



Environmental Appeal Board

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APPEAL NO. 2003-PES-014(a)

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

BETWEEN:	Tom Eberhardt	APPELLANT
AND:	Deputy Administrator, Pesticide Control Act	RESPONDENT
AND:	Merrill & Ring Forestry, Inc.	THIRD PARTY
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE OF HEARING:	Conducted by way of written submissions concluding on December 22, 2003	
APPEARING:	For the Appellant: Tom Eberhardt For the Respondent: Conrad Bérubé For the Third Party: R. Michael Tourigny, Counsel	

APPEAL

This is an appeal by Tom Eberhardt, a resident of Sooke, B.C. He appeals the September 2, 2003 decision of Conrad Bérubé, Deputy Administrator, *Pesticide Control Act*, for the Vancouver Island Region, Ministry of Water, Land and Air Protection (the "Deputy Administrator"), to approve Pest Management Plan 390-015-03/08 (the "PMP") submitted by Merrill & Ring Forestry, Inc. ("Merrill & Ring"). The PMP authorizes the use of *Vision®* (active ingredient glyphosate) and *Release®* (active ingredient triclopyr) to manage vegetation competing with crop trees.

The Environmental Appeal Board has the authority to hear these appeals under section 11 of the *Environment Management Act* and section 15 of the *Pesticide Control Act* (the "Act"). The Board's authority under section 15(7) of the *Act* is as follows:

On an appeal, the appeal board may

- (a) send the matter back to the person who made the decision being appealed, with directions,
- (b) confirm, reverse or vary the decision being appealed, or
- (c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

Mr. Eberhardt seeks an order rescinding the PMP.

BACKGROUND

Following a notification and consultation process, the Deputy Administrator approved Merrill & Ring's final draft of the PMP on September 2, 2003, subject to a number of conditions that form part of the approved PMP. The term of the PMP is five years from the date of the approval. The PMP covers all of Merrill & Ring's private and managed forest lands in or around Jordan River, Squamish, Theodosia River, Menzies Bay, Loughborough, Charles Bay, Kanish Bay, Waiatt Bay, Unwin Lake, Discovery Passage, Chonat, Minstrel Island, Jackson Bay, Hardwicke Island, East Thurlow, and Rock Bay. The specific purposes of the PMP include vegetation management for site preparation, seed control, conifer release, maintenance of access roads, utilities, borrow pits and industrial yards. The PMP states that the public can access most of the sites located on Vancouver Island, especially those located near Campbell River and Menzies Bay; however, with the exception of Squamish, Jordan River and Rock Bay, the mainland sites can only be accessed by boat or aircraft.

On September 12, 2003, the Board received a notice of appeal from Mr. Eberhardt. Mr. Eberhardt's grounds of appeal can be summarized as follows:

There is no 100% guarantee that:

- ground water and surrounding streams and vegetation will not be affected by the herbicides that are to be used;
- people living in the surrounding areas of the spray zones will not come into contact with the herbicides to be used;
- drinking water wells or any organic farms in the immediate areas in question will not be affected by the herbicides to be used; and,
- proposed spraying and application methods will not be affected by sudden winds or other atmospheric conditions.

There has been no scientific attempt made to determine:

- the effects on wildlife that depend on the competitive vegetation; and,
- the long-term affects on human or wildlife conditions.

There has been no consideration given to moral, ethical, economic and equitable arguments concerning the management of public forest resources for economic use.

There has been insufficient exploration of alternative methods to the use of herbicides and pesticides in managing competing species.

On October 7, 2003, with the consent of the parties, the Board scheduled a written hearing with submissions to conclude no later than October 28, 2003. Mr. Eberhardt required an extension of time, and the Board received his written submissions on November 18, 2003. Mr. Eberhardt's written submissions reiterated his grounds of appeal, and attacked the moral and scientific validity of the government's environmental legislation and policies.

In a letter to Mr. Eberhardt dated November 20, 2003, the Board advised Mr. Eberhardt that while his submissions set out his general "overarching concerns" with the PMP and with the application of herbicides generally, he had not addressed the legal test set out in the *Act*, or the test set out in the relevant case law. The Board explained that the onus is on the Appellant to demonstrate that the use of pesticides under the PMP will cause an unreasonable adverse effect on humans or the environment and offered him a further opportunity to provide evidence and argument in support of his appeal.

On December 22, 2003, the Board received final submissions from Mr. Eberhardt.

RELEVANT LEGISLATION AND CASE LAW

The relevant provisions of the *Act* are as follows:

Pesticide must be applied in accordance with a permit or approved plan

6 (3) The administrator

- (a) may issue a permit or approve a pest management plan if satisfied that
 - (i) the applicant meets the prescribed requirements, and
 - (ii) the pesticide application authorized by the permit or plan will not cause an unreasonable adverse effect, and
- (b) may include requirements, restrictions and conditions as terms of the permit or pest management plan.

Powers of administrator

12 (2) The administrator has the powers necessary to carry out this Act and the regulations and, without limiting those powers, may do any of the following:

- (a) determine in a particular instance what constitutes an unreasonable adverse effect;

...

In addition, section 2(1) of the *Pesticide Control Act Regulation* states that "no person shall use a pesticide in a manner that would cause an unreasonable adverse effect." Section 1 of the *Act* defines "adverse effect" as "an effect that results in damage to humans or the environment."

Under the federal *Pest Control Products Act*, R.S.C. 1985, P-9, a pesticide must be registered before it can be sold, used, or imported into Canada, and a registered pesticide must be used in accordance with its label.

The British Columbia Court of Appeal has ruled that the Environmental Appeal Board can consider a registered pesticide to be generally safe when used in accordance with the label (*Canadian Earthcare Society v. Environmental Appeal Board* (1988), 3 C.E.L.R. (N.S.) 55) ("Canadian Earthcare"). However, it is also clear that the fact that a pesticide is federally registered does not mean that it can never cause an unreasonable adverse effect.

Justice Legg, in *Islands Protection Society v. British Columbia Environmental Appeal Board* (1988), 3 C.E.L.R. (N.S.) 185 (B.C.S.C.) ("Islands Protection Society") found that the Board should engage in a two-step process to determine whether a pesticide application would cause an unreasonable adverse effect. The first stage is to inquire whether there is any adverse effect at all. The second stage is, if the Board decides that an adverse effect exists, then the Board must undertake a risk-benefit analysis to ascertain whether that adverse effect is reasonable.

The Court of Appeal in Canadian Earthcare agreed with the following comments of the Supreme Court:

Should the Board find an adverse effect (i.e. some risk) it must weigh that adverse effect against the intended benefit. Only by making a comparison of risk and benefit can the Board determine if the anticipated risk is reasonable or unreasonable. Evidence of silvicultural practices will be relevant to measure the extent of the anticipated benefit. Evidence of alternative methods will also be relevant to the issue of reasonableness. If the same benefits could be achieved by an alternative risk free method then surely the use of the risk method would be considered unreasonable.

It is clear that the test for "unreasonable adverse effect" is site specific and application specific.

ISSUES

This appeal raises the following issues:

1. Whether the use of pesticides, as authorised by the PMP, will cause an adverse effect on human health or the environment.
2. If so, whether the adverse effect is unreasonable.

DISCUSSION AND ANALYSIS

The first step for the Panel is to determine whether the use of pesticides under the PMP will cause any adverse effect at all. If satisfied that the pesticide application under the PMP will not cause an adverse effect, the Panel is not required to proceed to the second part of the test. The onus is on the person claiming an adverse effect (in this case, Mr. Eberhardt) to show, on a balance of probabilities, that the PMP under appeal allows the use of herbicides in a manner that will cause an adverse effect on human health or the environment.

Mr. Eberhardt's grounds for appeal list many general concerns; his main concern is that there is no absolute certainty that the use of pesticides, and herbicides, will not negatively affect humans or the environment. In his written submissions, Mr. Eberhardt provides his own personal opinions concerning Merrill & Ring, the Deputy Administrator, and the Ministry of Water, Land and Air Protection. He makes reference to social trends, the relationship between human activity and the natural environment, and his views on the political nature of resource management. In his final submissions, Mr. Eberhardt refers to the *Act's* requirement for evidence of an "unreasonable adverse effect" as "jargon." Rather than providing any evidence to support his beliefs and concerns, he poses this question to the Panel:

Can you give a 100% guarantee that using poisons will not harm the environment and/or its inhabitants (people included) in all possible ways in all possible conditions.

As the Board advised Mr. Eberhardt in its letter of November 20, 2003, this is not the test the Legislature has established in the *Act* for permitting pesticide use in the Province.

After carefully considering all of his submissions, the Panel finds that Mr. Eberhardt has not met the onus of proof required to succeed in his appeal. He failed to provide any information relevant to the PMP under appeal. He made no reference to the PMP other than as an example of what he considers to be the general dangers of pesticide and herbicide use. He did not refer to any of the herbicides, treatment methods, plant species or areas of application under the PMP. He provided no evidence relating to the toxicity or application methods of the herbicide under the PMP, or otherwise. Although Mr. Eberhardt is clearly concerned about the dangers of pesticide and herbicide use, to overturn a pest management plan, the Board must have some specific evidence that the application authorized by the plan will cause an adverse effect. If so, the Board must then consider whether this effect is unreasonable in the circumstances.

Since the Appellant's submissions contain no evidence to establish that the use of herbicides in accordance with the terms and conditions of the PMP will create an adverse effect on human health or the environment, there is no evidence that the PMP approval was issued contrary to the requirements of the *Act*. Accordingly, there is no need for the Panel to undertake a risk-benefit analysis to ascertain whether any adverse effect is "unreasonable," pursuant to section 6 of the *Act*.

Under the circumstances, it is also unnecessary for the Board to receive reply submissions from either the Deputy Administrator or Merrill & Ring.

DECISION

In making this decision, the Panel has considered all of the evidence and arguments provided, whether or not they have been specifically reiterated here.

The appeal is dismissed.



Alan Andison, Chair
Environmental Appeal Board

January 12, 2004