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DECISION NO. EAB-IPM-20-A002(a)

In the matter of an appeal under section 14 of the *Integrated Pest Management Act,* S.B.C. 2003, c. 58.

BETWEEN:	Western Aerial Applications Ltd.	**APPELLANT**
AND:	Administrator, *Integrated Pest Management Act*	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Darrell Le Houillier, Panel Chair	
DATE:	Conducted by way of written submissions concluding on March 5, 2021	
APPEARING:	For the Appellant: Leeanne Chow For the Respondent: Christopher Rolfe, Counsel	

APPEAL

[1] This appeal concerns an administrative penalty determination (the "Determination") issued to Western Aerial Applications Ltd. (the "Appellant") for applying a pesticide outside the area where it was permitted to do so, contrary to section 6(1)(a) of the *Integrated Pest Management Act* (the "*Act*"). The Determination was issued on July 6, 2020, by Christa Zacharias-Homer, an Administrator of the *Act* (the "Administrator"), in the Ministry of Environment and Climate Change Strategy (the "Ministry"). In the Determination, the Administrator imposed a penalty of $20,750 for the contravention.

[2] The Environmental Appeal Board has the authority to hear this appeal under section 14 of the *Act*. Under section 14(8) of the *Act*, the Board has the power to:

a) send the matter back to the Administrator, with directions,

b) confirm, reverse or vary the Determination, or

c) make any decision that the Administrator could have made, and that the Board considers appropriate in the circumstances.

[3] The Appellant challenges the penalty and asks that it be reduced or "cancelled". The Appellant does not dispute the Administrator's finding of non-compliance with the *Act*.

BACKGROUND

General Facts

[4] The Appellant has been a licensed pesticide applicator for over 20 years. The Appellant uses helicopters to apply pesticides. At all material times, the Appellant had a valid pesticide user licence, the Appellant's helicopter pilot held a certificate for aerial application of pesticides, and the Appellant's mixer/loader held a certificate for pesticides, as required by the *Act* and its regulations.

[5] Through a cost sharing program, the Thompson Nicola Regional District rebates landowners who conduct invasive plant control on private land. Purity Feed ("Purity"), a farm supply company, is the program coordinator and arranges for the Appellant to apply pesticides to kill plants (i.e., herbicides) on designated lands.

[6] Sometime before July 1, 2019, Purity arranged for the Appellant to apply herbicides on some private land to control plants that were undesirable as forage for livestock. Before applying the herbicides, Purity provided the Appellant with treatment maps and GPS data for four treatment blocks (the "Treatment Areas"). The Treatment Areas were either on private land owned by David Jarvis and Janice Jarvis ("Lot 1") or on neighbouring privately-owned land.

[7] Mr. Jarvis holds a grazing licence under the *Range Act* over an area of Crown land adjacent to Lot 1 (the "Grazing Licence Area"). Mr. Jarvis' cattle graze in the Grazing Licence Area.

[8] On July 1, 2019, the Appellant's helicopter pilot applied the herbicides Reclaim II A and Reclaim II B to the Treatment Areas. Before he applied the herbicides, the pilot was provided with GPS data and a map of the Treatment Areas.

[9] After completing treatment in the Treatment Areas, the pilot cleaned the herbicide application equipment by adding water to the system, resulting in a diluted pesticide solution ("Rinsate"). The pilot informed Mr. Jarvis that he was planning to apply the Rinsate to part of the Treatment Areas.

[10] Mr. Jarvis instructed the pilot to instead spray the Rinsate over an area (the "Additional Area") adjacent to the Treatment Area. The pilot applied the Rinsate to the Additional Area, believing it to be private land owned by Mr. Jarvis. However, the Additional Area was 3.76 hectares ("ha") of Crown Land within the Grazing Licence Area. Neither the Appellant nor Mr. Jarvis had a permit to apply pesticides to the Additional Area.

[11] On August 29, 2019, Zoe Simon, a Range Agrologist with Ministry of Forests, Lands, Natural Resource Operations and Rural Development ("FLNRORD") was inspecting the Grazing Licence Area when she observed, and took photos of, plants that appeared to be damaged by herbicides.

[12] On October 1, 2019, Margot Hollinger, an Integrated Pest Management Officer ("Officer") with the Ministry, contacted Ron Gladiuk, the Appellant's Manager of Forest Operations, and requested pesticide use records and GPS flight lines for the July 1, 2019 herbicide application. Mr. Gladiuk provided the requested records on October 3, 2019.

[13] On October 22, 2019, Ms. Hollinger and another Officer with the Ministry, Ms. Simon, along with other staff from FLNRORD, inspected and took photos of the Additional Area.

[14] On January 9, 2020, Ms. Hollinger sent an administrative penalty referral notice (the "Referral Notice") to the Appellant. The Referral Notice included details about the site inspections and investigation into the cause of the plant damage in the Grazing Licence Area. The Referral Notice stated that the Appellant had applied pesticides on Crown land without authority, contrary to section 6(1)(a) of the *Act*, and that the matter was being referred for an administrative penalty.

[15] Section 6(1) of the *Act* states that a person must not use a pesticide for a prescribed use unless the person holds the permit that is, under the regulations, required for that purpose, and complies with the terms and conditions of that permit. Section 18(2) of the *Integrated Pest Management Regulation* (the "*IPM Regulation*") states that the aerial application of a pesticide is a prescribed pesticide use for the purpose of section 6(1) of the *Act*, except as provided in section 18(4) of the *IPM Regulation*. The exceptions in section 18(4) of the *IPM Regulation* are discussed later in this decision.

Overview of the administrative penalty scheme

[16] Under section 23(1)(a) of the *Act*, the Administrator may issue an administrative penalty to a person who fails to comply with a prescribed provision of the *Act* or its regulations.

[17] The *Administrative Penalties (Integrated Pest Management Act) Regulation*, B.C. Reg. 134/2014 (the "*Penalties Regulation*") governs the determination of administrative penalties under the *Act*. Section 11 of the *Penalties Regulation* specifies which sections of the *Act* are prescribed for the purposes of section 23(1)(a) of the *Act*, and the maximum penalties for contraventions. The maximum penalty for contravening section 6(1) of the *Act* is $40,000.

[18] Section 7(1) of the *Penalties Regulation* lists factors that an administrator must consider, if applicable, in establishing the amount of an administrative penalty. In summary, those factors are:

a) the nature of the contravention;

b) the real or potential adverse effect of the contravention;

c) any previous contraventions, administrative penalties imposed on, or orders issued to the person who is the subject of the determination;

d) whether the contravention was repeated or continuous;

e) whether the contravention was deliberate;

f) any economic benefit derived by the person from the contravention;

g) whether the person exercised due diligence to prevent the contravention;

h) the person's efforts to correct the contravention;

i) the person's efforts to prevent recurrence of the contravention; and

j) any other factors that, in the opinion of the administrator, are relevant.

[19] Under section 7(2) of the *Penalties Regulation*, if a contravention continues for more than one day, separate administrative penalties may be imposed for each day the contravention continues.

The Determination

[20] On March 5, 2020, the Administrator issued a Notice Prior to Determination of Administrative Penalty (the "Notice Prior to Penalty") to the Appellant, recommending a penalty of $20,750 for the contravention of section 6(1)(a) of the *Act*. The Notice Prior to Penalty included information from the inspection and investigation process, and details about how the Administrator calculated the amount of the proposed penalty.

[21] The Notice Prior to Penalty advised that the proposed "base penalty" was $20,000 to reflect the seriousness of the contravention. In that regard, it stated that the nature of the contravention (as per subsection 7(1)(a) of the *Penalties Regulation*) was "major", and the actual or potential adverse effect of the contravention (as per subsection 7(1)(b) of the *Penalties Regulation*) was "medium". The Notice Prior to Penalty stated that the nature of the contravention was "major" because the Appellant had applied pesticides to 3.76 ha of Crown land without authorization, and there was no need for herbicide treatment on that land. It stated that the actual or potential adverse effect of the contravention was "medium" because the herbicide would suppress native forbs and shrubs for two to three years on the Crown land, and less desirable or invasive grasses could colonize and out-compete native grasses on any bare ground created by removing the brush species. Also, using pesticides on Crown land without following the permitting process jeopardized the Ministry's ability to protect human health and the environment, and did not allow for prior consultation regarding public and Indigenous values associated with the Crown land.

[22] The Notice Prior to Penalty explained that the Administrator then considered whether to increase or decrease the base penalty according to "penalty adjustment" factors set out in subsections 7(1)(c) through (j) of the *Penalties Regulation*. The only adjustment made by the Administrator was an increase of $750 under subsection 7(1)(j) (i.e., additional relevant factors), for the following reasons:

> In considering mitigating factors, [the Appellant] was cooperative and forthcoming with providing all information requested in a timely fashion.
>
> … Western Aerial Applications Ltd. was supplied with treatment maps and Global Positioning System (GPS) data for the blocks to be sprayed on the private land prior to application. Those maps clearly indicated the boundaries of the areas to be treated (outlined in red with hectares shown). The portion of Crown land overspray did not have mapped treatment boundaries as it was not intended to be sprayed.
>
> The licensee is also required to conduct an inspection of the treatment area before any treatment is conducted to identify the boundaries of features to be protected, treat only problem vegetation, and ensure that no areas outside of the designated boundaries are treated with pesticide. This process

> is necessary to ensure that there is proper protection for human health and the environment.
>
> The private land treatment boundaries were clearly defined and available to the certified applicator. All treatment areas were on private land and it is clear the application flight line continued beyond the treatment boundary onto the Crown land.

[23] The Notice Prior to Penalty offered the Appellant an opportunity to provide written submissions before the Administrator made a final determination regarding the penalty.

[24] On April 3, 2020, Mr. Gladiuk, on behalf of the Appellant, provided a letter to the Administrator. Among other things, Mr. Gladiuk stated that the Appellant's pilot had followed Mr. Jarvis' instructions on where to spray the Rinsate, and the pilot had believed the Additional Area was private land owned by Mr. Jarvis. Mr. Gladiuk submitted that, based on the Ministry's inspection reports, the Rinsate appeared to have sublethal effects. Therefore, he expected that broadleaf plant removal was unlikely to occur, which would reduce concerns about a potential shift in the plant community. He also submitted that the Appellant received no economic benefit from the contravention, and had made efforts to prevent reoccurrence, as the Appellant's pesticide applicators are instructed to stay within the identified treatment blocks.

[25] On July 6, 2020, the Administrator issued the Determination with reasons that state, in part:

> …
>
> Mr. Gladiuk stated that [the pilot] confirms that he applied rinsate containing diluted Reclaim I and Reclaim II to the Crown Land adjacent to and north of the private land subject to pesticide application. Western Aerial Applications Ltd. did not hold an authorization to apply pesticides (even in diluted quantity) to this Crown Land, and as such did not conduct Indigenous nor public consultation as required as part of the authorization process for this activity.
>
> The rinsate caused impact to broad leaf plants located on a 3.76-hectare Crown Land parcel as evidenced in the photos appended to the January 9, 2020 inspection report…. An unreasonable adverse affect resulted on a significant area of Crown Land.
>
> Western Aerial Applications Ltd. has made it company policy for licensed pesticide applicators to stay within the treatment boundaries; however, this policy is a legal requirement within the Integrated Pest Management Regulation, Section 71(1). This requirement must be adhered to regardless of whether it is company policy.
>
> An administrative penalty factor for economic benefit was not contemplated, therefore this factor remains unchanged.
>
> The base penalty and additional factors will remain the same as described in the Penalty Assessment Form. …

Appeal of the Determination

[26] On August 10, 2020, the Appellant appealed the Determination.

[27] The Board directed that the appeal be conducted by way of written submissions. The appeal was conducted as a new hearing of the matter, which means the Board considered both evidence that was considered by the Administrator and new evidence that was not considered by the Administrator.

[28] The parties provided an Agreed Statement of Facts, with numerous documents attached to it, which sets out facts that are not in dispute. Both the Appellant and the Administrator also provided written submissions, and documentary evidence in support of their submissions. However, the Appellant provided no submissions in reply to the Administrator's submissions, despite the Board providing the Appellant with an opportunity to do so.

[29] The Appellant submits that the penalty should be reduced or cancelled based on the circumstances in this case and the considerations under section 7 of the *Penalties Regulation*.

[30] The Administrator submits that the facts in this case, and the relevant factors in section 7 of the *Penalties Regulation*, justify confirming the Determination.

ISSUE

[31] In deciding this appeal, the only issue is whether the penalty should be reduced or rescinded, based on the parties' submissions and evidence and the relevant factors in section 7 of the *Penalties Regulation*.

[32] The Appellant submitted in its notice of appeal that one of the exceptions in section 18(4) of the *IPM Regulation* applies in this case and that it did not need a permit to spray pesticide on the Additional Area. Also in the Notice of Appeal, however, and in its appeal submissions, the Appellant states that it does not dispute that the contravention occurred. The Appellant did not mention section 18(4) of the *IMP Regulation* again in its submissions or reply to the Administrator's submissions, which address section 18(4). Therefore, I conclude that the Appellant abandoned its argument regarding section 18(4) of the *IPM Regulation*. I have accordingly considered the Appellant's submissions as being directed at the factors in section 7 of the *Penalties Regulation* and whether the penalty should be reduced or rescinded, but I have not considered those submissions as being an argument that it did not contravene section 6(1) of the *Act* because the Appellant concedes that it did.

RELEVANT LEGISLATION

[33] The relevant sections of the *Act*, the *Penalties Regulation*, and the *IPM Regulation* are summarized or reproduced where they are referred to in this decision.

DISCUSSION AND ANALYSIS

Whether the penalty should be reduced or rescinded

Summary of the Appellant's submissions

[34] The Appellant submits that it has a good compliance history, this is its first contravention, and it intends to comply with the legislation. The Appellant received no financial benefit or other advantage from the contravention. The Appellant says it was, and will continue to be, cooperative and forthcoming with any request from the Ministry. The penalty, regardless of amount, is a matter of public record, and will cause monetary and job market impacts on the Appellant's business, relations, and reputation.

[35] Regarding Mr. Jarvis directing the Appellant's pilot to spray the Rinsate on the Additional Area, the Appellant submits that the GPS data and map supplied to it and its pilot did not identify Crown Land or privately owned land. This led the pilot to follow Mr. Jarvis' instructions on where to spray the Rinsate, believing that Mr. Jarvis was aware of his private land and grazing licence authorization requirements.

[36] In addition, the Appellant maintains that invasive plant management is the responsibility/right of the Crown "lease" holder, Mr. Jarvis, and he had a right to direct the pilot to spray the Rinsate on the Crown land to control invasive and undesirable plants. Any requirement for consultation prior to pesticide application on the Crown land would be the responsibility of Mr. Jarvis, and not the Appellant.

[37] The Appellant further submits that its employees are trained and instructed to stay within the designated treatment areas and GPS data identified prior to pesticide application, as part of the usual course of business and annual training. This has been reinforced and emphasized especially for private land, and this measure will prevent future reoccurrence.

[38] Regarding the real or potential for adverse effects of the contravention, the Appellant submits that there is already evidence of plants regenerating in the Additional Area and broadleaf plant removal is unlikely, which reduces the concern about a potential shift in the plant community. Furthermore, there is evidence of invasive and undesirable plants growing on the Grazing Licence Area and spilling onto private land. These weeds displace native plant species and reduce available forage on Crown land. In support of those submissions, the Appellant provided photographs of plants in the Additional Area and the adjacent Grazing Licence Area and private land, and identified the plants and commented on their state of growth or regeneration.

[39] The Appellant also notes that the 3.76 ha Additional Area is six percent of the 59.34 ha Grazing Licence Area. The Appellant submits that based on the gravity of the environmental impact, plus the magnitude/size of the area affected, the contravention did not create an unreasonable adverse effect.

[40] Finally, the Appellant submits that a penalty of $2,450 was issued to an unidentified person in 2017 for providing pesticide service without a licence, in contravention of the *Act*. The Appellant argues that there is some similarity

between that case and the present case, yet the penalty was almost nine times lower in that case.

Summary of the Administrator's submissions

[41] The Administrator submits that the factors in section 7 of the *Penalties Regulation* support the penalty that was imposed in the Determination. The Administrator's submissions review each of those factors and reference the 2020 edition of the Ministry's *Administrative Penalties Handbook – Environmental Management Act and Integrated Pest Management Act* (the "Handbook"). The Handbook recommends calculating a base penalty that takes into account the maximum penalty and the factors in subsections 7(1)(a) and (b) of the *Penalties Regulation*, and then adjusting the base penalty upwards or downwards based on the factors in subsections 7(1)(c) through (j) of the *Penalties Regulation*.

[42] The Administrator submits that the nature of the contravention was correctly classified as "major", given the risks associated with pesticide uses that require a permit, and the potential to undermine the regulatory scheme if permits are not obtained when necessary. The Administrator explains that the *Act* establishes different levels of government oversight for different levels of risk to the environment and human health created by different pesticide uses. In the hierarchy of risks associated with pesticide uses, permits are required for pesticide uses that require the greatest oversight.

[43] The Administrator submits that a permit was required in this case, as none of the exceptions in section 18(4) of the *IPM Regulation* apply. The Administrator submits that any failure to obtain a permit when one is required is a major contravention because it involves conducting a high-risk pesticide use without authorization. Non-compliance with section 6 of the *Act*, by its nature, causes a significant impact or serious threat to the environment or human health, and undermines the integrity of the regulatory regime.

[44] Furthermore, the Administrator maintains that the aerial application of pesticides to Crown land without authorization is a major contravention because it undermines the Province's ability to manage public land for multiple values including biodiversity, supporting the cultural practices of Indigenous people, erosion control, and providing grazing for livestock. The Administrator notes that FLNRORD's pest management plan for Crown land in the southern interior of BC (valid for five years from April 23, 2019) only allows spot or targeted pesticide use rather than aerial spraying, because aerial spraying affects non-target plants including those that are important for biodiversity and are culturally significant to First Nations. The Administrator submits that an application for a permit to use pesticides on Crown land typically triggers the Crown's obligation to consult with First Nations. A permit application also triggers public consultation under section 20 of the *IPM Regulation*. Thus, failing to apply for a permit when one is required deprives First Nations of the ability to identify concerns about a proposed pesticide use and have those concerns accommodated, and deprives the public of their ability to raise concerns.

[45] The Administrator submits that her classification of the real or potential adverse effects of the contravention as "medium" was also appropriate. In support,

the Administrator provided an affidavit sworn on December 16, 2020, by Sheryl Wurz, a professional agrologist and an Invasive Plant Specialist with FLNRORD.

[46] In her affidavit, Ms. Wurz states that the Additional Area had a plant "imbalance" due to overgrazing before the contravention occurred, but the unauthorized herbicide use appears to have exacerbated that imbalance by eliminating most native forbs and shrubs. She expects a shift towards a plant community dominated by western snowberry and non-native bluegrass, and a reduction in native shrubs other than snowberry, for three to five years and possibly longer. She acknowledges that western snowberry is a native shrub which provides food and habitat for small mammals and birds, and browse for ungulates, but she says the regeneration of snowberry is not indicative of other shrubs regenerating, as snowberry is difficult to kill. Killing native shrubs and forbs in this area has left less competition against non-native bluegrass, weedy annuals, and invasive species, leading to an increase in those species. Although the herbicide use appears to have reduced the amount of St. John's Wort (an invasive forb) in the Additional Area, Ms. Wurz says this is likely to be short lived because St. John's Wort regenerates from seeds and rhizomes, and typically requires repeated treatments to be eradicated.

[47] Ms. Wurz attests that the changes in the plant community in the Additional Area will likely benefit livestock grazing due to the increase in bluegrass, but the temporary reduction in snowberry and the longer term reduction of native plants such as chokecherry, wild rose, and saskatoon berry has reduced biodiversity, reduced forage and habitat for birds, small mammals, ungulates, and bears, and reduced flowers for pollinators. Also, the increase in shallow-rooted bluegrass at the expense of forbs and native shrubs may make the area more susceptible to erosion.

[48] Regarding previous contraventions, the Administrator submits that the Appellant has one past contravention, and therefore, no reduction in the base penalty is justified under this factor. The Administrator provided a copy of an advisory letter from Ministry dated December 16, 2016, notifying the Appellant that it had contravened section 35 of the *IPM Regulation* by failing to include required information in pesticide use records, and requesting that the Appellant immediately take steps to correct the non-compliance. A December 17, 2017 letter from the Ministry states that the Appellant was in compliance with section 35 of the *IPM Regulation* during a follow-up inspection in October 2017.

[49] The Administrator maintains that previous contraventions for which there were no penalties, orders, or convictions are still previous contraventions for the purpose of the *Penalties Regulation*. The Administrator notes that section 7(1)(c) of the *Penalties Regulation* refers to "any previous contraventions or failures by, administrative penalties imposed on, or orders issued to" the person. The *Penalties Regulation* defines "contravention or failure" as meaning:

(a) a contravention of a prescribed provision of the Act or the regulations,

(b) a failure to comply with an order under the Act, or

(c) a failure to comply with a requirement of a licence, certificate or permit issued, or a pesticide use notice given, under the Act;

[50] Based on that definition, the Administrator argues that "contravention or failure" is not limited to contraventions that have been subject to tickets, administrative penalty proceedings, or orders. By referring to "previous contraventions or failures" as well as "administrative penalties… or orders" in section 7(1)(c) of the *Penalties Regulation*, the Legislature clearly intended for decision-makers to consider contraventions that led to penalties as well as contraventions that led to no penalty or order being issued. Otherwise, the reference to "contraventions" would be superfluous.

[51] The Administrator did not adjust the penalty based on whether the contravention was repeated or continuous. The Administrator submits that a downward adjustment for this factor would be inappropriate.

[52] Regarding whether the contravention was deliberate, the Administrator says that although the Appellant's pilot deliberately sprayed the Additional Area, the evidence supports this being based on a "mistake of fact" by the pilot. The Administrator did not adjust the base penalty based on this factor.

[53] The Administrator did not adjust the base penalty based on whether the Appellant derived any economic benefit from the contravention. The Administrator submits that a downward adjustment based on this factor would be inappropriate.

[54] The Administrator did not adjust the base penalty for due diligence. She submits that this was appropriate because there is no evidence of due diligence by the Appellant to prevent the contravention. The Administrator acknowledges that the Appellant's pilot sprayed Rinsate on the Additional Area at Mr. Jarvis' suggestion and based on the belief that Mr. Jarvis owned the land. However, Administrator notes that the pilot did not ask Mr. Jarvis if he owned the Additional Area, and the pilot took no other steps to confirm who owned the Additional Area. The Administrator submits that due diligence is measured by whether the Appellant took all reasonable steps to avoid the contravention, and not by whether the pilot reasonably believed in a mistaken set of facts. The Administrator says there is no evidence that, before the contravention, the Appellant directed its pilots to stay within the designated treatments areas. Moreover, the evidence indicates that the Appellant was able to quickly compare the actual flight path against the designated flight path, but there is no evidence that the Appellant periodically confirms that pilots stay within designated treatment areas. The Administrator maintains that due diligence to avoid a contravention requires more than simply delegating compliance to employees; it requires systems, and taking steps to ensure that systems are working.

[55] Alternatively, if the Appellant's due diligence turns on the reasonableness of the pilot's mistake of fact, the Administrator maintains that the pilot's mistaken belief was not reasonable, because the pilot did not take all reasonable steps to ascertain the true state of affairs. The contravention was due to the pilot's negligent mistake of fact and the Appellant's lack of due diligence in ensuring that its pilots kept to designated treatment areas.

[56] Regarding the Appellant's efforts to correct the contravention, the Administrator submits that there is no evidence of such efforts.

[57] Regarding the Appellant's efforts to prevent recurrence of the contravention, the Administrator does not contest the Appellant's submission that it has instructed its pilots to stay within the boundaries of designated treatment areas. However, the Administrator argues that the Appellant's efforts fall short of due diligence, and no adjustment is appropriate.

[58] Regarding other relevant factors, the Administrator says she considered the Appellant's cooperativeness in providing information to the Ministry in a timely manner, but she also considered the failure of the Appellant's pilot to stay within the Treatment Area as an aggravating factor, as was the pilot's failure to inspect and delineate the Additional Area before applying pesticides. The Administrator maintains that it was appropriate to increase the penalty by $750 based on these considerations. In addition, the Administrator says that the herbicide use in the Additional Area has increased the dominance of grasses which provide grazing for livestock. The Administrator says this benefit to the Appellant's clients is a relevant factor which supports a higher penalty, to counteract the interest of service providers in providing maximum benefit to their clients.

[59] Finally, in response to the Appellant's reference to a $2,450 penalty imposed in 2017 for a contravention of the *Act*, the Administrator argues that the factors which lead to that penalty being relatively low are absent in the current case. The Administrator provided a copy of the 2017 penalty determination. The penalty was imposed for providing a service after the person's licence had expired, contrary to section 4(1)(c) and (e) of *Act*. The contravention in that case, like the present case, was subject to a maximum penalty of $40,000. However, the Administrator submits that the contravention in that case was significantly less serious than the Appellant's contravention, as there was no evidence of environmental harm or risk to the environment. Where there is a maximum penalty of $40,000, no environmental harm, and the contravention is of a major nature, the base penalty under the Handbook is $10,000. Moreover, the 2017 determination states that the penalty was reduced by $8,000 because the person was a small operator, and administrative penalties were a new enforcement tool under *Act*. The Administrator maintains that those considerations do not apply in the preset case.

The Panel's findings

[60] I have considered the parties' submissions and evidence in light of each of the relevant factors in section 7 of the *Penalties Regulation*, as discussed below.

Factors a) and b): nature of the contravention, and real or potential adverse effect of the contravention

[61] I agree with the Administrator that the nature of this contravention is "major". The legislative scheme requires permits for pesticide uses that involve the greatest risk to the environment and human health. The parties agree that a permit was required in this case and the Appellant contravened section 6(1) of the *Act* by applying pesticides to the Additional Area without one. As noted previously, this is not an issue under appeal. Aerial application of a herbicide without a permit when one was required is, in itself, a significant breach of the requirements of the legislative scheme, and warrants significant enforcement action.

[62] In addition, I find that failing to obtain a permit in this case undermined the objectives and values that are supported by the legislative scheme. Aerial spraying of herbicides on the Additional Area without authorization undermined the Province's ability to manage that land for values other than cattle grazing. Notably, FLNRORD's pest management plan that covers the Additional Area only contemplates spot or targeted pesticide use, if any pesticides are to be used at all. Aerial spraying is not contemplated because it affects non-target plants, including those that are important for biodiversity, wildlife, and First Nations' uses. Failing to apply for a permit in this case also prevented the consultation processes that would occur if a permit was sought. This deprived First Nations and the public of the ability to express any concerns they may have had about herbicide use on the Additional area.

[63] I also agree with the Administrator that the contravention had "medium" actual or potential adverse effects. Although Rinsate was applied, which means the herbicide was more diluted than it would be when used at full strength, there is clear evidence that the Rinsate damaged or killed many plants in the Additional Area, and not only those that are invasive or undesirable. Although the Appellant provided evidence that some invasive and undesirable plants such as St. John's Wort were growing on the Grazing Licence Area before the contravention occurred, the Administrator provided evidence that the reduction in St. John's Wort is likely to be short-lived because it regenerates from seeds and rhizomes. I accept the Administrator's evidence in that regard. I also accept the Administrator's evidence that the Rinsate killed or damaged native forbs and shrubs in the Additional Area, which will cause a shift towards a plant community dominated by snowberry and non-native bluegrass for three to five years. The increase in bluegrass may benefit livestock grazing, but the reduction in native plants other than snowberry has reduced biodiversity and wildlife forage and habitat on the Additional Area for several years. This is a significant adverse environmental impact, especially given that no herbicide treatment was planned for the Additional Area.

[64] Even if herbicide treatment had been planned for the Additional Area, it would have been targeted or spot treatment, and not aerial treatment, according to the FLNRORD's pest management plan. As such, any herbicide use would have targeted invasive plants such as St. John's Wort, and not desirable native shrubs and forbs, to help rectify rather than exacerbate the pre-existing imbalance in the plant community.

[65] Although the Additional Area is 3.76 ha within a Grazing Licence Area totaling 59.34 ha, I find that the magnitude of the impact should not be determined by comparing the size of the area affected by the contravention to the size of the Grazing Licence Area. 3.76 ha is not a small area. Whether there is a larger grazing area outside of the Additional Land does not lessen the actual or potential adverse effects to the area.

[66] Finally, I have considered the maximum penalty for this contravention, which is $40,000 under the *Penalties Regulation*. Although the $20,000 base penalty is in the middle of the scale relative to the maximum penalty, I find that it is still a significant amount.

[67] Overall, I find that the $20,000 base penalty is appropriate given the "major" nature of the contravention, the "medium" actual or potential adverse effects of the contravention, and the maximum penalty that could be imposed for the most serious noncompliance with section 6(1) of the *Act*.

Factor c): any previous contraventions, administrative penalties imposed on, or orders issued to the Appellant

[68] Although the Administrator did not add an amount to the base penalty for previous contraventions by the Appellant, the Notice Prior to Penalty shows that the Administrator did consider the letter issued to the Appellant in 2016 regarding a contravention of section 35 of the *IPM Regulation*.

[69] I have considered whether to add an amount to the base penalty for a previous contravention based on the 2016 letter. No administrative penalty determination was issued as a result of the events documented in that letter, and the letter itself says it is an "advisory" letter. As such, the 2016 letter could be interpreted as a warning letter rather than a conclusive determination of contravention. However, I accept that the letter provides evidence that, in the Ministry's view, there was a contravention by the Appellant. The 2016 letter documents the Ministry's evidence and perspective regarding a contravention. The 2016 letter did not lead to an opportunity for the Appellant to make submissions to the Administrator in response to the Ministry's allegations. During the appeal process, the Appellant had an opportunity to respond to the Administrator's submissions, including those regarding the 2016 letter, but the Appellant provided no reply submissions at all. However, I note that the Appellant's notice of appeal in the present case states that its 2019 contravention "is the first contravention". As such, I find that there is mixed evidence before me regarding the alleged 2016 contravention.

[70] Even if I accept the 2016 letter as documenting a past contravention by the Appellant, that contravention appears to have been relatively minor. The 2016 letter states that the contravention involved incomplete record-keeping with respect to one pesticide use, unlike the circumstances giving rise to this appeal. There is no evidence that pesticides were used inappropriately or unlawfully, or that the contravention had any potential or actual impacts on the environment or human health. Also, the Ministry's subsequent 2017 letter states that the contravention was rectified.

[71] For these reasons, I conclude that no amount should be added to the base penalty for previous contraventions by the Appellant.

Factor d): whether the contravention was repeated or continuous

[72] I find that there is no evidence that this contravention was repeated or continuous. I agree with the Administrator that no amount should be added to the base penalty for this factor.

Factor e): whether the contravention was deliberate

[73] The Administrator did not add or subtract an amount to the base penalty for this factor. I agree with that approach.

[74] Based on the evidence, I find that the Appellant and the pilot received a map and GPS data for the Treatment Area in advance, and they knew or should have known that the Additional Area was outside of the Treatment Area. Although the Appellant's pilot intended to spray Rinsate on the Additional Area, I find that this resulted from the pilot's mistaken belief that Mr. Jarvis owned the Additional Area or was otherwise authorized to direct the pilot to spray Rinsate on the Additional Area. Although I find, for reasons provided below, that the pilot's mistaken belief was not reasonable, I accept that the Appellant and its pilot did not deliberately contravene the *Act*.

Factor f): any economic benefit derived by the Appellant from the contravention

[75] The Administrator did not add an amount to the base penalty on account of this factor. I find that there is no evidence that the Appellant derived any economic benefit from the contravention, and I agree that no amount should be added to the base penalty for this factor.

Factor g): whether the Appellant exercised due diligence to prevent the contravention

[76] The Administrator found that the Appellant did not exercise due diligence to prevent the contravention, and she did not adjust the base penalty to account for due diligence.

[77] I find that the Appellant was not duly diligent in preventing this contravention. Although the Appellant submits that the GPS data and the treatment map supplied to it and its pilot did not identify Crown land or privately owned land, I find that the treatment map and GPS data should have made the boundaries of the Treatment Area clear to the pilot. The map clearly indicates the boundaries of the areas to be treated, outlined in red. The Additional Area is not within the mapped treatment boundaries.

[78] Given that the pilot held a certificate in aerial pesticide application, he should have known that he was only authorized to apply the herbicides within the boundaries of the Treatment Area, regardless of Mr. Jarvis' instructions to spray the Rinsate outside of the Treatment Area. Although the pilot mistakenly believed that Mr. Jarvis owned the Additional Area or was authorized to direct pesticide treatments on it as part of his Grazing Licence Area, there is no evidence that the pilot took steps to confirm who owned the Additional Area. There is also no evidence that the Appellant had procedures or systems for preventing this type of contravention, such as auditing flight data to confirm that pilots stay within designated treatment areas. As a licensed pesticide applicator for over 20 years, the Appellant should have had such systems or procedures in place.

[79] Given that the Appellant did not exercise due diligence to prevent the contravention, no reduction in the base penalty is warranted based on this factor.

Factor h): the Appellant's efforts to correct the contravention

[80] The Administrator did not add or subtract an amount to the base penalty for this factor, and I agree with that approach. There is no evidence that the Appellant took steps correct the contravention or the damage it caused. It is unclear what remediation or mitigation, if any, could have been done to correct the spraying of

the herbicide on the Additional Area after it had happened, but in any event no reduction is warranted in considering this factor.

Factor i): the Appellant's efforts to prevent recurrence of the contravention

[81] The Agreed Statement of Facts states at para. 33:

> Subsequent to the incident Western Aerial has made efforts to prevent recurrence by instructing licenced pesticide applicators conducting work on private land to stay within provided treatment maps and GPS data.

[82] In the Determination, the Administrator acknowledged those efforts, but she made no adjustment to the base penalty. The Administrator stated in the Determination that the Appellant "has made it company policy for licensed pesticide applicators to stay within the treatment boundaries; however, this policy is a legal requirement" of section 71(1) of the *IPM Regulation*. I note that section 71(1)(a)(i) states that a licensee (i.e., the Appellant) is required to ensure that each person using a pesticide is informed of the boundaries of the proposed treatment area. In addition, section 71(1)(d) states that if the pesticide is to be applied aerially, the licensee must ensure that the pilot conducts an inspection of the proposed treatment area to ensure that he or she is familiar with the boundaries and other critical features of the treatment area.

[83] I find that the parties agree that the Appellant has made efforts to prevent recurrence of this contravention, by instructing its pilots and other pesticide applicators to stay within the treatment boundaries indicated on maps and GPS data. The question is whether the Appellants efforts warrant an adjustment to the base penalty, even if the Appellant's efforts amount to emphasizing a practice or procedure that is already required by the *IMP Regulation*.

[84] The recipient of a penalty should not be disqualified from a reduction in a penalty just because efforts to prevent recurrent contraventions of the *Act* align with a requirement under the *IPM Regulation*. The question is not whether the recipient of a penalty has gone beyond legislated and regulatory requirements, but their efforts to prevent recurrence of contraventions. Robust training and follow-up with applicators about obligations under the *Act* and *IPM Regulation* can, for example, result in the use of financial and administrative resources and be indicative of efforts to prevent recurrent contraventions.

[85] In this case, the Appellant has indicated that applicators' training and instruction, annually and before applications, to remain within treatment areas has been "reinforced". The Appellant did not provide further detail, however. It is unclear how the training and instruction was "reinforced" and how much effort (including financial and administrative resources) were used to do so. For this reason, in the circumstances of this case, a downward adjustment of the penalty is not appropriate when considering this factor.

Factor j): any other factors that, in the opinion of the Administrator (and now the Board), are relevant

[86] The Administrator considered the Appellant's cooperativeness with the Ministry's investigation to be a mitigating factor. However, the Administrator found (in the Notice Prior to Penalty) that the Appellant had failed to comply with section

71(1)(a)(i) of the *IPM Regulation*, which required the Appellant to ensure that the person applying the pesticides (the pilot) was informed of the boundaries of the proposed treatment area. The Administrator considered this to be an aggravating factor. The Administrator found that these considerations, collectively, justified adding $750 to the base penalty.

[87] I agree that the Appellant's cooperativeness with the Ministry's investigation is relevant as a mitigating factor.

[88] I disagree that the penalty should be increased because of the Appellant's non-compliance with section 71(1)(a)(i) of the *IPM Regulation* in the circumstances of this case. As the Respondent noted in her submissions, "… the Appellant provided its employee with instructions to treat the Designated Treatment Areas, all of which was located on private land." The issue in this case is not that the pilot did not know the boundaries of the Treatment Areas, but rather that he agreed to treat the Additional Area without knowing if Mr. Jarvis was authorized to instruct him to do so.

[89] I also disagree with the Respondent that any benefit to grazing in the Additional Area, to be realized by Mr. Jarvis, is a reason to increase the penalty amount. There is insufficient evidence to conclude that this benefit influenced the Appellant's contravention or would influence the Appellant's conduct in the future. In the circumstances of this case, I am not satisfied that any benefit Mr. Jarvis experiences is a matter not appropriately considered in setting the amount of the penalty.

[90] I agree with the Respondent, however, that an aggravating factor for the contravention of section 6(1) of the *Act* was that the pilot sprayed an area that he did not inspect, as required by subsections 71(1)(c) and (d) of the *IPM Regulation*. He did not verify the boundaries of the Additional Area before spraying, as required by section 71(6) of the *IPM Regulation*. He did not verify whether there were any critical features or other circumstances that contra-indicate the application of pesticides. Particularly given that the application was a non-discriminating, aerial one, this is an aggravating factor in this case.

[91] For different reasons than the Respondent, I agree that an increase of the penalty in $750 is appropriate in these circumstances. In particular, the aerial application of the Rinsate to the Additional Area, without first inspecting the area or delineating its boundaries added an additional element of risk to the application. Even if the Appellant had been authorized to apply pesticides to the Additional Area, doing so without having first inspected the area and properly defined its boundaries may well have attracted its own penalty. This is a sufficiently distinct and aggravating factor from what is represented by the base amount of the penalty.

[92] Finally, regarding the penalty of $2,450 levied against a person for contravening sections 4(1)(c) and (e) of the *Act*, I find that the contravention in that case was significantly less serious than the present contravention. The contravention occurred in 2015 and involved applying pesticides to a farmer's nut trees as a service, after the person's licence had expired. The farmer wanted the pesticides to be applied to the trees, and there was no evidence of environmental harm or impact to the actual or potential rights of Indigenous peoples. I also note

that the pesticide use in that case was ground-based, which poses a lower risk of harm to the environment than aerial treatment. The base penalty of $10,000 was reduced by $8,000 because the person was an individual operator, and administrative penalties were a new enforcement tool beginning in 2014.

[93] I find that the facts in that case were significantly different than those in the present case. Most importantly, in the present case, the contravention resulted in environmental harm to a significant area of Crown land, where herbicides were not supposed to be applied. The Appellant was conducting an aerial pesticide application, which is a higher risk activity than ground-based pesticide application. Also, administrative penalties had been a known enforcement tool for several years when the Appellant's contravention occurred in 2019.

Conclusion

[94] Based on these considerations, I conclude that a penalty of $20,750 is appropriate for the Appellant's contravention of section 6(1) of the *Act.*

DECISION

[95] In making this decision, I considered all of the relevant and admissible evidence and the submissions of the parties, whether or not specifically reiterated in this decision.

[96] For the reasons set out above, I confirm the penalty in the Determination, and order the Appellant to pay a penalty of $20,750 for the contravention of section 6(1) of the *Act.* The appeal is dismissed.

"Darrell LeHouillier"

Darrell LeHouillier, Panel Chair
Environmental Appeal Board

April 16, 2021