



Environmental Appeal Board

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DECISION NOS. EAB-IPM-22-A001(a) to EAB-IPM-22-A008(a) [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 and Diana Smardon	APPLICANTS
AND:	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:	David Bird, Panel Chair	
DATE:	Conducted by way of written and oral submissions concluding May 19, 2022	
APPEARING:	For the Applicants: Dr. Evan Frangou Benjamin Isitt, Articled Student For the Appellants: Katy Young Karen Forbes For the Respondent and Third Party: Amanda Macdonald, Counsel Kyle Chesley, Articled Student	

Interim Stay Decision

APPLICATIONS

[1] On May 2 and 9, 2022 the Environmental Appeal Board (the "Board") received two applications seeking a stay of Pesticide Use Permit No. 738-0030-20/23, as amended on April 4, 2022 (the "Amended Permit"). The Amended Permit was issued by an Authorizations Section Head with the Integrated Pest Management and Environmental Protection Division with the Ministry of Environment and Climate Change Strategy, on behalf of the Administrator, *Integrated Pest Management Act* (the "IPMA"). The Administrator is the Respondent in the appeals. The Board has received eight appeals of the Amended Permit, which have been joined and are being heard together.

[2] The Amended Permit was issued to Ministry of Forests, Forest Science, Planning and Practices Branch (the "Permit Holder"). The Permit Holder is a third party to these appeals.

[3] Two of the Appellants, Dr. Frangou and Diana Smardon (represented by Mr. Isitt) (the "Applicants") filed applications for interim relief through a stay of the Permit. Some of the other Appellants were invited to provide submissions on the two applications by Friday, May 13, 2022.

BACKGROUND

[4] The Amended Permit authorizes the use of Foray 48B, a pesticide with the active ingredient *Bacillus thuringiensis* var. *kurstaki* ("BtK"), in a spray program designed to eradicate populations of the *Lymantira dispar* moth in a specified areas throughout British Columbia (B.C.). The Amended Permit issued under section 6 of the *IPMA* authorizes the Permit Holder to use pesticides subject to the conditions listed in the Amended Permit.

[5] Specifically, the Amended Permit authorizes the use of Foray 48B by aerial and ground spray for the eradication of the European and Asian *Lymantira* Moth from public and private land in Surrey, Lake Cowichan Area, Nanoose Bay, City of Victoria (View Royal), City of Burnaby, City of Mission, City of Langley and the City of Chilliwack. The Amended Permit sets conditions on the number of applications of Foray 48B, the maximum treatment area for each of the eight locations, and the authorized method of application including ground spray and aerial by fixed-wing aircraft.

[6] The Amended Permit sets conditions on the number of litres of Foray 48B that can be applied per hectare, and the allowable treatment dates based on notification requirements. It also sets out requirements for public access to the Amended Permit.

[7] Section 4 of the Amended Permit sets out notification requirements starting within 15 days of the issuance of the Amended Permit. Some, but not all, of the following notification requirements are set out in section 4 of the Amended Permit:

- Within 15 days of the issuance of the Amended Permit, the Permit Holder must publish notice in at least one community newspaper circulated within each treatment area.
- Annually, at least 7 days prior to commencement of the first pesticide application, press release providing details of the pending local pesticide use must be sent to a minimum of one community newspaper, one locally broadcast AM Radio station, one locally broadcast FM Radio station, and one locally broadcast television station that serve the communities in and around the treatment areas.
- At least 24 hours before commencement of each pesticide application, notification (written if possible) must be provided to the following persons:
 - the Medical Health Officer for each Health Authority in which application will take place;

- the principles of all schools within the treatment areas and primary zone of spray drift deposition;
- the owners or managers of any licensed care facilities within the authorized spray area and primary zone of spray drift deposition;
- all persons subscribed to the list serve or other subscription email application;
- the mayor for each town or city in which an application will take place, and;
- an Integrated Pest Management Authorization Officer via email.
- At least 48 hours before commencement of each spray application, the Permit Holder must place treatment notices so they are clearly visible to anyone entering the treatment areas.

[8] Section 6 of the Amended Permit sets out various restrictions, including that aerial applications must be completed between civil morning twilight and 07:45 hours. Treatments can be conducted to 08:00 hours on weekends, school professional development days, and on weekends in some locations. However, aerial applications must be completed by 07:45 hours in View Royal and Cowichan Lake at all times except on school professional development days.

[9] In a May 12, 2022 letter, counsel for the Respondent and the Permit Holder stated that, unless the Board issues a stay, the Permit Holder plans to follow the schedule of planned treatments, as regularly posted on a Province of British Columbia website¹, because the application of the pesticide only affects Lymantria moth when they are at the larvae stage of life, which coincides with the aerial spray window set out in the Amended Permit.

[10] I reviewed the pesticide spray schedule as updated on May 19, 2022, which confirmed three initial spray treatments for Foray 48B occurred in Langley, B.C., on May 6, in Surrey, B.C., on May 13, and in Burnaby, B.C., on May 19, 2022. The next initial treatment sprays scheduled are in Mission, B.C., on May 20, in Chilliwack, B.C., on May 21, in View Royal, B.C., on May 21, in Lake Cowichan, B.C., on May 25, and in Nanoose Bay/Lantzville/Nanaimo, B.C., on May 26 thru 28, 2022. The second spray treatments are scheduled to begin on May 29, 2022.

[11] The Applicants seek a stay of the Amended Permit pending a decision on the merits of the appeals. The Board held an expedited hearing on the stay applications on May 19, 2022, by videoconference. The Permit Holder took no position on the stay applications, but the Respondent submitted that no interim stay should be granted because of the potential impact to the overall eradication program from even a minor delay in the treatment schedule.

[12] This decision grants a partial interim stay of the Amended Permit pending the final decision on the stay applications.

¹ Publicly viewable at: <https://www2.gov.bc.ca/gov/content/industry/forestry/managing-our-forest-resources/forest-health/invasive-forest-pests/lymantria/news>

DISCUSSION AND ANALYSIS

[13] In its May 12, 2022 letter, the Permit Holder has confirmed that it will proceed with the spray program authorized by the Amended Permit unless a stay is issued by the Board.

[14] The evidence from the Permit Holder's website, quoted above, confirms that the spray program has proceeded in some areas despite the eight appeals filed in response to the Amended Permit. There are various aerial sprays scheduled under the Amended Permit going forward.

[15] The Board expediated the process to hear the stay applications, and I am endeavoring to make my decision on the stay applications as quickly as possible.

[16] There was no dispute that I have the authority to issue an interim stay under section 25 of the ATA. In addition, the parties agreed that the legal test to be applied when deciding a stay application is the three-stage test in *RJR-Macdonald Inc. v. Canada (Attorney General)* (1994), 111 DLR (4th) 385 (SCC) [*RJR-Macdonald*]. This test was referenced by both parties in their submissions. The test involves the following three parts:

- whether the appeal raises a serious issue;
- whether the applicant for a stay will likely suffer irreparable harm if a stay is refused; and
- whether the harm that the applicant will suffer if a stay is refused exceeds any harm that may occur if a stay is granted (the "balance of convenience" test).

[17] I find there is a serious issue to be tried because the issues under appeal involve questions regarding whether the application of a pesticide will cause harm to human health and the environment. These are not questions that are vexatious, frivolous, or purely questions of law.

[18] The Applicants have made submissions and provided evidence suggesting that there may be irreparable harm to human health and the environment if the pesticide is applied. In this interim decision, I am only conducting a preliminary analysis of the evidence to decide if a short interim stay is required before I issue my final decision on the stay applications.

[19] In considering the question of whether the pesticide use will likely cause irreparable harm, I have placed significant weight on the fact that the Applicants primarily focused their evidence and arguments on the potential irreparable harm that may occur if the pesticide is sprayed in the View Royal area. The Applicants also argued for a stay to apply to entire Amended Permit and all the remaining scheduled sprays under it.

[20] In support of the applications, Ms. Young and Ms. Forbes both argued against the aerial spray programs given the vulnerability of the people in the spray areas and the drifting of the spray bloom, which is discussed below.

[21] I also noted Ms. Young's argument that the aerial spray applications scheduled in Cowichan Lake area, Chilliwack and Nanoose Bay, Lantzville and Nanaimo will potentially have environmental impacts on waterways.

[22] The Applicants raise concerns about the potential adverse effects of the pesticide treatments on human health and the environment, particularly in the View Royal spray zone. Mr. Isitt, on behalf of Ms. Smardon, led evidence regarding the potential for human exposure during the spray program in View Royal since there is an addictions facility, recreational vehicle park, and the regional bike trail in or near the identified spray zone. The Applicants also led evidence regarding the location of Victoria General Hospital in or near the spray zone and buffer zone, and the potential human health impacts to vulnerable populations attending that hospital. The Applicants submit that Foray 48B can worsen pre-existing conditions including asthma, allergies, and other respiratory illnesses, and the Applicants have significant concern about the vulnerability created by COVID-19.

[23] Finally, the Applicants submit that there may be environmental impacts in the View Royal spray zone since there is a creek running in the zone and there may be drift to other significant water ways.

[24] I also considered the evidence of the Respondent and Permit Holder that there is scientific basis for the aerial spray program and that its efficacy significantly diminishes if all three applications of Foray 48B cannot be completed in the subject areas by the end of June 2022. The Respondent submits that if treatments do not proceed as scheduled, the moth population can greatly increase and potentially become established, even from one season. The Respondent referenced a trial program using mass trapping as an alternative eradication strategy that resulted in increase populations. The Respondent noted that an example of this was discussed by the Board in *Caryl and Jeff Jones v. Administrator, Integrated Pest Management Act*, Decision No. 2010-IPM-001(a), April 12, 2010, at para. 111:

As an example of what can occur, Ms. Burleigh refers to a failed attempt to eradicate the moth population on southern Vancouver Island in 1998 through a ground spray program. The moth population increased and expanded in area to Nanaimo. The CFIA imposed a large quarantine zone, covering 139,600 hectares in Victoria and 9,900 hectares in Duncan, affecting a large number of industries including Christmas trees, nursery stock, non-propagative forest products with bark attached, outdoor household articles, military vehicles and equipment and recreational and personal vehicles and equipment.

[25] The Respondent also referred to a report titled, "Proposed Acceptability for Continued Registration", based on a study done in 2006 by the Pest Management Regulation Agency, re-evaluating *Bacillus thuringiensis*. At page 17, that report states:

Drinking water exposure is expected to be minimal as Canadian *B. thuringiensis* subsp. *Kurstaki* and *B. thuringiensis* subsp. *tenebrionis* labels limit direct application to, or contamination of, water bodies and *B. thuringiensis* subsp. *israelensis* labels prohibit application to treated, finished

drinking water. The low toxicity associated with *B. thuringiensis* and its safe history of use suggest that human exposures through drinking water do not pose a significant risk.

[26] I find that there is some evidence supporting the Applicants' position that irreparable harm may occur because of the scheduled application of Foray 48B in the View Royal area. I find it significant that the View Royal area has a hospital in the area, a recreational vehicle park, and an addictions treatment center. The Applicants raised questions about the added vulnerability of homeless or low-income individuals in the treatment area and their lack of access to the notification and information required under the Amended Permit. There is also a regional bike trail that runs from the treatment zone. I have also considered the potential respiratory and other health vulnerabilities that some people may have due to the recent global pandemic respiratory disease, and individuals at the local hospital who might experience irreparable harm if the schedule treatment occurs.

[27] However, I am not satisfied that there is a likely to be an adverse effect on aquatic species or drinking water, given the available evidence. I am not persuaded that the evidence shows that there is a risk to the environment respecting watersheds and aquatic species.

[28] In considering of these factors, I find there is sufficient evidence under the three-stage test in *RJR-Macdonald* to issue an interim stay of the application of Foray 48B in the View Royal zone under the Amended Permit until 11:59 p.m. on May 31, 2022. This interim order will stay the scheduled treatment application scheduled on May 21, 2022.

[29] I am not persuaded that the other areas under the Amended Permit should be stayed because the site-specific concerns related to the View Royal treatment area do not apply to those areas.

[30] In consideration of the balance of convenience, I acknowledge that this interim order may cause some prejudice to the Respondent and Permit Holder because the Permit Holder will not be able to proceed with the pesticide treatment planned for View Royal in May. However, any prejudice will be minimal because several other dates are planned for treatment in the coming weeks, and those treatments can proceed or be added to the schedule if the stay applications are ultimately denied. I note that the spray schedule is subject to change due to weather and other factors, and there should be other days to resume the treatment program if the stay applications are denied.

[31] However, I find that there is greater prejudice to the Applicants as a result of the potential harm to human health if this interim stay is not granted for the View Royal treatment area under the Amended Permit.

[32] This interim order will limit the potential impact on the moth eradication program in the View Royal area of the pesticide program until my final decision on the stay applications is issued.

[33] Therefore, I order a partial stay of the Amended Permit for the scheduled aerial application of Foray 48B in the identified zone in View Royal scheduled for May 21, 2022.

[34] The remainder of the scheduled aerial spay applications provided for under the Amended Permit are not subject to this Order until and unless I so order in my final decision on the stay applications.

[35] Finally, I emphasize that the findings in this decision are for the limited purpose of deciding whether to grant an interim stay of the Amended Permit pending my stay decision. These findings are not binding on me when I make my final decision on the stay applications, or on the Board when it decides the merits of the appeals.

DECISION

[36] For the reasons provided above, I grant a partial interim stay of the Amended Permit. The interim stay is limited to the View Royal treatment area defined in the Amended Permit, and is in effect until May 31, 2022 or until I issue my final decision on the merits of the stay applications, whichever comes first.

"David Bird"

David Bird
Panel Chair

May 25, 2022