



Environmental Appeal Board

APPEAL NO. 91/20 PESTICIDE

In the matter of appeal under s15 of the Pesticide Control Act, RS Chap. 322, 1979, against the issuance of Pesticide Use Permit 242-032-91/93.

BETWEEN	Canadian Earthcare Society	APPELLANT
AND	Administrator, Pesticide Control Act	RESPONDENT
BEFORE	A Panel of the Environmental Appeal Board Mrs. L. Michaluk, Chairman Mr. C. Palmer, Member Dr. M. Ryan, Member	
DATE	February 18, 1992 and April 27-28, 1992	
PLACE	Capri Hotel, Kelowna	
APPEARING	For Appellant Spokesman Mr. L. Manchester Witnesses Mr. D. Bleumenauer Mr. M. Goldstein Mr. D. Jones Mr. T. L. Jones Mr. J. Vos Mr. R. White	
	For Respondent Spokesman Mr. D. Doyle Witnesses Dr. R. Kobylnyk Mr. S. Craig	

This was an appeal against the issuance of a permit allowing the use of Simazine, Karmex, Roundup, Amsol 500 and Glean.

EXHIBITS

- A-1 Appellant Evidence Booklet
- A-2 a) Map of the City of Kelowna (GVC 1982)
b) 1991 Chemical Weed Control Summary
- A-3 Project list of Michael Goldstein, M.Sc, P.Ag
- A-4 Education and Experience of Michael Goldstein

- A-5 Pesticide Monitoring Study of Brandt Creek, 11 pps
- A-6 Letter of 19 May, 1989, to Boulton Pest Control from D. Bertoia, Agriculture Canada
- A-7 Pesticide Fact Sheet, Diuron. Fact Sheet No. 9. September 30, 1983. EPA
- R-1 Respondent Appeal Brief
- R-2 VISION Information Update, Monsanto Canada Inc. July 30, 1991. re: 1,4 Dioxane levels in VISION herbicide
- R-3 Advertising Insertion Order

APPEAL

The authority for the Panel of the Environmental Appeal Board to hear this appeal is found in the *Environment Management Act*, and in s15 of the *Pesticide Control Act*.

This is an appeal against the issuance of Pesticide Use Permit (PUP) 242-032-91/93 authorizing the application of Simazine, Karmex, Roundup, Amsol 500 and Glean to all vegetation to achieve total weed control on roadside, crack and crevice, around signs, poles and hydrants within the municipal boundaries of Kelowna.

The stated grounds for appeal are:

1. The Administrator failed to make any, or in the alternative, sufficient inquiries to enable him to carry out an assessment of whether an unreasonable adverse effect would occur;
2. The Administrator failed to make any independent assessment beyond the material supplied by the proponent which was inadequate to enable him to determine whether there would be an unreasonable adverse effect;
3. The Administrator erred in issuing this permit by contravening Section 8 of the *Pesticide Control Act* in that the permit application does not conform to the Regulations of the Act. The Appellant contends that the application contravened Section 17(b) of the *Pesticide Control Act* Regulation.

The orders requested are:

1. That the permit be quashed and returned to the Administrator to make suitable inquiries;
2. That the permit issued to Boulton Pest Control be stayed until the Environmental Appeal Board has issued a decision on this appeal;
3. In the event the permit is not stayed, the Appellant requests that a representative of the ministry of Environment be present during applications.

BACKGROUND

The City of Kelowna has conducted a weed control program for many years. Since 1989, a pesticide control permit has been required for this project.

The previous permit issued for this program (PUP 242-024-89/90) was appealed by Canadian Earthcare Society in 1989 to the Environmental Appeal Board. A Hearing was held and a decision denying the appeal but amending the permit was issued.

PUP 242-032-91/93 issued August 29, 1991, reflected the Board ordered amendments to the previous permit. The issuance of this second permit was appealed by Canadian Earthcare Society to the Board on September 26, 1991. A stay against the permit was also requested.

After requesting and receiving comments from the permit holder and Pesticide Management Branch, and evaluating the Appellant's stay request, the Board declined to stay the permit. A Hearing was set for February 18 in Kelowna.

During the period between the filing of the notice and the Hearing, the Respondent requested information of the Appellant that was not available until the day of the Hearing. An adjournment was subsequently requested and granted. The Hearing reconvened April 27 and concluded April 28.

A second stay request was received from the Appellant by the Environmental Appeal Board on April 29. This request was denied.

ISSUES AND EVIDENCE

During the presentation of evidence, several issues were identified and addressed. The major issues raised follow in no particular order.

Issue 1. Witness Status of Mr. M. Goldstein

The Appellant presented Mr. Goldstein as an expert witness. A resume for Mr. Goldstein as well as a project list was presented.

The Respondent accepted Mr. Goldstein as having expertise in the field of soil physics, but not as personally qualified to give opinion evidence on the effects of simazine on the environment when used for industrial weed control.

On reviewing Mr. Goldstein's curriculum vitae, there was no evidence of Mr. Goldstein having taken any special diplomas for advanced studies in simazine related research; nor had he published any work on simazine in peer-reviewed journals. The Panel, therefore, did not accept Mr. Goldstein as an expert witness in this field.

The Panel did allow the introduction of Mr. Goldstein's report, subject to weight, as is the policy of the Board.

Issue 2. Inquiries of the Administrator

The Appellant alleges the Administrator failed to make sufficient inquiries to enable him to carry out an assessment of whether an unreasonable adverse effect would occur if the pesticide use permit was exercised

The Respondent introduced evidence by way of the comments of the pesticide review committee to show that the site specific impacts of the pesticide had been considered. These comments were reviewed before the permit was granted. In addition, the findings of the Environmental Appeal Board in an earlier appeal against a similar permit issued for a similar purpose in this area were also considered.

Testimony showed the fact that the pesticides were federally registered was also taken into consideration.

The *Pesticide Control Act* states:

6 ... a person shall not apply pesticide ... unless

(a) ...the administrator, on being satisfied that the pesticide application will not cause an unreasonable adverse effect, has granted the permit

12 (2) The administrator ... may

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

17 (c) The (pesticide review) committee shall review applications for permits referred to it by the administrator...

The *Act*, therefore, allows the Administrator discretionary authority to refer a permit application to the pesticide review committee. In the matter at hand,, that discretionary authority was exercised. This review provided information independent of the permit applicant. The comments of the committee members were used in the determination of whether or not the use of the pesticides would result in an unreasonable adverse environmental effect.

The Panel finds that the Administrator did make sufficient inquiries to carry out an assessment of whether an unreasonable adverse effect would occur.

Issue 3. Comments of Committee Member Responsible for Health

The Appellant was concerned that the comments of the pesticide review committee member for health were actually made by the D/Administrator.

The D/Administrator confirmed that he had filled in the first part of the sheet providing background information of the application. he bottom

portion of the form contained spaces for comment and two areas for the signature of the review committee member responsible for health. One of the spaces for signature was for those applications "approved" and the other space was for those applications "not approved". In the matter at hand, the form was signed by the member in the "approved" space. The committee member testified that prior to making the recommendation the application be approved, he had reviewed the literature on the pesticides proposed for use.

On reviewing the form used to provide the comments for the committee member for health, it was not immediately apparent that it was in fact a two part form: the top portion providing information for the reviewer in considering the application; and, the bottom portion available for the reviewer to make his comments.

The Panel finds that the actual review regarding the effects of the pesticide application on health was conducted by the pesticide review committee member for health.

The Panel has comments to offer on this subject which may be found in the Comments section of this Decision.

Issue 4. Comments of Committee Member Responsible for Wildlife

Mr. D. Jones, pesticide review committee member for recreational fisheries and wildlife, testified as a witness for the Appellant. Mr. Jones testified that although there were high value fisheries sites within the permit area he did not do a field assessment because the treatment was to occur in the municipal boundaries of Kelowna. He also considered the toxicity of the proposed pesticides in making this decision. Mr. Jones testified that although fish kills had occurred in the area in the past, he was not aware of any pesticide related fish kills. He stated that he considered the creeks to be adequately protected by the pesticide free zones.

Obviously the preferred situation would be to have every site physically investigated by those reviewing an application. Realistically, however, this may not always be possible.

In the matter at hand, the member used his professional judgment and technical expertise in conducting a "paper exercise". Thus the Panel finds that the committee member did review the application.

The Panel has comments to offer on this subject which may be found in the Comments section of this Decision.

Issue 5. Permit Requirements

The Appellant contends that as the permit application does not conform to Regulation (17b) of the *Pesticide Control Act*; the Administrator erred in issuing the permit.

The Respondent stated that the Regulation requires the applicator's name and certificate number be included as may be appropriate and available. At the time of granting the permit, this information was not available. Once it was available, the information was added to the permit by way of a permit amendment.

The Panel finds that the Administrator did not err in granting the permit when the applicator's name and certificate number were not included on the application.

Issue 6. Use of Simazine as a Soil Sterilant

The Appellant introduced evidence to show that one of the American manufacturers of simazine, CIBA-GEIGY, USA, is dropping the use of simazine for industrial weed control. The same evidence showed CIBA-GEIGY, USA, does not support the use of simazine at rates greater than 10 pounds active ingredient per acre (11.2 kg/ha) as a risk management strategy.

The Respondent testified that simazine is registered in Canada for industrial weed control and that the amount allowed by the permit is within the accepted use level.

The Courts have ruled that it is not within the mandate of the Environmental Appeal Board to challenge the federal registration of a pesticide. The Panel, therefore, finds that simazine is registered for use in Canada for the purpose authorized by the pesticide use permit. The fact that the American manufacturer is advising the product not be used for this purpose did not escape notice of the Panel.

DECISION

In making this Decision, the Panel of the Environmental Appeal Board has carefully considered all documentary evidence and testimony placed before it during the Hearing, whether or not specifically reiterated here.

The grounds for appeal were quite narrow in scope in that they concerned inquiries which the Appellant alleges the Administrator failed to make and a technical error the Appellant alleges the Administrator made.

On the technical point regarding the error of omission of the applicator's name and certificate number from the permit application, the Panel found the provisions of the *Pesticide Control Act* were upheld.

The body of evidence presented showed that inquiries were made to assist in determining whether or not the use of specific pesticides in specific ways in a

specific location would result in unreasonable adverse environmental impact. In addition, all of the pesticides authorized for use in this permit are federally registered.

The Administrator has discretion under the Act to determine what constitutes unreasonable adverse effect and there was no evidence presented to show that the Administrator erred in the exercise of his discretion.

Therefore, it is the unanimous decision of the Panel that as all of the grounds for appeal have been dismissed, the appeal must be dismissed.

COMMENTS

There were several aspects of this appeal on which the Panel would like to comment.

Use of Standard Forms by Pesticide Review Committee Members

Two of the pesticide review committee members testified they had used a standard form for their review comments. In each case, this resulted in misunderstanding or confusion for the public who later viewed these comments. In the case of the fisheries review, the form letter did not accurately document the actions of the reviewer. For the health review, the fact that the first part of the form was filled out by the D/Administrator gave the appearance of the D/Administrator participating in the review.

On reviewing the testimony of the committee members, it was accepted by the Panel that the proper reviews had been carried out. The Panel questions, however, whether a different review presentation format would have prevented the ensuing confusion.

The purpose of the pesticide review committee as stated at the Hearing is to review pesticide use permit applications to ensure that the use of a particular pesticide in a specific site will not pose an unreasonable adverse effect. The Panel questions whether a form letter should be used in such a specific review.

The comments of the committee members serve, in the opinion of the Panel, two purposes: to assist those granting permits in the assessment of potential impacts; and, to ensure the public that the risks of a pesticide use permit have been reviewed in a site specific manner.

Therefore, the Panel recommends that the use of standard forms or form letters be reviewed as to their suitability in what is to be a site specific review.

Information provided to Committee Members

Committee members are given the application for a pesticide use permit to review. This material includes a map of the area under consideration for pesticide treatment.

In order to better prepare those charged with the responsibility of assessing these applications, the Panel recommends that as a general policy, Pesticide Management Branch require the applicant to provide detailed mapping, marking such features as populated areas, watercourses, wells and any other features which may be appropriate.

Fish Kills

Testimony was given to show that in years past there have been fish kills in the creeks within the permit area. The suspected causes were chlorine contamination, high water temperature and low oxygen levels of the water. There was no evidence to show that pesticides have contributed in any way to these kills; nor, however, have tests been done to determine if pesticides were responsible for the fish kills.

During the Hearing, testimony was given to show that pesticide free zones contained in the permit would protect the streams from any pesticide contamination. There are, however, agricultural and residential users of pesticides in the area who are not regulated by permits.

The Panel was surprised to learn, given the significance of the fisheries resource in this area, that there has not been an analysis done to determine the cause of the previous fish kills. Obviously the only way to determine the cause of such an event is to conduct an analysis on the fish and/or the water.

Therefore, the Panel recommends that should a fish kill occur an analysis be conducted to attempt to determine the cause.

Use of Alternatives to Pesticides

The purpose of the pesticide use was stated as the total control of all vegetation on roadsides, crack and crevice, around signs, poles and hydrants within the municipal boundaries of Kelowna. The amounts of pesticide authorized place this control program within the bounds of industrial vegetation control which is acknowledged to be a soil sterilization program.

The municipality views the control of weeds as an infrastructure maintenance issue as they must protect the road pavement edges and sidewalk, curb and gutter. In addition, they must ensure that safety is assured on the roadsides.

The municipality has tried burning weeds as an alternative control method but this resulted in damage to public and private property. The municipality has been using mowing as an alternative method of vegetation control on the roadsides. The mowing alternative was clearly more acceptable to the public present at the appeal than was the use of pesticides.

Pesticides often provide the quickest and least expensive means of vegetation control. In the matter at hand, the pesticides are federally registered and there is no evidence that the pesticide use will result in a measurable impact or that past

applications of pesticides in the manner authorized by this permit have resulted in unreasonable adverse effects.

As stated by the pesticide review committee member responsible for fisheries and wildlife, however, pesticides may well be one of the contributors to incremental changes which may eventually have a cumulative impact. Urban streams such as the ones in the permit area are under many pressures. Obviously then, unnecessary pressures should be avoided.

The Panel recommends that alternatives to pesticide use for the purposes outlined in this permit continue to be investigated.

Pesticide Applications to Sidewalks

The permit authorizes the application of pesticides to sidewalks and regulates the manner in which they are to be applied.

Pesticide applications are governed not only by the permit but also by the pesticide label. The labels of KARMEX and GLEAN, two of the pesticides included in this permit, prohibit their application to lawns, walks, driveways, tennis courts or similar areas. The Panel interprets this to mean these two chemicals may not be applied to sidewalks. The Panel does not wish to imply that these pesticides have been applied to sidewalks in the past or that such an application is contemplated under the present permit, but offers the comment for clarification purposes only.

Linda Michaluk, R.P. Bio.
Chairman, Environmental Appeal Board

June 11, 1992