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Sent: Friday, May 10, 2024 10:34 AM
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Subject: BC EAB Denies a halt to BTK Aerial Pesticide Use Permit

FOR IMMEDIATE RELEASE

BC Environmental Appeal Board Denies Request to Halt BTK Aerial Pesticide Use Permit

West Kelowna, May 10, 2024 - The West Kelowna Branch of the Kelowna Citizens Safety Association (WKB/KCSA) has received notification from the BC Environmental Appeal Board regarding the denial of their application to stay (halt) the Ministry of Forests (MOF) aerial pesticide use permit. This permit enables the MOF to continue aerial spraying Foray 48B, a bacterial pesticide in 13 BC communities, including West Kelowna.

Expressing disappointment with the decision, spokesperson Manchester stated, "We did not expect a favourable decision knowing the Appeal Board had denied stays for these applications in the past." The decision, according to Manchester, hinges partly on whether an unreasonable adverse event causing harm to humans or the environment.

The WKB/KCSA has voiced concerns over the MOF's promotion of the bacterial pesticide Foray 48B as non-toxic, despite explicit safety instructions to minimize exposure and the undisclosed composition of 87% of the formulation. Manchester highlighted that aerial applications exposes a broad section of people, workers, and pets to the pesticide without their knowledge, posing health risks to humans, animals, and the ecosystem.

Of significant concern are pesticide residues potentially drawn into air conditioning units in residences and buildings without occupants' knowledge. Such residues pose risks to students, staff, and passersby, compromising air quality systems and contaminating structures, Manchester stated.

The aerial pesticide permit mandates precautionary advice, including remaining indoors with windows and doors closed during active spraying and for at least 1 hour thereafter, and washing hands after outdoor activities. Manchester emphasized that these conditions cannot be met for those unknowingly exposed to the aerial bacterial pesticide. Manchester encourages those concerned to call the Minister of Forests at 250-387-6240 and express your concerns.

In response to the lack of awareness and informed consent among residents, the WKB/KCSA has initiated a comprehensive community education program, distributing "Pesticide Free Zone" signs to expand awareness in West Kelowna. Additionally, the KCSA is distributing Spray Drift Cards to detect pesticide presence on properties, and inside and outside of the buffer zone.

For media inquiries or further information, please contact:

Lloyd Manchester

250-878-9352

www.kelownacsa.org

Spray Hot Line 1-800-573-0213

NoSpray_kcsa@proton.me

Environmental Appeal Board

Citation: Communities United for Clean Air and Dr. Tynan v March 18, 2024 Pesticide Use Permit Nos. 738-0037-24-24 and 738-0038-24-24, 2024 BCEAB 10

Decision No.: EAB-EMA-24-G001 [EAB-IPM-24-A001(a), EAB-IPM-24-A002(a), EAB-IPM-24-A003(a), and EAB-IPM-24-A004(a)]

Decision Date: 2024-05-03

Method of Hearing: Conducted by way of written submissions concluding on April 26, 2024.

Decision Type: Preliminary Decision on Stay Application and Jurisdiction

Panel: Darrell Le Houillier, Chair

Appealed Under: *Integrated Pest Management Act,* SBC 2003, c. 58

Between:

Communities United for Clean Air and Dr. Tynan

Appellant(s)

And:

Administrator, *Integrated Pest Management Act*

Respondent

And:

Ministry of Forests

Third Party

Appearing on Behalf of the Parties:

For the Appellant(s): Ben Isitt, legal counsel

For the Respondent: Amanda MacDonald, legal counsel

For the Third Party: Amanda MacDonald, legal counsel

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Decision on Stay Applications

INTRODUCTION

[1] This preliminary decision addresses whether two pesticide use permits will be stayed pending the outcome of appeals of those permits.

BACKGROUND

The Permits

[2] On March 18, 2024, Sajid Barlas, Ph.D., P.Ag. (the "Respondent") issued two Pesticide Use Permits under the *Integrated Pest Management Act*, S.B.C. 2003, c. 58 (the "*Act*"): No. 738-0037-24-24 and No. 738-0038-24-24 (collectively, the "Permits"). The Permits authorize the Ministry of Forests (the "Ministry") to apply Foray® 48B ("Foray 48B"), which has an active ingredient of *Bacillus thurngiensis* subsp. *kurstaki* ("Btk"), in designated treatment locations. Up to three aerial applications were permitted between April 1, 2024, and June 30, 2024, for each treatment location.

[3] The Permits impose several requirements on the Ministry which must be adhered to prior, and during, the application of Foray 48B. These requirements include: posting of information, public notification, monitoring, labelling, minimization of pesticide drift during applications, equipment calibration, security, licencing requirements for contractors, application time windows, limitations on weather in which applications can take place, spill evaluation and clean-up or decontamination, and record keeping and reporting.

The Order in Council

[4] On April 8, 2024, by Order of the Lieutenant Governor in Council[1] amended the *Spongy Moth Eradication Regulation*, B.C. Reg. 100/2022 (the "*Eradication Regulation*"), which was enacted as a regulation to the *Plant Protection Act*, R.S.B.C. 1996, c. 365 (the "*PPA*"). The *Eradication Regulation* was amended to define all spray areas authorized by the Permits as treatment zones.

[5] The *Eradication Regulation* provides that inspectors appointed under the *Ministry of Agriculture and Food Act*, R.S.B.C. 1996, c. 296, are authorized to undertake aerial or ground

[1] No. 175/2024.

spraying to apply an insecticide containing Btk within designated treatment zones, up to four times from April 1 to October 31 each year.[2]

[6] The Board advised all parties to the appeals about the April 8, 2024, amendment of the *Eradication Regulation* and requested comment on what, if any, effect this had on the appeals and the stay application.

The Applicants' Position

[7] The Permits were appealed by, among others, Communities United For Clean Air and Dr. Jennifer Tynan (collectively, the "Applicants"). The Applicants argue that: the Respondent erred in concluding that the pesticide use authorized would not cause an unreasonable adverse effect on human health and the environment, the required public notification and consultation processes undertaken before the Permits were issued were procedurally unfair, and there were insufficient terms and conditions in the Permits to protect human health and to ensure adequate public reporting. The Applicants ask the Environmental Appeal Board (the "Board") to set aside the Permits and to remit the matter to the Respondent, with directions. The Applicants seek to have spongy moth population management occur through ground trapping and "ground application".[3]

[8] The Applicants also ask the Board to stay the Permits. They raise several arguments. First, the Applicants say there are environmental risks associated with aerial applications of Foray 48B. The Applicants argue that these risks apply particularly to grey copper butterfly populations, which can reportedly be found within a kilometer of one of the treatment zones, and to pet health generally. The Applicants reference a scholarly journal article which discusses the importance of butterflies from an ecological perspective and argue that the Respondent and Third Party have conceded, in previous appeals, that butterflies may be impacted by aerial treatments of Foray 48B in British Columbia. The Applicants also assert facts about the ecological importance of butterflies.

[9] The Applicants also note that the manufacturer of Foray 48B recommends that it be kept out of drains, sewers, ditches, and waterways. The manufacturer further advises that Foray 48B is ecotoxic and should not be allowed into waterways or lakes. The manufacturer recommends not applying Foray 48B where rain is forecast within six hours, or where the dew point is sufficient to allow run-off from foliage. CUFCA and Dr. Tynan also note that the manufacturer recommends rotating pesticide use in a site, as dictated by an integrated pest management program that includes monitoring for resistance to Foray 48B.

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[2] One treatment incident can take place over multiple days if a treatment cannot be done throughout a treatment area on a day.

[3] The submissions from CUFCA and Dr. Tynan do not make clear what "ground application" is, although it is presumably application of a pesticide on the ground.

[10] Second, the Applicants say there are risks associated with aerial application of Foray 48B to vulnerable human populations in the treatment areas. The Applicants summarize what they have presented as human health impacts related to prior Foray 48B applications in British Columbia. In addition to occupational exposures from those applying the pesticide, they describe individuals suffering respiratory difficulties (coughing, wheezing, asthma attacks, and difficulty breathing), gastric upset, allergy-like symptoms affecting eyes and throats, congestion, loss of appetite, and rashes among those exposed to aerial applications of Foray 48B. The Applicants also provided reports of individuals who experienced headaches and fatigue at, or around, the time of the previous aerial applications. The Applicants note that previous studies found similar symptoms occurred in nearby human populations after aerial applications of Foray 48B in other jurisdictions. The Applicants also rely on a statement provided by Dr. Per Einar Granum, an academic and professor with years of study and work in biochemistry, biology, and food safety, who states that the active ingredient in Foray 48B has been responsible for food poisoning.

[11] Third, the Applicants say the public was not adequately notified of the Permits to enable them to meaningfully participate in a public consultation phase, the completion of which is required before a pesticide use permit is issued.[4] During that consultation phase, the Applicants raised this concern to the Respondent and Third Party and asked that the process be suspended until informed consent had been obtained and more research on the impacts of Foray 48B had been conducted. The Appellants also argue that the Respondent and Third Party were procedurally unfair during the public notification and consultation process which preceded the issuance of the Permits.

[12] Turning to the subject of notification, the Appellants argue that the Ministry intends to not conform with notification requirements under the Permits requiring precautionary advice. The Appellants say the Third Party failed to comply with similar permits issued in 2022.

[13] Additionally, with respect to information-sharing, the Applicants say they have not yet received summary reports that had been required under similar Foray 48B permits issued to the Third Party in 2022, after requesting them in March 2024.

[14] CUFCA and Dr. Tynan also argue that the motivation for spongy moth population control in British Columbia seems to be economic, although the Applicants reference government publications that also describe environmental threats related to spongy moth populations.

[15] While CUFCA and Dr. Tynan made extensive submissions on the stay application, they did not address, in any substantive way, the impact of the amendment of the *Eradication Regulation* on that application or the appeals.

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[4] This requirement exists under section 60 of the *Regulation*.

The Respondent and Third Party's Position

[16] The Respondent and Third Party say that the Permits are the latest in a series, and are intended to eradicate spongy moth populations before they get established in British Columbia. These programs have been underway since 1979 and continue to be required because spongy moths continue to be re-introduced into British Columbia. If a population were to become established, more widespread and cyclical use of Foray 48B would be required to combat these established populations.

[17] The Respondent and Third Party also say that addressing any noncompliance with the Permits is not the Board's function: any issues of noncompliance are for the administrator appointed under the *Act* to address. The administrator is empowered to address noncompliance, and, unless he makes a decision on noncompliance with the Permits and that decision is subsequently appealed to the Board, the Board lacks the jurisdiction to address noncompliance. Furthermore, the Respondent and Third Party say the problematic aspects of signage were fixed mid-printing, resulting in some signs being compliant with the Permit requirements while others are not. Those signs that are not Permit-compliant will be replaced with compliant signage before treatment begins.

[18] With respect to public consultation, the Respondent and Third Party note that not all language around the Permits was finalized at that time (during consultation) and so some aspects of the Permit wording were not communicated during consultation. However, they were neither expected nor required to be consulted on. The Respondent and Third Party also disagree that misinformation about risks associated with Foray 48B was provided during consultation.

Post-Submission Correspondence

[19] After the submissions from all parties (which are summarized below) were provided to the Board, the Applicants wrote the Board to provide copies of letters and other materials that the Applicants say show that the Third Party was noncompliant with several terms of the Permits in areas where treatments had begun. The Respondent and Third Party objected to this information being accepted into evidence before the Board, arguing it is irrelevant to the stay application, as discussed in their submissions on the subject.

[20] I agree with the Respondent and the Third Party in this matter and find that the post-submission correspondence from the Applicants should not be entered into evidence in this application before me. There is no need for me to consider this material, for the reasons provided below.

ISSUE(S)

[21] The principal issue to be addressed in this preliminary decision is whether the Applicants' stay application should be granted.

DISCUSSION AND ANALYSIS

The Regulatory Framework

[22] The regulatory framework related to the *Act* and the *Eradication Regulation* raise issues which could determine the outcome of a stay application with respect to the Permits. The *Act* prohibits, subject to some exemptions, people in British Columbia from using or authorizing the use of pesticides:

> **6** (1) A person must not use or authorize the use of a prescribed pesticide or class of pesticides or a pesticide for a prescribed use unless the person
>
> (a) holds the permit that is, under the regulations, required for that purpose, and
>
> (b) complies with the terms and conditions in **or** attached to that permit.

[23] A pesticide, as defined in section 1 of the *Act*, is "… a micro-organism or material that is represented, sold, used or intended to be used to prevent, destroy, repel or mitigate a pest." There is no dispute between the parties that Foray 48B is a pesticide as defined in the *Act*, and I find that it is one.

[24] Section 6(1) of the *Act* establishes that a person may not use a pesticide for a prescribed purpose unless they hold a permit allowing them to do so. Section 18 of the *Integrated Pest Management Regulation*, B.C. Reg. 604/2004 (the "*Management Regulation*") is the mechanism that prescribes these restricted purposes. Aerial applications are prescribed under section 18(2) of the *Management Regulation*, so long as they are not exempt under section 18(4). Neither party argues that the aerial applications of Foray 48B authorized under the Permits are exempt and I find that they are not. As a result, the aerial applications contemplated in the Permits are prescribed in the *Management Regulation* for the purposes of section 6(1) of the *Act* and must not be undertaken without a permit.

[25] The *Eradication Regulation* stands in contrast to this requirement. Section 2(1)(a) allows inspectors appointed under the *Ministry of Agriculture and Food Act*, R.S.B.C. 1996, c. 296, to "undertake treatment within a treatment zone by applying Btk, using an aerial or ground spray," provided they adhere to the requirements and limitations set out in that regulation.

[26] Section 1 of the *Eradication Regulation* defines Btk as "an insecticide containing [Btk] as its massive ingredient." As noted above, Foray 48B has an active ingredient of Btk,

meaning it constitutes "Btk" as defined in the *Eradication Regulation*. As a result, inspectors are empowered to undertake treatment within a treatment zone by way of aerial spraying of Foray 48B, providing they are otherwise compliant with that regulation. In particular, section 3 of the *Eradication Regulation* places limits on Btk treatments by restricting applications so that they can only occur between April 1 to October 31 each year, and by limiting the applications withing a treatment zone to four treatments (even if treatments are spread out over multiple days) during that timeframe.

[27] Section 2(3) of the *Eradication Regulation* references the *Act*, noting, "Nothing in subsection (1)(a) limits an authorization granted under the [*Act*] for overspray or drift from treatment to pass into the buffer zone:" an area delineated on maps of treatment areas included as a schedule to the *Eradication Regulation*. As a result, when inspectors undertake aerial spraying of Btk in treatment areas, this will not impact authorizations granted under the *Act* because of overspray or drift passing into adjacent areas. Even in contemplating the interplay between the *Act* and the *Eradication Regulation*, the legislature did not make the treatment authorized in the *Eradication Regulation* subject to, or dependant upon, the requirements of the *Act*. As noted by the Respondent, pre-2020 versions of the *Eradication Regulation* provided that treatments authorized by that regulation needed to comply with the *Act*. This may signal legislative intent that such eradications are not subject to the *Act*.

[28] The Board solicited submissions from both parties on the impact of the *Eradication Regulation* on the Third Party's requirement to comply with the *Act*. The Applicants did not make substantive submissions on this issue and the Respondent took the position that the *Eradication Regulation* did not exempt a person from the requirements of the *Act*. The Respondent and Third Party understand that the *Eradication Regulation* empowers inspectors to do various things to eradicate pests, but still require a permit under the *Act* to use a pesticide.

[29] These submissions are not of assistance to me in evaluating the effect of the *Eradication Regulation* on the *Act,* where authorization to undertake the same action is provided by both. I am concerned that none of the parties provided detailed submissions on circumstances where enactments from the same level of government are in overlap, as discussed in *Telus Communications Inc. v. Federation of Canadian Municipalities*, 2023 FCA 79 (CanLII), *Thibodeau v. Air Canada,* 2014 SCC 67 (CanLII), *Lévis (City) v. Fraternité des policiers de Lévis Inc.,* 2007 SCC 14, [2007] 1 S.C.R. 591, and other cases. While the Respondent and Third Party provided a position on this issue, they did not reconcile that position with the fact that the *Eradication Regulation* specifically authorizes inspectors to, subject to specific requirements, apply pesticides containing Btk, like Foray 48B, using aerial and ground spraying. This authorization does not explicitly include the requirement that inspectors act in compliance with the *Act:* a change since pre-2020 versions of the *Eradication Regulation*.

[30] I do not need to answer the question of the effect of the *Eradication Regulation* on the *Act*, however, for the reasons that follow. If the Respondent and Third Party's position

is correct, the analysis which follows is required. If the Respondent and Third Party's position is incorrect however, and inspectors do not need to comply with the *Act*, the analysis which follows is unnecessary but ultimately arrives at the same conclusion.

Should the Stay Application be Granted?

[31] Both parties referenced the test on stays historically used by the Board: that from *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC) ("*RJR-MacDonald*"). I agree with the parties that this is the applicable test in this case. There are three questions involved in this test:

1. Is there a serious issue to be tried?
2. Will the Applicants suffer irreparable harm if the stay is not granted?
3. Does the balance of convenience favour granting a stay?

All three questions must be answered in the affirmative for a stay to be granted.

Is there a serious issue to be tried?

[32] All parties agree there is a serious issue to be tried. I agree. The appeals involve allegations of significant risks to human health and the environment. These appeals are not frivolous or vexatious. They pass the "low bar" of raising a serious issue to be tried.

Will the Applicants Suffer Irreparable Harm if the Stay is not Granted?

The Applicants' Submissions

The Applicants argued in their initial submissions that they, other people, and non-human animals will suffer irreparable harm if the stay is not granted. The Applicants argue that any harm to humans as a result of exposure to Foray 48B will not be compensated for monetarily, making it "irreparable" as discussed in *RJR-MacDonald*. The Applicants add that the Board has concluded in previous decisions that harm to wildlife constituted irreparable harm if that was demonstrated in the appeal on its merits, but referenced only *City of Port Coquitlam v. Deputy Administrator, Pesticide Control Act*, 1998 BCEAB 41 (CanLII) ("*Port Coquitlam*"). The Applicants referenced reports from Dr. Granum and scientific articles discussing the impact of Btk on human health and the environment.

[33] Dr. Granum says that Btk can produce enterotoxins that cause food-borne illness. Btk can also produce eye infections and side-effects in asthmatic individuals. Dr. Granum referenced studies of Btk spraying in different jurisdictions, which described human health impacts at the time when Btk was sprayed. Dr. Granum also says that in his native Norway, Btk cannot be administered by aerial spraying.

The Respondent and Third Party's Submissions

[34] The Respondent and Third Party say that, for a stay to be granted, the harm identified must be real, definite, and unavoidable, not hypothetical and speculative.[5] They say the Applicants did not provide any evidence to establish how they will suffer harm if the stay application is denied or why such harm would be irreparable. The Respondent and Third Party suggested financial remedies may potentially be available through tort for any harms suffered, although they disputed claims made by the Applicants about ecological and human health impacts associated with Foray 48B. The Respondent and Third Party also say such impacts (economical, human health-related, and ecological) have not been shown to constitute irreparable harm.

[35] The Respondent and Third Party also cautioned about relying on historical reports of exposure, as improvements in public notification and stricter permit requirements have been introduced over time. They also say that exposures should not be correlated with the treatments authorized by the Permits without being able to correlate the exposure concentrations of Foray 48B or Btk.

The Applicants' Reply

[36] The Board provided the Applicants, in setting the submission schedule for the stay application on April 19, 2024, with an opportunity to make submissions in "final reply." Any information or submissions received must take the form of a final reply and must not be intended to confirm the first arguments made. As noted in *Allcock Laight & Westwood Ltd. v. Pattern, Bernard and Dynamic Displays Ltd. and L.A. Corney Commercial Deliveries Ltd. v. Bernard and Dynamic Displays Ltd.*, 1966 CanLII 282 (ON CA):

> … the party beginning exhaust [their] evidence in the first instance and may not split [their] case by first relying on prima facie proof, and when this has been shaken by [their] adversary, adducing confirmatory evidence … The rule is so well settled that is requires no further elaboration.[6]

[37] The Applicants' reply submissions must be limited to evidence and argument which could not have been provided in their initial submissions. The Board should consider additional evidence and submissions put forward in reply only where that evidence and those submissions are presented in response to evidence and arguments advanced by another party that could not have been anticipated when the replying party provided their initial submissions.

[38] The Applicants' reply submissions offend this requirement in large part. In particular, the Applicants decide to "reiterate their submission that the [Third Party's]

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[5] *Canada (Attorney General) v. Oshkosh Defense Canada Inc.*, 2018 FCA 102 (CanLII).

[6] This case has been cited with approval recently in *Carter v. Canada (Attorney General)*, 2012 BCSC 886 (CanLII).

public consultation process was fatally compromised by a number of short-comings" in a number of ways:

- misrepresenting a treatment area described in the Permits (including with reference to two documents provided along with initial submissions);
- not obtaining the input of public health professionals during the public consultation process; and
- having a closed mind and inflexible response to public comment (including with reference to correspondence between the Third Party and CUFCA's counsel from February 2024).

[39] This aspect of the Applicants' submissions exceeds the proper scope of reply. The Applicants should have particularized their concerns with the Third Party's public consultation process during the Applicants' initial submissions. These reported deficiencies were, or should have been, known to the Applicants at the time they made those submissions and, as a result, do not meet the legal requirements for consideration in this appeal. Consequently, I have not considered those submissions in my analysis and reasoning.

[40] Similarly, the Applicants exceeded the proper scope of reply by making arguments that either reasserted positions adopted in their initial submissions or made arguments that they should have made during initial submissions if they had wanted to have them before the Board, as they were capable of being made at that time. Those arguments include:

- that evidence submitted along with their initial submissions was sufficient to establish the irreparable harm that would result if the stay application was denied—that Btk is toxic to humans and can harm the environment;
- that CUPCA will suffer direct, irreparable harm because one of its members lives near a treatment area authorized in the Permits and was previously exposed to Foray 48B aerial spraying;
- an attempt to introduce new evidence that existed when their initial submissions were due (while not explaining why the evidence was not provided in their initial submissions), including evidence of a health impact from aerial spraying of Foray 48B in 2022, a scholarly article discussing the inevitability of spongy moth reintroduction in British Columbia and a treatment methods, and correspondence with the Third Party critiquing the use of Foray 48B to eradicate spongy moth populations;
- elaborating on their argument that the risk of their appeals being dismissed as moot if the stay applications are denied constitutes irreparable harm;
- that spongy moth populations may be managed in other ways so populations will not necessarily become established if aerial spraying is not done; and

- that the aftermath of cancelled spraying on Salt Spring Island in 2006 and treatment choices from other jurisdictions indicates that aerial spraying is unnecessary.

[41] I have not considered these portions of the Applicants' reply submissions not only for the reasons described above pertaining to the scope of proper rely submission, but also because it amounts to case-splitting. It would be procedurally unfair to the Respondent and Third Party to consider these arguments without allowing them a chance to provide a sur-reply; however, the spraying authorized under the Permits has already begun and any further delay will render more ineffective any stay that the Board might grant in response to an appeal of the Permits.

[42] Most of the Applicants' reply arguments which were within the proper bounds pertain to the third question in the *RJR-MacDonald* test. While I considered the Applicants' arguments with respect to the second question as well, they are for the most part chiefly concerned with the third question. The exception was an argument that the uncertainty about the full extent of adverse effects from exposure to Foray 48B should not be used to conclude that there is insufficient evidence to make a finding of irreparable harm.

The Panel's Findings on the Second Question

[43] The Applicants argued, under the heading of irreparable harm, that the Board should not consider only harm to the Applicants. They referenced *RJR-MacDonald* and *Carvalho v. British Columbia (Medical Services Commission)*, 2016 BCSC 1603 (at paras. 72, 74). Dr. Tynan raised this same argument in an earlier appeal, which was answered by the Board thusly:

> [117] Dr. Tynan argued, quoting *RJR-MacDonald*, that adjudicators were cautioned in that case, to "… reject an approach which excludes consideration of any harm not directly suffered by a party to the application." This quote was in the context of the third portion of the applicable test, the balance of convenience.
>
> [118] Dr. Tynan also referenced paragraph 72 of *Carvalho* in support of this argument. That portion of Carvalho adopts the earlier quote from *RJR-MacDonald*, but also specifically notes that "… at the second stage only irreparable harm to the applicant is relevant …". It is accordingly clear from the authorities referenced by Dr. Tynan that the question is whether the applicants for the stay order will suffer irreparable harm.[7]

[44] In this case, the same response serves for this argument. The Applicants are incorrect: the second question requires that the identified irreparable harm affects the Applicants. A discussion of the three questions applicable to this stay application follows.

[7] See *Wartels et al v. Administrator, Integrated Pest Management Act*, 2023 BCEAB 14 (CanLII).

[45] As noted above with respect to the second question, in order to grant a stay the Board must be satisfied that one or more of the Applicants will likely suffer irreparable harm if the stay application is denied. Contrary to the submissions of the Applicants, *Port Coquitlam* does not say that damage to wildlife, on its own, constitutes irreparable harm. In that case, the Board accepted that an applicant for a stay had an interest in the protection of geese. The Board in that case concluded that harm to geese could cause irreparable harm to that interest of the applicant for a stay in that case.

[46] The Applicants did not provide sufficient, admissible evidence to establish that they will be present in or around the treatment areas authorized under the Permit to establish that they are at risk of any impacts (including human health impacts) associated with the Foray 48B spraying authorized in the Permits. I have attempted to determine this question with reference to the notices of appeal submitted by the Applicants; however, despite the requirement in section 22(1)(e) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, that an appellant must provide their address, neither of the Applicants did so. Despite this deficiency, I have considered this application on its merits in the interests of access to justice.

[47] Even if the Applicants had established they would be present in or around the treatment area, however, their evidence does not support a conclusion that any of the human health effects they describe are likely to occur. The statistics referenced by Dr. Granum and the Applicants' summary of previous health outcomes surrounding the spraying of Foray 48B describe some potential impacts. However, the evidence presented establishes neither that such health effects are likely nor that they would rise to the level of significant harm. I conclude that it would be speculative to conclude that the Applicants are likely to suffer irreparable harm if the stay application is denied. Accordingly, I do not need to consider the possibility of whether financial recovery for any losses suffered may be possible through other legal means, as argued by the Respondent and Third Party.

[48] For the purposes of this decision, I would have considered Dr. Tynan's children sufficient to establish harm to Dr. Tynan, as it would be logical and rational to assume that she would have an interest in the health and well-being of her children. This was evidenced by her inclusion of them in her submissions; however, using the same analysis as above, insufficient evidence has been presented to establish that Dr. Tynan's children are likely to suffer harm, let alone irreparable harm.

[49] While the Applicants also argued that there were deficiencies in the public consultation and notification process, they did not adequately explain how those deficiencies result in irreparable harm to any of the Applicants. The Applicants are aware of all scheduled treatment locations and times, have had the opportunity to review and critique the precautionary measures recommended by the Respondent and Third Party, and have had the opportunity to review the literature available on the risks and merits of Btk and Foray 48B. For those reasons, absent convincing evidence from the Applicants that is not present here, I cannot conclude that they suffered or will suffer irreparable harm as a result of any deficiencies in those processes.

[50] For these reasons, I find that there is insufficient evidence to conclude that the Applicants are likely to suffer irreparable harm if the stay applications are not granted.

Does the Balance of Convenience Favour Granting a Stay?

The Applicants' Submissions

[51] With respect to the third question, the Applicants identified several factors that they say support granting a stay. They point to the Third Party's:

- reported imminent and historical noncompliance with permits allowing it to carry out aerial treatments of Foray 48B;
- alleged violations of procedural fairness during public consultation before the issuance of the Permits;
- inadequate notification of the public prior to public consultation, according to the Applicants;
- alleged provision of misinformation during public consultation; and
- alleged inadequate documentation of reports of adverse health impacts during previous Foray 48B treatments, evidenced by there being more adverse health reports documented by Health Canada than by the Third Party in previous years.

[52] The Applicants say it would be reasonable to infer that the Third Party will not comply with other requirements of the Permits in spraying Foray 48B, such as monitoring for human health impacts and reporting these impacts. This means, according to the Applicants, the public cannot have faith that the Third Party will comply with the requirements of the Permits. The Applicants say the Board should not condone "apparent breaches or apparent imminent breaches" of permits and may uphold the public interest by considering such breaches when addressing the balance of convenience.

[53] Additionally, the Applicants say that numerous people and non-human animals will be at risk of adverse health impacts if the spraying authorized under the Permits proceeds, in particular given that the Permits do not seem to account for the risks of Foray 48B running off from foliage and thereby, or otherwise, entering waterways. Further, the appeals will not be heard on their merits if the stay application is denied.

[54] By contrast, the Applicants argue, the Third Party would suffer minimal inconvenience if a stay is granted. They say the spongy moth eradication program has been pursued for many years, yet the moths persist. Since the spraying program is not required in all parts of the province each year, the Applicants say that annual spraying is not essential. They also assert there would be no negative economic effects resultant from halting the spraying, and there may be positive ones.

[55] The Applicants further argue that the Board should apply the precautionary principle described in the *Canadian Environmental Protection Act*, S.C. 1999, c. 33 ("*CEPA*"), s. 2(1)(a). They assert there remains uncertainty on the impacts of Foray 48B on human

health, despite recommendations in 1999 from the Capital Health Region Office of the Ministry of Health that more studies be undertaken on the impacts of Foray 48B.

The Respondent and Third Party's Submissions

[56] The Respondent and Third Party reference *RJR-MacDonald*, at para. 71, which says that the third question will "… nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility." The Respondent and Third Party say that they are charged with the duty of eradicating pests that are destructive to plants in British Columbia, under the *PPA* and the *Eradication Regulation*.

[57] The Third Party and Respondent say, as they argued when addressing the second question, the Applicants have not provided sufficient evidence to establish that the exposure to Foray 48B that may result from the treatment authorized in the Permits will cause significant or lasting harm to humans or to the environment. They argue that any human harm suffered is likely to be minor and temporary, while any side-effects for the environment will be resolved within three years, referencing evidence from Third Party employees in support of that position.

[58] With respect to reporting requirements in previous permits, the Respondent and Third Party say that they have no control over whether the public report health concerns to other authorities rather than the Third Party's reporting service. They also argue that, while their notification program would not reach everyone in a community, achieving that goal would be impossible. One of the notifications which was sent even asks those it reaches to spread word of impending treatment to others in the same community, to try to reach more individuals within affected communities. In any event, the informed consent of each citizen is not required for the issuance of the Permits.

[59] The Respondent and Third Party argue that, should a spongy moth population become established in British Columbia, there may be human health and environmental impacts resultant from that establishment. They provided information from another jurisdiction in support of this argument. The Respondent and Third Party specifically deny that the Province is motivated only by economic considerations in trying to eradicate spongy moth populations in British Columbia. although they argue that economic considerations remain an important factor for consideration.

[60] With respect to the precautionary principle, the Respondent and Third Party argue that the definition from *CEPA* does not bind British Columbia's decision-making, but that principle is already incorporated in the permitting process under the *Act*. Furthermore, the Respondent and Third Party argue that the eradication of an invasive species like the spongy moth is supported by the precautionary principle.

The Applicants' Reply Submissions

[61] As noted above, portions of the Applicants' reply submissions could not be considered in a fair and responsive decision on the stay application because those portions amounted to case-splitting. Portions of the Applicants' reply submissions were appropriate, however. Most relevant to the third question were the following arguments:

- the Respondent's recommended measures to minimize exposure—remaining indoors with windows and doors closed during treatment and for at least one hour afterward—was inconsistent with recommendations from Health Canada's Pest Management Regulatory Agency (to do so during treatment and for "a few hours afterward"), despite the Respondent and Third Party's submissions that their recommendations were consistent with Health Canada's recommendations on this point;
- technical documents relied upon by the Respondent and Third Party suggest the possibility that Btk may have a role in the propagation of food-borne illness;
- that whether Btk is naturally-occurring does not inform whether exposure carries risk of human health and environmental impacts;
- the Applicants were skeptical that the Third Party could adequately fix the public notification that was not compliant with the Permits before spraying was scheduled to begin;
- there is no history of defoliation associated with spongy moth populations in British Columbia;
- the precautionary principle does not favour the spraying of Foray 48B, which is mostly made up of nondisclosed additive ingredients, for that reason among those previously argued by the Applicants;
- the Respondent and Third Party's documents indicate that mass trapping is possible for spongy moths, especially where populations are low and sparse—even if the Respondent and Third Party do not consider this methodology to be optimal, its availability should be considered when assessing the balance of convenience;
- the Respondent and Third Party giving regard to property rights but not human health and security of the person offends *Charter* values, and giving property rights regard over those rights, privacy rights "and other factors" is unreasonable;
- the Respondent and Third Party deciding to expose nearly 140,000 people living in the treatment areas authorized under the Permits (according to their own estimates) in order to eradicate 360 trapped moths reflects a poor balancing of competing interests;
- that of the treatment area population estimates, the worst proportions of humans impacted are (by the Respondent and Third Party's estimates) roughly 55,000 people affected and 65 moths trapped across six treatment areas, indicating a particularly poor balancing of interests;

- the Respondent and Third Party indicated that Foray 48B is scheduled for a Health Canada review in 2024 and the balance of convenience favours granting the stay application until that review is completed; and
- discrepancies between records of reporting to human health effects provincially and federally underscore discrepancies between the systems, which the Respondent could address by including a requirement that the Third Party share reports of human health effects with Health Canada and, without such a provision in place, the balance of convenience favours granting the stay application.

The Panel's Findings on the Third Question

[62] While consideration of the third question is not necessary in this instance given my conclusion on the second question, I will address the submissions on this point in a general way.

[63] As noted by the Respondent and Third Party, the third question is nearly always satisfied when a governmental authority is charged with promoting or protecting the public interest and that authority has undertaken the activity in question further to that responsibility. In this case, the Third Party has been assigned the duty of eradicating pests destructive to plants in British Columbia by the *PPA* and the *Eradication Regulation*. They obtained the Permits to attempt to eradicate a pest (spongy moths) to avoid destruction of plants in British Columbia.

[64] In weighing the balance of convenience, the fact that the spraying authorized in the Permits is undertaken by Third Party to satisfy the duty imposed upon them by the *PPA* and the *Eradication Regulation* weighs significantly in favour of denying the stay application. There are competing factors, however.

[65] Many of the Applicants' arguments focused on the risks Foray 48B presents to human health and to the environment. I agree with the Respondent and Third Party that the risks identified are not well-quantified. I conclude that there is likely some risk of generally mild and temporary symptoms affecting humans in the treatment areas, with a lesser risk of more serious or long-lasting effects. Overall, however, the number of complaints received, when compared to the number of exposures documented historically in British Columbia (as discussed by the parties) or in other jurisdictions, indicates a very low risk of any significant side-effects for humans in the treatment areas resultant from the aerial application of Foray 48B.

[66] Furthermore, these risks are, to some extent, mitigated by the precautions the Third Party has taken efforts to communicate to the public, although I recognize that those precautions are less stringent than those recommended by Health Canada. The key difference is the number of hours that are recommended before individuals in an area sprayed by Foray 48B go outdoors. Independent toxicological information has not been presented, however, to allow me to assess the adequacy of the preventative recommendation made by the Third Party. As such, while I am concerned about the

content of the precautionary information, this concern is not a major factor in the balance of convenience because there is insufficient evidence to establish that there is a significant risk of harm.

[67] Similarly, while I understand the Applicants' displeasure that not everyone in the treatment areas could be consulted, it is not required or feasible for the Third Party to reach every individual. They are required to take the measures prescribed in the *Regulation* and in the Permit and they have generally done so, with the exception of the wording in some signs that the Third Party is attempting to remedy before treatments begin. I find the value of the precautionary information to be less than it otherwise might have been because of the posting of incorrectly worded signage. However, in considering this factor, I find that the evidence remains insufficient to give rise to any major concern about significant, persistent side-effects experienced by anyone in the treatment areas at the time treatments are carried out.

[68] With respect to environmental risks, the Applicants have discussed the risk of Foray 48B running off of foliage and persisting in lakes and other waterways, and the impacts it may have on other caterpillar and butterfly species. The Applicants raised a particular concern about the grey copper butterfly, stating that some habitat for that species can be found within a kilometer of one treatment zone. Insufficient evidence was presented to establish that Foray 48B exposures would detrimentally affect that habitat, and to what extent, however. Overall, while I am concerned about potential environmental side-effects, these possible side-effects were shared with the Respondent and Third Party during the public consultation process. They considered the possible benefits and side-effects in setting the terms of the Permits. While I do not owe any deference to the Respondent in setting the Permits, insufficient evidence has been presented to establish that there are any significant risks or harms not accounted for in the Permits that warrant significant weight in the balance of convenience based on the evidence provided.

[69] The parties dispute the environmental effects of granting a stay. The Applicants argue that alternative treatment methods could be used to eradicate spongy moth populations and that aerial spraying is not effective in any event. They argue that there is insufficient evidence to support a conclusion that an established spongy moth population would give rise to environmental, human health, or economic damage and, in fact, suggest that it could be an economic benefit (without providing evidence on that point). The Respondent and Third Party argue that the stay would give rise to a risk that spongy moth populations would become established in British Columbia and result in environmental damage, possible human health impacts, and economic damage.

[70] The Applicants bear the burden of proof in this application. They have asserted that an established spongy moth population in British Columbia would not result in environmental, human health, or economic damage and they have not met their burden of proof. I prefer the evidence that other jurisdictions have experienced these difficulties as a result of established spongy moth populations. I do not give the arguments of the Appellants on this point any significant weight as a result.

[71] The Applicants also argued that there are other trapping methods available, and this favours granting the stay. I disagree. Insufficient evidence has been presented to establish that, if the stay were granted, other trapping methods could be used effectively to address spongy moth populations in British Columbia, in place of the eradication efforts authorized in the Permits. I do not find this argument persuasive.

[72] I also recognize that all parties have argued that the precautionary principle from the *CEPA* supports their position. Neither the *CEPA* nor the precautionary principle apply to these appeals or to stay applications. The precautionary principle, as referenced by the parties, is a statutory adjustment to the way in which evidence is weighed under *CEPA*. Neither the *Act* nor any other legislation applicable to the Board's weighing of evidence includes such an alteration to the statutory authority or legal processes governing how the Board must consider and assess evidence. It has no place in this preliminary decision and would not have a place in a decision on the merits of this appeal.

[73] Overall, based on the evidence and submissions made, I do not find the human health and environmental risks associated with the Foray 48B spraying authorized in the Permits to weigh significantly in my assessment of where the balance of convenience lies in granting a stay of the Permits. In reaching this conclusion, I considered not only the risks but also the human population estimates for the treatment areas in the Permits.

[74] I also recognize that Health Canada may soon have new or different information on Foray 48B after a review scheduled for 2024. This is not, however, a reason which favours granting the stay application. The stay application must be decided based on the evidence presented and not based on the possibility of more, or different, evidence becoming available at a future date. The same would hold true of a decision on the merits of these appeals.

[75] Moving beyond the consideration of any immediate impacts to human health and the environment, I turn to consider the arguments made by the Applicants with respect to the documentation and reporting of human health concerns that arise at or around the time of the treatments authorized under the Permits. I agree with the Respondent and Third Party that it is not necessarily concerning that Health Canada documented more, or different, reports of health impacts than the Third Party did during prior years of spraying. The Respondent and Third Party have no control over whether, or to whom, members of the public who think they have suffered ill effects from exposure to Foray 48B report their concerns. I am not satisfied that there was any compliance issue insofar as documentation and reporting of complaints is concerned.

[76] Whether the Permits would be better if they included a requirement that the Third Party share any complaints from the public it receives with Health Canada is not relevant to the stay application. This requirement cannot be the cause of any harm that might occur if the stay application is, or is not, granted.

[77] Similarly, the concerns raised by the Applicants as to how the Respondent weighed competing interests in deciding to issue the Permits is not relevant to this stay application.

This portion of the stay application is concerned with balancing the harm that could result from granting the application against the harm that could result from denying it. Any argument about the improper balancing of the competing interests at play in issuing the Permits is not generally considered in the context of a stay application, which is narrowly focused on the practical outcomes of a decision being stayed or not.

[78] The parties all acknowledge that this stay determination may be determinative of the appeal because the Permits expire within two months and a hearing on the merits would be unlikely to be complete, and a decision completed, by that time. The test in *RJR-MacDonald* makes special provisions for this circumstance, saying, "[t]wo exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action." This excerpt was referenced, with approval, in *R. v. Canadian Broadcasting Corp.,* 2018 SCC 5 (CanLII).

[79] As such, considering the merits as much as I can, I do not consider the Applicants' critique of the weighing of interests to give rise to a significant concern. This was not a case of weighing property rights against privacy rights, rights to health, and rights to security of the person. The parties disagree as to whether human health and security of the person is best secured by spraying Foray 48B to eradicate populations of spongy moths or by allowing those populations to propagate. The balancing of benefits and risks is more nuanced than the Applicants describe.

[80] Furthermore, I do not consider the effect of any historical episodes of noncompliance with the Permits (or previous versions of similar permits) to weigh, on their own, in the balance of convenience. Granting an application for a stay of a permitted activity is not an appropriate mechanism for dealing with issues of noncompliance. The relevant legislative scheme sets out the manner in which the government can exercise its powers to respond to any alleged noncompliance with conditions of an authorization. Expressing condemnation for episodes of noncompliance or effectively suspending a permit for reasons of noncompliance are not appropriate uses of a stay. Issuing a stay in response to noncompliance with the conditions of an authorization, let alone in response to an alleged noncompliance, would amount to an abuse of process. I strongly caution all parties before the Board against seeking a stay in such circumstances. Furthermore, it would not be appropriate for the Board to cater to any public perception that a stay should be used for such a purpose.

[81] Similarly, a stay is not the appropriate mechanism to use to deal with procedural defects. The effects of any procedural defects may well merit consideration in the balance of convenience, but a stay is a prospective decision, not a retrospective one. In this case, the prospective effects of the alleged deficiencies described by the Applicants are that more members of the public may be exposed to Foray 48B without having been notified or had the opportunity to make submissions on the planned treatments authorized by the Permits or with the mandated information to lessen their exposure during and following spraying events. Without added information to establish that there is any significant risk

of significant harm, the Appellants have not established that the effect of any procedural defects should weigh significantly in weighing the balance of convenience.

[82] The same holds true with respect to the merits of the appeal. As noted by the Respondent and Third Party, the question of compliance with any permits is not before the Board. While sufficiently serious issues of demonstrated noncompliance might inform the content of any prospective permits at any given time, I do not consider the historical allegations of untested and unproven noncompliance to be significant in this case.

[83] I do not accept that it is reasonable to infer that the Third Party will not comply with other requirements in the Permit based on any alleged procedural inadequacies. While the Applicants were not satisfied with the Third Party's public consultation, they did not argue that the Third Party did not satisfy the requirements for public notification as set out in section 60 of the *Management Regulation*. While the Applicants identified deficiencies in signage the Third Party is obligated to post, the Respondent and Third Party advised they were attempting to remedy those deficiencies. This does not suggest that the Third Party is unconcerned with the issue of compliance.

[84] Lastly, I do not consider the fact that the Applicants' appeal may be dismissed on their merits for being moot to weigh significantly in the balance of convenience. The test from *RJR-MacDonald* contemplated such a circumstance and I have taken the appropriate steps in this preliminary decision to account for that possibility.

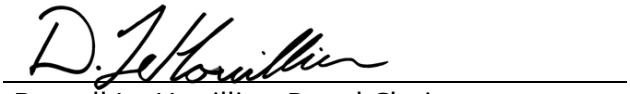
[85] The Applicants have clearly stated that they are concerned that their appeals may be dismissed as moot if I do not grant their application for a stay of the Permits. Being fully informed and aware of this possibility, I have accordingly taken the appropriate measures to reflect that this stay application may be determinative of the appeals overall by engaging in a review of the merits of the Applicants' case, where appropriate. Even considering all the evidence, including evidence which pertains to the merits of the appeals and not only this stay application, I do not consider the balance of convenience to favour the granting of the application.

[86] For the reasons provided above, I find that the balance of convenience favours denying the stay application. Based on my findings with respect to both question two and three, I conclude that the Applicants have not met their burden in this case and their application for a stay should be denied.

DECISION

[87] For the reasons above, I deny the Applicants' stay application.

[88] In reaching this conclusion, I have read and considered all evidence and submissions provided, except where otherwise noted above, whether or not that material was specifically referenced in this preliminary decision.



Darrell Le Houillier, Panel Chair
Environmental Appeal Board