are serious issues to be tried in this case. Most notably, the Association submits that the Province of British Columbia failed to consult and accommodate the member First Nations, contrary to its duty under Treaty 8, section 35(1) of the *Constitution Act, 1982*, and the honor of the Crown.

The Association submits that the only consultation that took place was conducted by the project proponent, CCS; it began only three months before the amendment was issued, and was wholly inadequate. The Association states that the amendment was issued in such a way that the member First Nations had no input into the process.

CCS does not accept the Association's characterization of the consultation that took place regarding the proposed amendment, but accepts that the Appellant's appeal is not frivolous or vexatious and agrees that it has met this branch of the test.

The Panel agrees that the Association has raised serious issues to be tried, which are not frivolous, vexatious, or pure questions of law.

Irreparable Harm

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

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the Association'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 Association describes the harm it will suffer under two main headings: lack of meaningful consultation, and irreparable harm to aboriginal and treaty rights.

Regarding the first heading, the Association submits that refusing the stay will result in irreparable harm to the ability of the member First Nations to effectively implore the Province of British Columbia to engage in meaningful consultation on this matter. Given that the Province did not contact the member First Nations at any time before approving the amendment, the member First Nations do not believe that effective consultation will take place without suspension of the amendment until the appeal is decided. This is because the more NORM that is transported and delivered to the facility prior to the appeal hearing, the fewer options, and less willingness there will be, to accommodate the Association's concerns. These concerns include the standard and type of construction, and the transport route and storage of NORM waste.

The Association submits that if CCS is permitted to continue to transport NORM to the facility and store more of this material, the harm to the Association and its members will only increase. It states,

> Irreparable harm is ongoing to the consultation process because the process continues to be egregiously breached by the transport, storage and handling of NORMs on land in Treaty 8 territory. The transportation, handling and storage of NORMs in and throughout Treaty 8 territory without adequate consultation and accommodation of the member First Nations' concerns is unconstitutional. As such, irreparable harm continues to the integrity of the process each and every day such activity continues.

Regarding the second heading, irreparable harm to aboriginal and treaty rights, the Association submits that the receipt and disposal of NORM at the CCS site could lead to exposure. It maintains that exposure to NORM could or will cause irreparable harm to the member First Nation's constitutionally protected Treaty rights, including, but not limited to, damage to wildlife, resources and land in the Fort St. John area.

In its reply submissions, it clarifies that it seeks a stay to prevent two types of irreparable harm to its treaty rights to harvest wildlife:

> 1) The member First Nations are seeking to prevent *actual* harm that will occur to their treaty rights through increased and uncontrolled exposure to NORM; and,
>
> 2) The member First Nations are seeking to stem the harm that will *practically* occur to their treaty rights through a "chill" created in the First Nation community and in the public at large through a perception of danger from exposure to resources contaminated by radioactivity.
>
> [emphasis in original]

In support of its concerns regarding actual harm due to exposure, the Association refers to the *Canadian Guidelines for the Management of Naturally Occurring Radioactive Material (NORM*), Health Canada, Canadian Working Group, Federal Provincial Territorial Radiation Protection Committee, first edition, October 2000. However, no copy of this document was provided to the Panel.

The Association also states that, according to the Federal Provincial Territorial Radiation Protection Committee, even a low dose of radiation can produce harmful and irrevocable effects to humans and the natural surrounding environment. It further states that, once NORM is disposed of at the CCS site, the material cannot be remediated and the damage cannot be reversed. As such, handling and disposal of NORM is not like other waste materials that can be removed from a landfill without consequence. It submits that potential radiation hazards from NORM are the same as those from radioactive materials controlled by the Canadian Nuclear Safety Commission, and that NORM poses significant risks to the environment, workers and the general public.

No evidence in support of these assertions was provided to the Panel.

Finally, the Association submits that even if its appeal of the amendment is successful and all further receipt and disposal of NORM is ceased, NORM cannot be removed after-the-fact without exposing the Treaty rights of member First Nations to further risk through the transportation and export of NORM out of the site. In this manner, irreparable harm will result if the stay is not granted because the damage to Aboriginal rights and Treaty rights held by the member First Nations under Treaty 8 will have occurred and will be irrevocable. In this regard, it notes that the likely transport route to and from the facility is directly through territory of the member First Nations.

In addition to concerns about transportation of NORMs generally through the territory, the Association also has concerns that there is no practical way to ensure that the radioactivity levels of NORM being delivered to the facility are within the permitted levels. If CCS measures the levels and finds they exceed those set out in the amended permit, the Association submits that it will be further exposed to harm because the "unsafe shipment will then be transported back out again", subjecting it to "double transportation risk". It submits that irreparable harm is done to humans and wildlife when the dose limit is exceeded in a single shipment or even when dose limits are exceeded through increased exposure.

In response, CCS disagrees with the Association's characterizations of the consultation process and the Association's interpretation of the legal requirements for consultation. It submits that it did consult, and is legally able to consult with, the relevant Treaty 8 First Nations that were potentially impacted by the amendment. Alternatively, in the event that there was inadequate consultation, CCS submits that it would be improper to grant a stay for the purpose of attempting to compel consultation with the Crown while an appeal on whether and what consultation was required is outstanding. It notes that the issue of whether consultation was required and whether the consultation that took place was

adequate is a matter to be determined on the appeal. If consultation was inadequate, the appropriate remedy will be determined at the conclusion of the appeal on the merits, including, presumably, further consultation.

Regarding the Association's claim of irreparable harm to aboriginal and treaty rights, CCS points out that the Association has not provided any evidence to support its assertions, or any evidence to support its allegation that the disposal of NORM wastes at the Silverberry facility poses a danger.

CCS submits that, contrary to the Association's assertion, its members do not exercise treaty or asserted aboriginal rights in the area subject to the amended permit. It states that the Silverberry facility is on private land and is secure from potential exposure to humans and wildlife. The site is monitored 24 hours a day, seven days per week, is enclosed by a two metre high fence, and is covered with barbed wire. Consequently, CCS submits that no traditional activities or opportunity to engage in traditional activities takes place on these lands, and there is no wildlife at the Silverberry facility. CCS states that this was the case even before the amended permit allowed CCS to accept NORM waste.

Further, CCS states that Health Canada's *Canadian Guidelines for the Management of Naturally Occurring Radioactive Materials (NORM)* sets dose limits at 20 mSv/yr for occupationally exposed workers and 1 mSv/yr for incidentally exposed workers and members of the public. CCS' permit limits the radioactive concentration of NORM containing waste to achieve a performance objective of 0.3 mSv/yr incremental exposure to CCS personnel, less than one-third of Health Canada's guidelines for members of the public. CCS did not provide these guidelines to the Panel.

CCS further submits that in Novitsky's radiological assessment, it concluded that the potential risks to the public and environment associated with the acceptance of low-level NORM waste were "negligible". Based upon a series of "screening radiological assessments", CCS submits that Novitsky demonstrated that, subject to effective on-site administrative controls, the acceptance of NORM waste "will not have any measurable radiological impact to anyone residing near the reclaimed landfill site." CCS states:

> Ingestion and inhalation are the only exposure pathways of concern to human or wildlife health from NORM. With proper disposal facilities in place, these pathways are not a concern. In particular, disposing NORM at the Silverberry facility materially reduces the potential harm to humans or wildlife through the exposure pathways. Further, accepting NORM from unprotected flare pits and the unmonitored sites means that NORM is contained at concentrations where it will not pose a significant risk to human or wildlife health.

As noted earlier, the Panel was not provided with the Novitsky Report.

CCS submits that since the perimeter of the facility is fenced, monitored and secure, and given the way that NORM is accepted, stored, monitored, sampled and

analyzed (see the background to this decision), CCS has effective on-site administrative controls, as well as proper disposal facilities, to ensure that there will be no "pathways" for NORM exposure to humans or wildlife.

CCS also notes that the NORM levels approved for the Silverberry facility are not classified as hazardous or "radioactive" under Canada's *Transportation of Dangerous Good Regulation*, SOR 2001-286. Section 2.37 of this *Regulation* classifies materials as radioactive and requires placarding (a safety mark) only at radioactivity levels higher than 70 Bq/g. CCS points out that the "maximum" concentration of NORM nuclides that CCS will accept under its permit is 70 Bq/g, with a maximum radioactive concentration of 5 Bq/g due to Radium 226. Therefore, its point appears to be that the maximum NORM concentration allowed under the permit, is at the same level that safety warnings begin to be required for the purposes of transportation.

Finally, CCS takes issue with the Association's claim that a stay is needed because, if the Association is successful on its appeal, the NORM cannot safely be removed. CCS states that the NORM that it has received, and any other NORM that is received and secured during the course of the appeal, can be removed and safely transported at a later time.

In reply, the Association points out that CCS did not provide evidence in support of its factual assertions and that the Panel should "wholly disregard any statements made on these grounds."

The Association also points out that the use of 0.3 mSv is actually a "minimum standard" rather than a cautious one, and that the guidelines set out 0.3 mSv as a "first investigation level", whereby any increase over this amount regardless of how incremental, triggers a need for even further investigation and management actions. As noted above, it did not provide a copy of the guidelines in support of its assertion.

The Panel

In *RJR-MacDonald*, the Court stated:

> '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… a permanent loss of natural resources will be the result when a challenged activity is not enjoined.

Satisfying this branch of the test, that irreparable harm will be likely to occur between now and the time that the appeal is decided unless interim relief is granted, requires the presence of credible evidence in support of the claim for harm. The evidence need not be so strong as to be irrefutable, but there should be some evidence in support of the harm alleged. As noted above, the applicant bears the onus of proof in an interim application of this nature.

Does the evidence presented by the Association in this application establish the likelihood of irreparable harm?

The only evidence provided by the Association is contained in the four affidavits that were provided as part of its reply submissions. Three of the affidavits are related to the consultation that occurred. The fourth affidavit shows the proposed transportation route through Treaty 8 territory to the Silverberry facility. The Panel's findings on those affidavits are set out earlier in this decision.

The Association claims that it will suffer "actual" irreparable harm to its constitutionally protected Treaty rights, including but not limited to damage to wildlife, resources and land in the Fort St. John area. However, there is simply no evidence provided in support of the "actual" harm claimed under this heading. None of the guidelines or documents referenced in the Association's submissions were provided. Aside from a map showing the Treaty 8 territory, the Association provided no evidence regarding the location of the member First Nations' communities in relation to the facility. Nor is there any evidence of the wildlife around the facility and/or the transportation route, or any evidence regarding the likelihood and consequences of NORM impacting animals or people. The Panel finds that the Association has not established a basis for a finding of irreparable harm.

The affidavit evidence of "practical" harm is that there will be a "chilling" effect on the exercise of Treaty rights. This type of alleged harm is vague and speculative, and simply cannot be the basis for a stay. It is properly evidence on the merits where it will be subject to cross-examination.

The Association also makes significant submissions on the harm caused by the alleged failure to consult and accommodate by the government. Since the amendment has been granted and at least one shipment of NORM has already been received by the Silverberry facility, the Panel appreciates the difficult and frustrating position in which the Association finds itself. There is no question that the appropriate level of consultation, as required by law, and any relevant accommodation should take place prior to a decision being made. This is the most effective way to ensure that the process and substance of consultation is meaningful.

However, the required level of consultation and the adequacy of the consultation performed in relation to the amended permit is one of the very issues to be decided in this appeal. To order a stay of section 6.4 of the amended permit on the basis of a failure to consult and accommodate would require the Panel to make, at the very least, a *prima facie* determination about the level of consultation required on the facts of this case, which is based upon an assessment of the treaty rights (and other aboriginal rights) at stake and the potential impact of section 6.4 on those rights. There is simply insufficient evidence before the Panel at this time to make this finding. Although there will undoubtedly be a great deal of evidence and legal argument provided to the Board when it hears the merits of this appeal, it has not been provided to this Panel in the context of this preliminary application.

Further, the Panel is also of the view that it would not be appropriate for the parties to provide full evidence and argument on the consultation issue in the context of this preliminary application. The Panel would then be drawn into an assessment of conflicting evidence, much of which addresses issues and facts which also go to the merits of the appeal. The Panel agrees with Beetz J. in *Re Attorney General of Manitoba and Metropolitan Stores (MTS) Ltd. et al.* (1987), 38 D.L.R. (4th) 331 (S.C.C.), that:

> The limited role of the court at the interlocutory stage was well described by Lord Diplock in the American Cyanamid case, at p. 510:
>
> > It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. (p. 335)

In this case, the Panel finds that the Association has not established that there is irreparable harm arising from either the consultation or the presence of the NORM within its Treaty area.

Balance of Convenience

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

The Panel notes that an interlocutory injunction is considered an exceptional remedy. In *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504, at 509, Lord Diplock states:

> The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience" lies.

CCS submits that it will suffer harm in the form of financial losses, possible harm to its reputation and client base, possible loss of revenue and the loss of job

opportunities to third parties should a stay be granted. CCS intends to receive additional NORM at the facility and, if section 6.4 of the amended permit is stayed, it will be unable to do so. It submits that this will result in financial losses as well as the other identified consequences, such as harm to its reputation and client base.

In addition, CCS states that it has installed a "state of the art" gate monitor for identifying NORM wastes and safe handling procedures at the Silverberry facility.

The Panel accepts that there will be financial consequences to CCS if it is not able to exercise its rights under section 6.4 of the amended permit. The Panel accepts that CCS has invested some money in the facility so that it can accept NORM waste, implemented certain internal procedures regarding the NORM waste, and that it is already is storing NORM at the facility. The Panel also accepts that CCS intends to accept additional NORM, although there is no evidence as to whether this may occur prior to a hearing and decision on the merits of this appeal.

Regardless of the timing, the Panel accepts that a stay of this provision will impact CCS' negotiations with potential customers, which will undoubtedly have negative financial consequences for CCS and may impact its business reputation.

As noted above, the Panel has found that the Association will not suffer irreparable harm either because of the presence of NORM within its Treaty area or because of the level of consultation that has occurred.

Under these circumstances, the Panel finds that balance of convenience weighs in favour of denying a stay of section 6.4 of the amended permit.

DECISION

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

For the reasons stated above, the application for a stay is denied.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

April 26, 2007