



Environmental Appeal Board

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DECISION NOS. EAB-IPM-22-A001(c) to EAB-IPM-22-A008(c) [Group Appeal File: EAB-IPM-22-G001]

In the matter of eight appeals under the *Integrated Pest Management Act*, S.B.C. 2003, c. 58

BETWEEN:	Dr. Evan Frangou, Diana Smardon, Jane Elizabeth Rollins, Joanna Wilkinson, Karen Forbes, Louise Sawyer, Kelly Lahti, and Katy Young	APPELLANTS
AND:	Administrator, <i>Integrated Pest Management Act</i>	RESPONDENT
AND:	Ministry of Forests - Forest Science, Planning and Practices Branch	THIRD PARTY
BEFORE:	A panel of the Environmental Appeal Board Darrell Le Houillier, Chair	
DATE:	Conducted by way of written and oral submissions concluding June 13, 2022	
APPEARING:	For the Appellants: Dr. Evan Frangou Benjamin Isitt, Articled Student Katy Young Karen Forbes For the Respondent and Third Party: Amanda Macdonald, Counsel Kyle Chesley, Articled Student	

PRELIMINARY DECISION

[1] This decision relates to a group of eight appeals of a Pesticide Use Permit #738-0030-20/23 (the "Permit"), which authorizes the Forest Science, Planning and Practices Branch of the Ministry of Forests (the "Third Party") to disperse a pesticide over eight populated areas in British Columbia. The Permit was issued by Kerri Skelly, the Authorizations Section Head, Industry and IPM (the "Section Head"), on behalf of the Administrator, *Integrated Pest Management Act* (the "Respondent").

[2] While the Permit was initially issued on March 13, 2020, the Section Head amended it on April 4, 2022. It is that version of the Permit (the "Amended Permit") that was appealed to the Environmental Appeal Board (the "Board"). As explained in greater detail below, some of the Appellants requested that the Board stay the Amended Permit pending the outcome of the appeals. The Board denied those applications, and the Respondent and Third Party now ask the Board to dismiss the appeals as moot.

[3] This preliminary decision addresses whether the appeals should be dismissed.

BACKGROUND

Procedural History

[4] The Board provided a detailed summary of the facts of this appeal in *Frangou et al. v. Administrator, Integrated Pest Management Act* (Decision Nos. EAB-IPM-22-A001(b) to EAB-IPM-22-A008(b), June 3, 2022) [*Frangou et al.*]. I will not repeat the detailed recounting here. Rather, I will summarize only the details relevant to this decision, at a high level.

[5] On March 13, 2020, the Section Head issued the Permit, which authorized the Third Party to disperse Foray 48B, a pesticide, at specified locations in Surrey and Lake Cowichan. The treatments were intended to reduce or eliminate populations of European Lymantria moths in the treatment areas. The Permit was set to expire on March 1, 2023.

[6] The Permit set terms and conditions on the dispersion of Foray 48B. The Permit included provisions limiting the size of treatment areas and the times during which treatments can occur, requiring public notification, mandating windspeed monitoring during treatments, imposing record keeping requirements, and defining operational requirements associated with treatments.

[7] Foray 48B is only effective against Lymantria moth species during the larval stages of their development. In British Columbia, the larval stages occur in June and/or July each year. The Respondent planned to administer three rounds of the treatment in each of the treatment areas while the moths were in their larval stages.

[8] In November 2021, the Third Party applied for an amendment to the Permit. The amendment sought to add treatment areas in Mission, Langley, Chilliwack, View Royal, Nanoose Bay, and Burnaby, as well as adding the Asian variety of the moth to the Permit. The application for the amendment proposed dispersing Foray 48B by aircraft beginning in spring 2022.

[9] On April 4, 2022, the Section Head issued the Amended Permit, which also allowed treatments to reduce or eliminate populations of Asian Lymantria moths, and altered some terms and conditions of the Permit including adding the additional treatment areas. Eight Appellants filed appeals of the Amended Permit with the Board, from April 7 to 26, 2022.

[10] On May 2, 2022, two Appellants applied to the Board for a stay of the Amended Permit, pending a final decision in the appeals. The Board arranged for an expedited hearing to consider the applications. This hearing was scheduled for May 19, 2022.

[11] On May 6, 2022, the Third Party began treatments under the Amended Permit. The Third Party carried out treatments in several of the treatment areas.

[12] On May 19, 2022, the Board held the hearing for the stay applications. After the hearing, the Third Party conducted initial treatments in additional treatment areas.

[13] On May 25, 2022, the Board granted an interim stay with respect to the View Royal treatment area, pending its decision on the stay applications or until May 31, 2022, whichever came first (see *Frangou et al. v Administrator, Integrated Pest Management Act*, Decision Nos. EAB-IPM-22-A001(a) to EAB-IPM-22-A008(a), May 25, 2022). As a result of this stay, the Third Party missed the initial treatment window in View Royal, but the rest of the treatment areas were not the subject of an interim stay.

[14] On May 31, 2022, the Board convened a case management conference. With the agreement of all parties that participated, the Board set timeframes for the disclosure of documents between the parties, the identification of subjects for which expert testimony would be provided in the hearing of these appeals on their merits, as well as the provision of statements of points and notices of expert testimony in advance of the oral hearing. The oral hearing was scheduled to take place on June 23 and 24, 2022. This was the most expedited schedule that the parties could accommodate, while ensuring that relevant information could be gathered and shared as required for a fair and effective hearing.

[15] On June 1, 2022, the Board communicated to the parties that the stay applications were denied, with reasons to follow.

[16] On June 2, 2022, the Third Party advised the Board that it had updated its treatment schedule, and planned to complete all treatments by June 21, 2022. The Third Party and the Respondent requested that the Board dismiss the appeals as moot or, alternatively, delay the scheduled oral hearing and associated deadlines because all treatments would be complete before the hearing and there was, accordingly, no time pressure to complete the hearing during the 2022 treatment schedule.

[17] Later on June 2, 2022, the Board issued its reasons for denying the stay applications (see *Frangou et al.*).

[18] On June 8, 2022, one Appellant, Ms. Young, requested that the Board order the Respondent to disclose certain documents.

Preliminary Oral Hearing

[19] On June 13, 2022, the Board held an oral hearing by videoconference to consider the Respondent's and Third Party's application to dismiss the appeals and to postpone the deadlines associated with the appeals, including the scheduled oral

hearing. The Board also indicated that it may consider Ms. Young's application for an order compelling disclosure of documents, if required.

[20] Of the eight Appellants, three participated in the June 13, 2022 oral hearing: Dr. Frangou, Ms. Forbes, and Ms. Young. Ms. Smardon was represented by Mr. Isitt, and another Appellant, Ms. Sawyer, was represented by Ms. Forbes. The remaining Appellants - Ms. Wilkinson, Ms. Lahti, and Ms. Rollins - did not appear at the hearing and were not represented.

[21] In the prehearing conference on May 31, 2022, the Board had set aside the time on June 13, 2022 to hear any preliminary applications to be considered before the scheduled oral hearing. No parties objected and, in follow-up correspondence dated June 1, 2022, the Board urged all parties to advise if they had concerns with any procedural decisions made in the prehearing conference. No Appellants expressed any concern with the time on June 13, 2022 being reserved for any preliminary applications that would follow.

[22] On June 6, 2022, the Board advised all parties that the dismissal application would be considered in the timeslot reserved on June 13, 2022. The Board reiterated this on June 10, 2022 and noted that it may also consider Ms. Young's application for a disclosure order, if required. On June 13, 2022, the Board reminded the parties of the oral hearing and provided a videoconferencing link to access the hearing. The Board also made a teleconferencing number available.

[23] As none of the Appellants expressed any concern about the timeslot reserved for the Board to hear and consider any preliminary applications, and as the Board informed all parties repeatedly about the matters being considered in the June 13, 2022 oral hearing, while providing multiple avenues of access to the proceeding, I am satisfied that all parties who wished to participate did so. I consider all other parties to have waived their right to be heard with respect to these preliminary applications.

Verbal Orders Issued During the Preliminary Oral Hearing

[24] In the June 13, 2022 oral hearing, all parties present agreed that, following the denial of the stay applications, there was no longer any need to adhere to an expedited appeal process as outlined in the May 31, 2022 prehearing conference. I asked all parties whether any opposed the Respondent's application to delay the remaining processes. None did.

[25] As a result, in the oral hearing, I verbally ordered that the remaining procedural schedule for the appeals be vacated. I also ordered that the scheduled oral hearing dates be cancelled, and that the Board would raise the issue again, if necessary, pending the outcome of the Respondent's application to dismiss the appeals. Ms. Young's request for an order compelling document disclosure could likewise be considered, if necessary, pending the outcome of the application to dismiss the appeals.

[26] I made those orders because the pesticide treatments would be complete before the expedited hearing schedule could be completed, and there was no longer any time-sensitive reason to adhere to such an aggressive schedule. The expedited schedule imposed significant demands on all parties and on the Board.

Other Issues Addressed During the Preliminary Oral Hearing

[27] In the oral hearing, various parties discussed the possibility of the Board amending the Amended Permit, to reflect that no further pesticide treatments would be done after June 2022. Various Appellants wondered about such an alteration of the Amended Permit, but did not submit any application for interim relief that fulfilled the requirements of the Board's Rule 16, which describes the requirements for pre-hearing applications.¹

[28] Counsel for the Respondent advised that she was uncertain if the Respondent would consent to such a change in the Amended Permit. I informed the parties that the Board would not be able to order any change to the Amended Permit if it dismisses the appeals. I noted that the parties remained free to submit an application for a consent order to adjust the end date of the Amended Permit, if they wished.

[29] No application for a consent order was received before this preliminary decision was ready to be issued.

ISSUE

[30] The issue I must decide in this preliminary decision is whether the appeals should be dismissed because they are moot.

SUMMARY OF THE PARTIES' POSITIONS*The Respondent's (and Third Party's) position*

[31] The Respondent asks the Board to dismiss the appeals because the outcome of the appeals will not affect the 2022 treatments, which will complete before the appeals can be heard, let alone decided. The Respondent adds that the Permit will expire before the 2023 larval stages of the moths occurs, and as such before any treatments that might occur in 2023. Any treatments in 2023 would require a new permit or a further amendment to the Amended Permit, and either of these may be appealed to the Board.

[32] The Respondent adds that each case is decided on its own merits and any decision the Board makes about the Amended Permit will not necessarily impact any future permits or amendments to the Amended Permit.

[33] The Respondent notes that *Rossi v. Assistant Water Manager* (Decision No. EAB-WSA-20-A005(a), March 31, 2021) [*Rossi*], a recent decision in which the Board discussed mootness, applies the leading case on mootness in Canada: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 [*Borowski*]. The Respondent argues that *Borowski* says that a court will consider whether to dismiss a case for mootness where the court's decision will not resolve a live controversy affecting the rights of the parties.

¹ The Board's Rules are available online at <https://www.bceab.ca/app/uploads/sites/717/2020/09/rules.pdf>.

[34] The Respondent argues that *Borowski* establishes a two-part test that courts (and in this case, the Board) will consider when faced with a potentially moot decision. First, the court will consider whether the tangible or concrete dispute has disappeared, such that the remaining issue(s) are academic.

[35] With respect to this question, the Respondent says the live controversy between the parties disappeared when the Board denied the stay applications. The Respondent says the Notices of Appeal which started the appeals identify what controversies existed at the start of the appeals. They raise questions related to health and environmental impacts of the spraying of Foray 48B, and other issues related to public consultation and notification. The notices of appeal ask the Board to reverse the Amended Permit, to vary it by adding certain terms or conditions, or to send the matter back to the Section Head, with instructions to add terms and conditions.

[36] The Respondent argues that, given that this case is complex and requires the input of expert evidence, it cannot be completed before the treatment periods authorized under the Amended Permit are complete. Any spraying for next year must be authorized under a new permit or a further amendment to the Amended Permit. In either case, separate rights of appeal would exist and need to be exercised to bring the matter within the Board's jurisdiction; any decision the Board makes with respect to the present appeals will not impact any pesticide applications authorized under the Amended Permit.

[37] The Respondent says that, under *Borowski*, the second question to be considered by a court is whether to exercise its discretion to decide the case anyway, even if it is moot. The Respondent says that *Borowski* defines broad rationales that set out general principles for a court to consider when deciding whether to decide a moot appeal. Some include whether there is an appropriate adversarial context to the case, whether deciding the case would be an appropriate use of judicial resources, and whether the court would be fulfilling its appropriate adjudicative function.

[38] The Respondent argues that addressing these appeals would not be an appropriate use of the Board's resources. There will be no live controversy, as the effects of the pesticide applications will have already occurred before the appeals are resolved. Given that the circumstances of a permit are fact-specific, including because the treatment areas and moth eradication methods can vary year-to-year, there is little value in the Board addressing these appeals.

[39] The Respondent says that addressing the rights of parties where there is no live dispute may not fulfill an adjudicative function, but rather a legislative one. For example, section 60 of the *Integrated Pest Management Regulation*, B.C. Reg. 427/2008 (the "*Regulation*"), contains minimum publication requirements associated with pesticide use permits, and altering those requirements in general (and general comments are all the Board could make, given the fact-specific nature of each permit) would intrude into legislative functions.

The Appellants' positions

[40] Dr. Frangou states that, if counsel for the Respondent and Third Party accurately summarized the applicable court decisions, and he had no reason to

doubt her, he agreed with her analysis. Dr. Frangou adds that, if he had known this would have been the result of the denial of the stay applications, he would have made more thorough submissions or presented more evidence with respect to the stay applications.

[41] Dr. Frangou emphasizes that the dismissal of the appeals is a poor outcome. The Appellants were denied their rights of appeal because of the time-intensive nature of the appeal process, coupled with the short period of time between when the Amended Permit was issued and when the pesticide treatments concluded. Dr. Frangou argues that the public was not properly notified of the risks associated with the pesticide treatment, and that the difference between "harmless" and "generally safe" is not being recognized, particularly given the presence of vulnerable human populations in and around the treatment areas.

[42] Ms. Forbes agreed with the submissions of Dr. Frangou. She stated that, if there was nothing precedent-setting that could be done with these appeals, a dismissal was likely appropriate. Ms. Forbes agreed that the circumstances of this case were poorly timed and prevented the Appellants from exercising their appeal rights.

[43] Ms. Young queried who decided to issue the Amended Permit on such an abbreviated timeframe. She was unconvinced that the abbreviated timeframes and the prejudice to the appeals being considered on their merits was unintentional. She argues that harm had been done already, and the parties expended considerable effort to advance the appeals up to this point. She says that aerial spraying of pesticides is not taken seriously enough, and she describes the process as an assault for which the public needs a remedy.

[44] Ms. Young states that the public is disrespected through this process. The general public cannot be expected to gather the amount of information required in appeals, particularly when tasked to do so on an abbreviated timeline as was required in this case.

[45] Ms. Young suggested that the Board should keep information year-to-year so that not all information has to be re-submitted with each annual appeal of pesticide use permits. These pesticides have universal impacts on humans, and it is exhausting to re-submit the information each time the appellants wish to appeal a permit.

[46] Ms. Young also queried whether there were other avenues through which she could pursue records from the Respondent. She also wondered if the Board had the authority to reprimand the Third Party for failing to post signing warning of impending treatments, as required under the Amended Permit.

[47] Ms. Smardon shared the concern expressed by the other Appellants, arguing that the appeal rights within the *Act* were being effectively denied. She queried what safeguards exist if the appeal process is rendered moot or ineffective, to ensure that the legislature's intended appeal rights are effective. She states that, whatever factors are responsible, they need to be addressed.

[48] Ms. Smardon noted there were some procedural irregularities when it came to the issuance of the Permit. According to Ms. Smardon, the Third Party did not

complete public notification requirements associated with the issuance of the Permit on time in or around February 2022. Ms. Smardon also argues that the application for the Permit references a pest management plan that, according to counsel for the Respondent, was not required and did not exist.

[49] Ms. Smardon queried whether these irregularities warranted the expenditure of judicial resources and the parties' resources to address, calling it an "open question".

The Respondent's (and Third Party's) reply

[50] The Respondent argues that the stay applications were heard and decided quickly and efficiently. Had they been granted, the spray would not have occurred in 2022 because the associated larval phase of the moths would have passed before the Board could likely complete the appeals. The case would have been moot for that reason (due to the expiry of the Amended Permit before any 2023 treatment windows), and the Appellants likely would not have complained.

[51] The Respondent added that, while there were concerns about the timing of the amendment of the Permit, compared to the start of treatments, the Section Head complied with all requirements under the *Act* and the *Regulation*. Concerns about the timeframes would appropriately be addressed through legislation or regulation. The Respondent did not have any particular reply to the concerns expressed by Ms. Smardon, however, without prior notice that these issues would be raised in the hearing.

[52] With respect to Ms. Young's concerns, the Respondent noted that Ms. Young could request documents through the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("FOIPPA").

Appellants' Sur-reply

[53] Ms. Young notes that she had ongoing concerns with the Amended Permit, beyond its end date. She describes a number of alterations or additions she thinks would be beneficial under the Amended Permit, the details of which are not relevant for this preliminary decision.

DISCUSSION AND ANALYSIS

[54] Before the oral hearing, the Board directed the parties to *Rossi*, which adopts the analysis from *Borowski*, when addressing whether an appeal should be dismissed as moot. The Board has previously relied on this analysis in other decisions as well.²

[55] No party argued that the Board should consider a different analysis to decide whether to dismiss the appeals. Consistent with earlier Board decisions, I consider it appropriate to follow the analysis in *Borowski*. As noted by the Respondent, this is the leading case on mootness in Canada and it provides a consistent and predictable test for the Board, when considering appeals that are potentially moot.

² See, for example, *Gibson's Alliance v. Director, Environmental Management Act*, Decision No. 2017-EMA-010(c), September 24, 2019.

In the absence of any other persuasive authorities, I adopt the analysis in *Borowski* for the reasons provided above.

[56] I agree with the Respondent that the appeals are moot. The Board denied the stay applications in these appeals, the Respondent completed all treatments for 2022, and the Amended Permit will expire on March 1, 2023. The Respondent has explained that due to the limited window during which Foray 48B is effective in eradicating *Lymantria* moths, no further treatments are possible under the Amended Permit. None of the Appellants challenged this position, although some were concerned that there may be more treatments in the future.

[57] As a result, and given that the Amended Permit expires before the next larval development window of the *Lymantria* moths, I agree that there are no treatment windows remaining under the Amended Permit. Despite the best efforts of the Board and the parties, the Board could not conclude an oral hearing on the merits of the appeals before the eradication program under the Amended Permit was carried out, once the stay applications were denied.

[58] I also agree with the Respondent that this means no live disputes remain in the appeals. I find that any remedy that the Board could provide on the appeals will have no practical effect on the rights of the parties, and the subject matter of the appeals has become academic. This is because the issues that the Appellants raised in their Notices of Appeal, related to the environmental and human health impacts of the pesticide, and concerns about the sufficiency of the terms and conditions of the Amended Permit, would be answered after the last treatment occurred under the Amended Permit. The Board would only be able to comment on these issues in retrospect, and would be unable to make any orders affecting whether, when, where, and how the Third Party carries out the moth eradication under the Amended Permit. The Board can no longer affect the rights of the Third Party, or do anything to enforce or protect the rights of the Appellants, where the Third Party's eradication program under the Amended Permit is concerned.

[59] The next question I must consider is whether the Board should decide the case anyway.

[60] Multiple Appellants described feeling as though they were denied their appeal rights in this case. This is a serious consideration; however, this consideration does not mean that the Board should decide the moot appeals in these circumstances.

[61] In particular, I note that the Permit provided authority for the Third Party to engage in pesticide treatments over multiple years. If the Third Party wishes to conduct an aerial treatment of pesticides in the future, it will need to obtain an amendment to the Amended Permit, or a new permit. In either case, a public notification period is required under the *Regulation*, before any permit or amendment is issued. As a result, I am confident that the Appellants, with some attentiveness on the issue, will be aware of any new permit being issued, or the amendment of the Amended Permit, to authorize aerial applications of pesticide in areas of interest to them. As a result, they will have an opportunity to appeal any such amendment or permit that may be issued. This would provide the avenue to raise the serious concerns that the Appellants describe, and to make their arguments before the Board.

[62] Even if Ms. Smardon's critiques regarding the process leading to the Amended Permit have some merit, this does not justify the Board deciding the moot appeals. The Board would, at most, point out any deficiencies in the process that led to the Amended Permit without affecting the rights of any party. In these circumstances, this would not be a good use of the resources and time of the parties or the Board. I do not consider that to be an appropriate exercise of the Board's authority and discretion in this case, as the Third Party's process requirements may be different in the future, as the requirements for any future permits or any amendment to the Amended Permit (including treatment areas to be authorized) may be considerably different from previous requirements under the Permit and Amended Permit.

[63] In reaching this conclusion, I note that Ms. Smardon did not argue this would be an appropriate use of the Board's resources, simply calling it an "open question". Similarly, Ms. Young simply queried if this was within the Board's authority.

[64] Furthermore, the fact that the Board and various parties have already expended some resources to bring the appeals to their present stage does not mean that the appeals should be seen through to their conclusion, even though they are moot. From this point forward, the parties and the Board would need to consider and address Ms. Young's application for an order compelling the disclosure of documents; the completion and exchange of Statements of Points; the retention and instruction of expert witnesses; the exchange of Notices of Expert Testimony or Expert Reports; and the hearing itself. The bulk of the work remains to be done in these appeals, and the relatively small costs expended so far do not justify the Board adjudicating these moot appeals.

[65] Additionally, as pointed out by the Respondent, Ms. Young may be able to request the documents she seeks through *FOIPPA*. The Board cannot order the production of documents in the absence of an appeal proceeding. The Board's powers in this regard relate to the hearing of appeals. It would be an abuse of process for the Board to order the production of documents where there is no other reason to continue with the appeal. The Board cannot extend an appeal for that purpose.

[66] Rather, I agree with the Respondent that the fact-specific nature of the Amended Permit's terms and conditions does not support the Board making a decision on these moot appeals. Furthermore, the Board must be careful to maintain an adjudicative function, and should not use its jurisdiction to critique or manage any party's processes, or to intrude on legislative functions, such as setting standards for public notification generally, rather than in the particular circumstances of any given case.

[67] In closing, I appreciate Ms. Young's comments that the Board could better serve the public by keeping material submitted in the context of one appeal for later appeals. The Board's processes are not at issue in this preliminary decision, however, and I will not comment on them further.

CONCLUSION

[68] For the reasons provided above, I find that the appeals are moot, and the Board should not exercise its discretion to hear the merits of the appeals, notwithstanding that they are moot. As a result, I grant the Respondent's application and summarily dismiss the appeals.

[69] In reaching this conclusion, I considered all information and submissions provided to the Board, whether or not they were specifically referenced in this decision.

"Darrell Le Houillier"

Darrell Le Houillier, Chair
Environmental Appeal Board

June 29, 2022