



Environmental Appeal Board

APPEAL NO. 97-WAS-10(b)

In the matter of an appeal under section 44 of the *Waste Management Act*, R.S.B.C. 1996, c. 482.

BETWEEN:	Paddy Goggins	APPELLANTS
AND:	Assistant Regional Waste Manager	RESPONDENT
AND:	MacMillan Bloedel Paper Limited	THIRD PARTY
BEFORE:	A Panel of the Environmental Appeal Board Toby Vigod, Chair	

STAY DECISION APPLICATION

By letters dated August 21, 1997 and August 22, 1997, Paddy Goggins and John Keays filed separate appeals against Amended Permit PA-03149 and both applied for an interim stay pending the outcome of the appeals. The Appellants, the Respondent and the Third Party made fairly extensive written submissions on the stay applications.

Prior to a decision on the stay applications, the Appellants standing to appeal was challenged by the Third Party. In a decision dated November 16, 1997, the Board found that Mr. Goggins had standing to appeal but Mr. Keays did not. The Board dismissed Mr. Keays' appeal for lack of standing and has not considered his submissions when making its decision on this application.

BACKGROUND

MacMillan Bloedel Paper Limited (MB) currently operates a pulp and paper mill in Powell River under a permit originally issued by the Waste Management Branch on or about October 12, 1977. That permit authorizes the discharge of certain contaminants in specified amounts to the air from, among other things, wood residue boilers numbered 8, 16 and 17. The maximum rate of discharge authorized in the permit is 7500 cubic metres per minute.

On August 1, 1997, Mr. Robb, the Assistant Regional Waste Manager, issued Amended Permit PA-03149 to MB. It is the issuance of this Amended Permit that has been appealed to the Board and is the subject of this request for a stay.

The Amended Permit authorizes the discharge of contaminants from a new "No. 19 wood residue boiler stack", herein referred to as boiler 19 or "the new boiler", consisting of "a bubbling fluidized bed wood residue boiler with an oversized

furnace, a five-field electrostatic precipitator, exhaust gas recirculation, stack, and related appurtenances”.

According to the Amended Permit, this boiler is to replace boilers 8, 16 and 17 on or before December 31, 1997. In its submissions dated November 24, 1997, MB states that it is currently in the process of installing the new boiler. The Board notes that the Respondent does not expect that the new boiler will be capable of burning woodwaste “much before January 1, 1998”.

The authorized discharge from boiler 19 is greater than the discharge authorized from the old boilers under the original permit. The Amended Permit authorizes a maximum discharge of 12000 cubic metres per minute from the new boiler – roughly 4500 cubic metres per minute more than was previously authorized.

The Appellant, Mr. Goggins, appealed the Amended Permit on the grounds that the new equipment will result in a significant increase in the amount of waste imported into the community and there has been no proper characterization of the wastes, which increases the potential for an additional release of pollution. He also alleges that the method of disposal is a controversial means of disposing of salt laden materials and will include the incineration of mill process sludge.

The Appellant argues that a stay should be granted in order to protect the environment and the health of himself, his family, and the general community. Both the Respondent and MB argue that the Appellant misunderstands the nature of the amendments. They maintain that the new boiler will actually reduce the environmental impacts of the air emissions from the mill and that a stay should not be granted. MB also argues that none of the Appellant's submissions displace the normal presumption that permits or permit amendments are validly issued unless quashed or varied on appeal.

The hearing of the appeal has now been scheduled for January 29 and 30, 1998.

ISSUE:

Section 48 of the *Waste Management Act* grants the Board the authority to order a stay. Section 48 states that:

An appeal taken under this Act does not operate 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.

I now turn to consider the parties submissions in relation to the test.

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 nature of the issues may be revisited at the end of the day when reaching a conclusion on the balance of convenience test.

Considering the extensive submissions made by the parties, the Board finds that there are serious issues raised by the appeal. The new boiler authorized by the Amended Permit allows more woodwaste to be burned at the site and uses a different process for handling the materials prior to discharge. The issues raised by the Appellant regarding the effects of the amendments on the environment and public health are neither frivolous nor vexatious and require further consideration before they can be decided.

Irreparable Harm

The second factor to be considered is whether the applicant will suffer irreparable harm if the stay is not granted.

Under this heading, the Appellant first notes that the Amended Permit allows MB to operate a new business by default - that of a waste disposal facility, not necessarily an efficient pulp and paper and lumber mill. He also states there will be a dramatic increase in the amount of waste materials imported into the community.

The Appellant's concerns about MB changing the nature or scope of its business in Powell River is not a matter properly before the Board. MB's business decisions are not something over which the Board has jurisdiction. Similarly, the amount or flow of waste between districts is beyond the scope of the Permit. The critical issue properly before the Board in this appeal is whether the subject permit was properly issued - in accordance with the principles of fairness and the objects and purposes of the *Act* - e.g. the protection of the environment and the health of the public.

In this regard, the Appellant submits that the local ecology and community will suffer irreparable harm if the stay is not granted. He states that MB currently produces a relatively small amount of hog fuel at the mill when compared to the amount it intends to burn in the new facility. He points out that the new boiler will consume almost 40% more hog fuel (up to 100 tonnes per day) and that MB has not assessed the problems associated with the disposal of solid waste in the form of stack residue, ash, etc. as a result of increased burning. He states there is an

undefined level of air contaminants and the short and long term effects of any further increase to the amount of waste already burned is not yet understood.

The Appellant also states that there will be a 60% increase in total volume of air consumed (discharged) in the Amended Permit and that the increased volume of air discharged will be dramatically altered (e.g., temperature, oxygen content, carbon dioxide content) from the ambient airshed.

The Appellant argues that the impact of the new boiler will be compounded by the fact that the Amended Permit allows the old and new boilers to operate simultaneously. The net result being an increase in the level of air contaminants, some more subtle than particulate matter which is measurable. He also submits that operating both facilities simultaneously could have an impact on the effluent waste system and increase the volume of exhaust gas output.

The Respondent acknowledges, and MB agrees, that the Amended Permit does not prevent the operation of both boilers at their permitted limits. They submit, however, that given the limited energy demands of the mill, it would not be practical to run both the old and new boilers at capacity. Further, they submit that the Appellant's concerns may be easily addressed by the Board through a simple amendment to the Amended Permit, limiting the combined total loading of contaminants from all boilers.

Responding to the Appellant's other concerns, the Respondent submits that the increased burning of hog fuel at the new facility will not result in more contaminants being released to the local environment. He submits that the opposite is true – more hog fuel will be burned in the new boiler but the total loading of particulate matter (the principle concern related to the combustion process) which is authorized for release to the environment will be much less - about 1/5 of the amount authorized for the existing boiler.

More significantly, the Respondent argues that increasing the consumption of woodwaste by "this highly efficient boiler" will result in less wood waste being burned by more primitive methods (such as open burning) which releases much more particulate matter to the air. The Respondent maintains that:

Once the Powell River boiler is running, the ministry will be less inclined to authorize any open burning of land clearing or log sort debris in the community and will ask local government to similarly discourage this practice. Consequently, allowing additional wood waste to be burned in this boiler and requiring the company to maximize consumption of wood waste produced from land clearing debris and the like is expected to have the greatest environmental benefit to the community.

The Respondent submits that the Appellant's concerns of what may "possibly" occur should boiler 19 operate are not sufficient to offset the increased environmental impact that would result if a stay is granted. Specifically, the Respondent states:

- A stay would result in continued open burning of land clearing debris and the like which adversely affects local air quality.
- A stay would prevent energy production from biomass and require the use of fossil fuels to make up the energy needs. Fossil fuels contribute to the greenhouse effect.
- A stay would result in increased products of incomplete combustion being released by the old boilers. The new boiler's increased combustion efficiency will reduce the formation of incomplete products.
- A stay would allow more particulate matter to be discharged. He submits the new boiler and electrostatic precipitator are more efficient at removing particulate matter of all particle sizes than existing boilers and electrostatic precipitator.

While the Respondent does acknowledge that hydrogen chloride and gaseous products of complete combustion, such as sulphur dioxide, may actually increase with the new boiler, he maintains that these are less harmful than incomplete products of combustion which are more prevalent in the current processes. Therefore, while a stay would result in less hydrogen chloride and sulphur dioxide being discharged to the environment, the increased presence of incomplete products of combustion will have a greater negative environmental impact.

The Respondent also notes that, to reduce dioxins produced, the Amended Permit requires MB to maximize the use of acceptable quality low salt content wood residue in the boiler. The Appellant replies, however, that this is not an adequate solution as there is no definitive means to classify by observation "acceptable low salt content wood residue".

The Appellant also argues that the Respondent has made a number of statements that are speculative and the Respondent relies on his faith in technology and systems, which has proven inadequate for protecting the local population in the past. He also submits that the risk of unplanned release of contaminants into the airshed is directly linked to the amount of loosely defined and poorly characterized "wood residue" that are authorized for imposition into the community.

Counsel for MB states that the Appellant has attempted to argue the merits of the appeal as opposed to stating what irreparable harm will be suffered and that the materials supplied by the Appellant are not sufficient to justify a stay in this case. MB argues that the Appellant has failed to establish that he will suffer any irreparable harm or that the environment will be adversely affected should the stay not be granted.

MB further submits that the new boiler is specifically designed to substantially reduce particulate concentrations from the facility. When the new boiler becomes fully operational in 1998, it will reduce the environmental impact of the air emissions from the mill. MB submits that it will not cause any increase in the amount of air emission levels that are otherwise already permitted pursuant to the existing permit.

There is no dispute that the air quality in Powell River is currently a problem. The Respondent indicated that, as Assistant Regional Waste Manager responsible for air emissions in the region for the last six years, improving Powell River's power boiler was one of his highest priorities. According to the Respondent, "inhalable particulate is the highest priority outdoor air pollution issue in British Columbia." From their submissions, it is clear that the Respondent and MB believe that the new boiler will go a long way to reduce the amount of inhalable particulate matter and improve the air quality in the area. The Appellant argues, however, that that this is not the case. Although all parties want the Board to accept their submissions on the merits of the case, at this juncture, the Board is not in a position to do so. The Board cannot properly assess the conflicting submissions until there is a hearing on the merits.

For the purposes of this application, the Board is of the view that it must err on the side of caution when assessing irreparable harm. It is clear that when the boiler becomes operational in early 1998, emissions may increase by up to 4500 cubic metres per minute. We note that some of the contaminants that may be emitted are known cancer causing agents such as benzene. Until a hearing on the merits, the Board does not have sufficient information to assess the new boiler's effectiveness at controlling such emissions. Further, if wood residue is not adequately defined or characterized, as alleged by the Appellant, with the increased capacity of boiler 19, it is reasonable to assume that the air quality could be further jeopardized.

Although the Appellant is clearly not an expert in this field, the Board finds that he has raised a number of concerns about the operation of the new boiler which, if correct, indicate a potential to cause irreparable harm to the environment. If the boiler becomes operational before this appeal is completed, the increase in emissions as is contemplated by the Amended Permit could reasonably cause irreparable harm to the environment.

This application has raised difficult issues for the Board. While the current air quality is a problem and open burning is clearly a less desirable method of disposal of woodwaste, there are valid environmental issues raised by the Amended Permit. For the purposes of this motion I am prepared to assume there will be some irreparable harm to the local air quality in spite of the other parties efforts to keep it to a minimum and in spite of the current state of the local air quality.

Balance of Convenience

The third stage is the balance of convenience test. The balance of convenience requires the Board to determine which of the parties will suffer greater harm from the granting of, or refusal to grant, the stay application pending a determination of the appeal on its merits.

The Appellant's position appears to be that the environmental damage that will occur by allowing the building and operation of the facility prior to a decision on this appeal outweighs any damage that will be suffered by MB. The applicant submits that MB is already able to handle the primary, secondary and tertiary processing of

waste generated on site; that it is currently permitted to import waste to "top up" capacities at the existing facility; and that it is producing sufficient process steam to facilitate the operation of their existing pulp, paper and lumber operations. He seeks an order to protect the *status quo*.

The Appellant submits that the Amended Permit is wanting – it does not provide environmental protection. He submits that a stay until the conditions of the Amended Permit and the issuance of that permit are fully examined is an appropriate solution. The Appellant argues that MB can continue to operate the plant at a reasonable capacity without any extraordinary costs. Therefore, on balance, a stay should be granted until the appeal is completed.

MB disagrees. It submits that it will suffer financial harm if a stay is granted and that the balance of convenience in this case favours refusing a stay. If a stay is granted, MB argues that it would be required to drastically reduce its hog burning capacity and to compensate this by increasing natural gas consumption to maintain the same steam production rate. The hog fuel that could not be burned would end up being landfilled in a Richmond landfill. It states: "Increased landfilling and increased natural gas consumption are both undesirable environmental impacts that would be caused by a stay".

Further, MB submits that the costs of implementing such measures would be unreasonable. It estimates that the incremental cost for the increased natural gas consumption necessitated by a stay is \$5,711 per day. With 86 operating days from October 1 to December 31 (excluding Christmas), MB submits that the total increased natural gas consumption costs would be \$491,146. This is said to be based on 325 units per day of hog fuel that could not be burned (one unit is approximately equal to one tonne). MB submits that the incremental cost for landfilling of the excess hog fuel would amount to \$341,250, based on 86 operating days. Therefore, MB submits that the total cost of granting a stay would amount to \$832,400 should the stay be in effect from the period from October to December. Thus, the impact of granting a stay would be significantly adverse to both the environment and the economy of Powell River.

The Board has already found that there may reasonably be some irreparable harm to the environment if the new boiler is allowed to begin operation prior to the appeal being decided. At this branch of the test, the irreparable harm must be weighed against any harm that will be suffered by the other parties if a stay is granted.

Although MB has based its claim of financial loss on the months October - December, their basis for this loss is unclear since the boiler is not expected to be in operation until early January. Absent any evidence to the contrary, it would appear to the Board that any financial loss to be suffered to MB would occur after that date, i.e., after January 1, 1998.

The Board also notes that the hearing of this appeal has now been scheduled for January 29-30th, 1998; less than 1 month after the expected start-up of the new boiler. Finally, it is noted that a stay would not prevent MB from continuing its mill

operation at normal capacity. MB may continue to operate as usual under the existing permit until the new boiler is operating.

Based on these factors, the Board finds that any financial loss or prejudice to MB if a stay is granted is relatively minor. As the old boilers may still be used, there should be no additional expenditure – it is simply *status quo*.

On balance, the Board finds that the factors weigh in favour of staying the operation of boiler 19 until a decision is rendered in this appeal.

DECISION

Upon consideration of all the submissions provided by the parties, the Board finds that a stay of the operation of boiler 19 should be granted.

The Board also notes that, in his submissions, the Appellant suggests that a public forum may be the best way for MB to exchange information about its future plans and public concerns. He submits that importing waste for disposal is an issue the community must decide on. The Board cautions the Appellant that the Board cannot order a public hearing to address MB's business plans or the importation of waste into the community. This is beyond the Board's jurisdiction in this matter.

The Board also advises that any proposed amendments to the Amended Permit regarding the dual operation of the old and new boilers should be addressed at the hearing.

Toby Vigod, Chair
Environmental Appeal Board

December 4, 1997