1994 ABEAB 8 **Appeal No. 94-004**

October 12, 1994

IN THE MATTER OF Sections 84, 86, 87, 91 and 92 of the *Environmental Protection and Enhancement Act*, (S.A. 1992, ch. E-13.3 as amended);

-and-

IN THE MATTER OF appeals filed by the Cooking Lake Moraine Conservation Association and the Sherwood Park Fish and Game Association with respect to the approval issued by or on behalf of the Director, Chemicals Assessment and Management Division (formerly the Wastes and Chemicals Division), Alberta Environmental Protection to the County of Strathcona to apply pesticides within 30 horizontal metres of an "open body of water".

Report and Recommendations

Cite as: Cooking Lake Moraine Conservation Association and Sherwood Park Fish and Game Association v. Director, Chemicals Assessment and Management Division, Alberta Environmental Protection.

PRE-HEARING MEETING BEFORE: David H. Marko, Vice-chair

PARTIES TO THE APPEAL:

Cooking Lake Moraine Conservation Association, represented by Graham C. D. Griffiths, *Appellant*
Sherwood Park Fish and Game Association, represented by Andy Boyd, *Appellant*
County of Strathcona, represented by Ian Gray
Association of Alberta Agricultural Fieldmen, represented by Doug Henderson

Director of Chemicals Assessment and Management, represented by Robert Burland

I. FACTUAL BACKGROUND

On July 5, 1994, Graham C.D. Griffiths filed a notice of objection with the Board on behalf of the Cooking Lake Moraine Conservation Association. The notice of objection appealed the decision of the Director of the Chemicals Assessment and Management Division, Alberta Environmental Protection (the Director) to issue Approval No. 94-SU-043 (the Approval) to the County of Strathcona (the County) in response to Application No. RS008052. This Approval authorized the County to apply herbicides within 30 horizontal metres of open bodies of water, as defined in the Approval, under specified conditions. The Director issued the Approval to the County on May 31, 1994, and notice of his decision was advertised on June 17, 1994 in a local newspaper.

On July 12, 1994, the Board received a letter from the Sherwood Park Fish and Game Association. This association also expressed its concerns about the use of herbicides within 30 metres of open bodies of water and recommended that mowing be used as an alternative. On July 15, 1994, the Board acknowledged the letter from this association and, assuming that it wished to be a party to the appeal, forwarded to it a notice of objection form. The completed form was returned in due course.

The Board notified the Director and the County that the appeals were filed. On July 15, 1994, the Board wrote to all parties asking several questions concerning the Approval, including: (1) how the Cooking Lake Moraine Conservation Association and the Sherwood Park Fish and Game Association (the Appellants) were directly affected by the issuance of the Approval, and (2) how the wetlands and water fowl would be affected by the application of herbicides. All parties were to provide their responses to the Board by August 5, 1994. This date was subsequently extended to August 10, 1994 because the Director requested additional time to respond.

The Board reviewed the replies received from the parties and on August 18, 1994 determined to proceed with an oral hearing in this matter. The hearing date was set for October 12, 1994, and notice of the hearing was published in a local newspaper on August 26, 1994.

Notice of the scheduled hearing stated that interested persons could submit applications to the Board to make representations at the oral hearing. The Board received a written request on September 8, 1994 on behalf of the Association of Alberta Agricultural Fieldmen to make such a representation. The request by this association was accepted by the Board. The association was notified by letter dated September 14, 1994 that it would be added as a party to the appeal.

The Board scheduled a pre-hearing for September 29,1994 and all parties were advised in writing of the date, time, and location of the meeting.

II. THE PRE-HEARING MEETING

The pre-hearing meeting, which was held on September 29, 1994 in Edmonton, was called by the Board for the purpose of attempting to facilitate the resolution of this appeal or, failing that, to make arrangements for the oral hearing by determining all matters set out in s. 13 of the Environmental Appeal Board Regulation. The Board invited two representatives from each party to participate in this pre-hearing meeting, and the attendance at this meeting was as follows:

- Dr. Graham Griffiths and Mr. Glen Lawrence,
  representing the Cooking Lake Moraine Conservation Association;

- Mr. Andy Boyd,
  representing the Sherwood Park Fish and Game Association;

- Mr. Ian Gray and Mr. Kevin Glebe,
  representing the County of Strathcona;

- Mr. Doug Henderson,
  representing the Association of Alberta Agricultural Fieldmen;

- Mr. Robert Burland,
  representing the Director, Chemicals Assessment and Management Division,
  Alberta Environmental Protection; and

- Mr. William McDonald,
  representing the Environmental Law Section, Alberta Justice.

The primary concerns expressed by the Appellants were the blanket nature of the Approval issued by the Director and their view that the County was practicing "overkill" in its control of brush along

road rights-of-way. They were concerned about the perceived indiscriminate nature of the spraying to control brush, particularly in relation to the use of truck boom applicators within 30 horizontal metres of open bodies of water, which could affect waterfowl nesting habitat. In addition, they felt that the herbicide Tordon 22K should not be used near open bodies of water.

The County responded that it applies minimum amounts of herbicides to control weeds and brush near open bodies of water and they are never applied in those sensitive areas with a truck boom. Hand held sprayers are used for spot applications of herbicides within 30 metres of bodies of water. The County sprays brush only if it is less than one and one-half metres in height. It was also pointed out that the vast majority of the County's brush control program does not impinge on any bodies of water. The County agreed to use Tordon 22K only on specific weeds for which there is no satisfactory alternative herbicide. As a result of this discussion, a better understanding was reached between the parties with respect to the Appellants' concerns and the County's practices in the application of herbicides.

The Appellants expressed a desire to have input each year into the County's plans to apply herbicides. The County felt that this would be too onerous. It did agree to continue to use its thorough notification procedure to advise all residents of the County's plans regarding herbicide applications in their areas. Further, the County agreed to maintain its practice of preparing annual reports which provide detailed information on herbicide applications that have been carried out. These commitments from the County were deemed by all parties to be a satisfactory resolution of this concern.

There was agreement among all parties that the Director's Approval was broader than the County's application for that Approval. The Director's representative explained the reasons for this, but the Appellants felt that this was unacceptable and that the Approval should be as specific as the application.

The Appellants, the County and the Association of Alberta Agricultural Fieldmen expressed a desire to meet with the Director to discuss the processing of pesticide applications and the amount of detail that is included in approvals. The representative from the Chemicals Assessment and Management Division undertook to arrange for a meeting before the end of 1994 with the Director or his designate.

The parties agreed that the County's undertaking to restrict the use of herbicides to the manner described in Application No. RS008052 would be satisfactory to all for the duration of this Approval.

III. RESOLUTION OF APPEAL NO. 94-004 REGARDING APPROVAL NO. 94SU043

All parties to the appeal have agreed to the following terms and conditions:

1. THAT Strathcona County's pesticide applications to the Department of Environmental Protection will continue to be specific in terms of targeted species.

2. THAT the Department of Environmental Protection will in future approvals refer to the targeted species.

3. THAT Strathcona County agrees to restrict the use of TORDON 22K 9005 for the control of only the following three weed species: leafy spurge, toadflax and field scabious.

4. THAT Strathcona County will utilize only hand spraying of pesticides within 30 horizontal metres of open bodies of water.

5. THAT Strathcona County will present for discussion by its Environmental Protection Committee the conservation of waterfowl and wildlife habitat within road rights-of-way.

6. THAT all parties commit to meet before the end of 1994 to discuss various herbicide issues.

The following will be invited to participate in this meeting: the appellants, Stratchona County, the Department of Environmental Protection, the Department of Agriculture, Food and Rural Development and the Association of Alberta Agricultural Fieldmen. A proposed agenda for this meeting will be circulated by Graham C. D. Griffiths to all parties at least one week in advance.

7. THAT the Strathcona County will better publicize its annual report on the pesticides used and the locations where they were applied.

RESOLUTION AGREED TO BY:

"original signed by"

_____ Date: September 29, 1994

Cooking Lake Moraine Conservation Association
represented by Graham C. D. Griffiths

"original signed by"

_____ Date: September 29, 1994

Sherwood Park Fish and Game Association
represented by Andy Body

"original signed by"

Date: September 29, 1994

Association of Agricultural Fieldmen
represented by Doug Henderson

"original signed by"

Date: September 29, 1994

Robert Burland, Biologist
Chemicals Assessment and Management Division
Alberta Environmental Protection

"original signed by"

Date: September 29, 1994

Ian Gray,
Environmental Operations,
Strathcona County

IV. RECOMMENDATIONS

The Board recommends that the Minister of Environmental Protection confirm the decision of the Director of Chemicals Assessment and Management in Approval No. 94-SU-043, subject to the Resolution contained herein.

Further, with respect to section 92(2) of the Act, the Board recommends that distribution of this Report and Recommendations and of any decision by the Minister be sent to the parties to this appeal, namely: the Cooking Lake Moraine Conservation Association; the Sherwood Park Fish and Game Association; the Director of Chemicals Assessment and Management; the County of Strathcona; and the Association of Alberta Agricultural Fieldmen.

Dated October 12, 1994, at Calgary, Alberta.

"David H. Marko"
David H. Marko, Vice-chair

ORDER

I, Ty Lund, Minister of Environmental Protection, make the following Order:

_X_ I confirm the decision of the Director of Chemicals Assessment and Management, subject to the Resolutions listed above and the Report and Recommendations of the Environmental Appeal Board. If any further order is needed, it is either set out below or attached.

_____ I reverse the decision of the Director of Chemicals Assessment and Management and make a further order as set out below or attached.

_____ I vary the decision of the Director of Chemicals Assessment and Management and make a further order as set out below or attached.

Dated at Edmonton this 02 day of November 1994.

"Ty Lund"
Honourable Ty Lund
Minister of Environmental Protection

_____ Attachments

X___ No attachments