Court File Number: T-1422-13

FEDERAL COURT

ÉQUITERRE and
DAVID SUZUKI FOUNDATION

Applicants

and

MINISTER OF HEALTH

Respondent

APPLICATION UNDER sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at Ottawa, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicants' solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

AUG 23 2013

Date: _____

Issued by: _____

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APPLICATION

This is an application for judicial review challenging the failure of the Minister of Health, or her delegate, to perform mandatory statutory duties under subsections 17(2) and (5) of the *Pest Control Products Act*, SC 2002, c 28 ("*PCPA*"). Relatedly, this application challenges the unreasonable delay of the Minister of Health, or her delegate, to perform those mandatory duties within a reasonable time as required by subsection 17(5). There is no file or reference number.

On October 15, 2012, the applicants submitted a request to the Minister of Health to initiate mandatory special reviews, as required under subsection 17(2) of the *PCPA*, of the registration of the pest control products containing 30 active ingredients that have been prohibited by member countries of the Organisation for Economic Co-operation and Development ("OECD") for environmental or health reasons.

As of August 23, 2013, over ten months later, the Minister of Health or her delegate has unlawfully failed to decide "within a reasonable time" after receiving the applicants' request to initiate these mandatory special reviews, as required under subsection 17(5) of the *PCPA*, in relation to 26 of these 30 active ingredients.

The applicants apply for the following orders:

1. An order declaring that the Minister of Health or her delegate has failed, refused and unreasonably delayed the performance of her mandatory duty to initiate a special review, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing any of 26 active ingredients prohibited by OECD countries for all uses for environmental or health reasons.

2. An order in the nature of *mandamus* ordering the Minister of Health or her delegate to immediately initiate special reviews, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing any of 26 active ingredients prohibited by OECD countries for all uses for environmental or health reasons.

3. In the alternative to the relief sought at paragraph (2), an order in the nature of *mandamus* ordering the Minister of Health or her delegate to immediately determine whether special reviews must be initiated, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing any of 26 active ingredients prohibited by OECD countries for all uses for environmental or health reasons.

4. An order declaring that the matter in respect of which relief is sought at paragraphs (1), (2) and (3) is limited to a single order; or, in the alternative, an order allowing this matter to be the subject of a single application for judicial review pursuant to Rule 302 of the *Federal Courts Rules.*

5. Pursuant to Rule 105 of the *Federal Courts Rules*, an order that this application be consolidated or heard together with three other closely related applications issued by these applicants on or about August 23, 2013

6. An order requiring the respondent to pay the applicants' costs of this application.

7. Such further or other relief as this Honourable Court may deem just.

The grounds for the application are:

The Parties and Related Proceedings

1. The Minister of Health is the minister responsible for administering the *PCPA* generally and for implementing s. 17 of the *PCPA* specifically.

2. The Minister of Health has delegated responsibility for the *PCPA* to Health Canada's Pest Management Regulatory Agency (the "Agency"). The Agency is responsible for administering the *PCPA* on behalf of the Minister of Health. Specifically, the Agency is responsible for performing the Minister's duties under section 17, including under subsection 17(2), of the *PCPA.*

3. The applicants Équiterre and David Suzuki Foundation are environmental non-governmental organizations working to protect Canada's natural environment.

4. The applicants have genuine interests in protecting Canadians and their biodiversity from pesticides that are harmful to the environment or health. They have genuine interests in ensuring that the Minister of Health complies with the mandatory duties that Parliament has imposed upon him or her under the *PCPA.*

5. The applicants are public interest litigants and have no personal, proprietary or pecuniary interest in the outcome of this Application.

6. On or about August 23, 2013, the applicants issued three other closely related applications for judicial review, which share common parties, legal issues and factual issues.

7. The four applications arise out of the applicants' request on October 15, 2012 to the Minister of Health. That request addressed 30 active ingredients contained in pest control products registered for use in Canada. This application primarily seeks an order in the nature of *mandamus* requiring the Minister or her delegate to initiate special reviews in relation to 26 of the 30 active ingredients. The other three applications seek orders in the nature of *certiorari* quashing the Agency's decisions refusing to initiate special reviews in relation to 3 of those 30 active ingredients, and in the nature of *mandamus* requiring the Minister or her delegate to initiate special reviews in relation to those 3 of 30 active ingredients.

Section 17 of the *PCPA* imposes a duty to initiate special reviews

8. The primary, overarching objective of the Agency in administrating the *PCPA* is to prevent unacceptable risks to people and the environment from the use of pest control products [s. 4(1)]. This statutory object must guide all decisions made under the *PCPA*, including the Agency's determinations of whether it must initiate special reviews under section 17 generally or under subsection 17(2) specifically.

9. A "pest control product" is defined, in section 2, to mean:

    a. a product, an organism or a substance, including a product, an organism or a substance derived through biotechnology, that consists of its active ingredient, formulants and contaminants, and that is manufactured, represented, distributed or used as a means for directly or indirectly controlling, destroying, attracting or repelling a pest or for mitigating or preventing its injurious, noxious or troublesome effects;

    b. an active ingredient that is used to manufacture anything described in paragraph (*a*); or

    c. any other thing that is prescribed to be a pest control product.

10. An "active ingredient" is defined, in section 2, to mean a component of a pest control product to which the intended effects of the product are attributed and includes a synergist but does not include a solvent, diluent, emulsifier or other component that is not primarily responsible for those effects.

11. Section 17 governs the circumstances in which the Agency is legally obliged to initiate a special review of the registration of a pest control product. Whenever the conditions set out in subsections 17(1), (2) or (3) are satisfied, the Agency is obliged to initiate a special review of the registration of a pest control product.

12. At issue in this application are the duties of the Agency under subsection 17(2). Subsection 17(2) obliges the Agency to initiate a special review of registered pest control products containing an active ingredient when an OECD country prohibits all uses of that active ingredient for health or environmental reasons.

13. If an active ingredient in a pest control product registered for use in Canada has been banned by an OECD country for all uses for environmental or health reasons or both, the Agency lacks any discretion or jurisdiction to refuse to initiate a special review or to conclude that a special review is "not warranted".

The specific duty in subsection 17(2) is not limited by subsection 17(1) or section 18

14. Subsection 17(1) creates a more general, somewhat more discretionary duty than the specific, mandatory duty created under subsection 17(2). Subsection 17(1) obliges the Agency to initiate a special review "of the registration of a pest control product if the Minister has reasonable grounds to believe that the health or environmental risks of the product are, or its value is, unacceptable."

15. The specific duty under subsection 17(2), to initiate a special review whenever an OECD country has banned an active ingredient for all uses for environmental or health reasons, is separate from and not subsumed under the general duty in subsection 17(1). The specific duty under subsection 17(2) is not limited by the generality of subsection 17(1).

16. The Agency may be obliged to initiate a special review under subsection 17(2) even where the conditions triggering a special review under subsection 17(1), or the conditions under subsection 17(3), are not satisfied.

17. In addition, the Agency's duty to initiate special review under subsection 17(2) is not limited by section 18 of the *PCPA*. Section 18 imposes procedural duties that the Agency must comply with in the course of a special review and does not apply until *after* the Agency has initiated a special review under section 17.

The duty to initiate special review under section 17 is triggered in two distinct ways

18. The Agency's duty to initiate special reviews under section 17 is a continuing duty. This duty is triggered at any time that any of the conditions set out in subsections 17(1), (2) or (3) are present.

19. In particular, this duty exists regardless of whether any person has requested that the Agency initiate a special review.

20. However, subsection 17(4) of the *PCPA* also expressly permits any person to request a special review of the registration of a pest control product.

21. Where a person does request a special review under subsection 17(4), the Agency is obliged under subsection 17(5) to decide whether to initiate a special review, and to respond to the person with written reasons for its decision, within "a reasonable time after receiving a request."

The applicants submitted a request for special review in October 2012

22. On October 15, 2012, the applicants submitted a request, under subsection 17(4), to the Minister of Health. They requested that she initiate special reviews of the registration of pest control products containing 30 active ingredients that were prohibited in OECD countries, for all uses, for environmental or health reasons.

23. The applicants' request provided the Agency all information legally relevant to a determination, under subsection 17(2), that at the time of the request these 30 active ingredients were banned by OECD countries for environmental or health reasons. It provided the Agency with citations to all relevant regulatory decisions of OECD countries on the 30 active ingredients and to the supporting reasons.

24. The applicants' request did not provide the Agency with any information legally irrelevant to a determination under subsection 17(2) — such as underlying scientific studies relied on by OECD countries when banning active ingredients for environmental or health reasons, or any previous evaluations by the Agency.

25. On October 25, 2012, the applicants received a letter from the Agency acknowledging receipt of the request, confirming that the Agency was responsible for administering the *PCPA* on behalf of the Minister of Health and advising that the applicants would be notified, in due course, of the Agency's determination.

The Agency delayed for over nine months, until July 2013, before making only two decisions in relation to only two of 30 active ingredients

26. Four and a half months after submitting their special review request, the applicants had still received no response from the Agency advising of its decision.

27. On February 27, 2013, out of concern with the Agency's delay in responding, the applicants wrote the Agency seeking an update. They requested that the Agency communicate the anticipated timing of its response to their special review request.

28. On March 8, 2013, the Agency replied, acknowledging receipt of the applicants' letter dated February 27, 2013, although it did not indicate any date by which it would respond to their special review request ("Agency's March 2013 Letter").

29. The Agency's March 2013 Letter described processes purportedly necessary for the Agency to follow when making determinations under subsection 17(2). It incorrectly asserted that, as a precondition to determining if a special review must be initiated, the Agency was first required to go behind the OECD countries' regulatory decisions, by gathering and reviewing the scientific reviews forming the basis for those decisions. It further incorrectly asserted that the Agency was first required to investigate previous Canadian regulatory decisions and whether the OECD countries' decisions were based on "new" scientific evidence.

30. On June 11, 2013, the Agency wrote to the applicants, advising that it would notify them of *some* of its decisions for the 30 ingredients in early July 2013.

31. On July 9, 2013, the applicants wrote the Agency to express concern about its delay in determining that it must initiate special reviews under subsection 17(2).

32. On July 24, 2013, more than nine months after the applicants' request, the Agency advised that it was refusing to initiate special reviews of trifluralin and chlorthal-dimethyl. While not disputing that the two active ingredients are banned in OECD countries for all uses for environmental or health reasons, the Agency nonetheless concluded that special reviews were "not warranted" under subsection 17(2).

33. These two decisions refusing to initiate special reviews of pest control products containing trifluralin and chlorthal-dimethyl are the subject of two separate, closely related applications for judicial review, which the applicants will seek to consolidate or have heard together and with the instant application.

34. On July 26, 2013, the Agency responded to the applicants' letter of July 9, 2013. As in the Agency's March 2013 Letter, the Agency set out processes that it purportedly must follow in making determinations under subsection 17(2). The Agency incorrectly asserted that, as a precondition to determining whether it must initiate special reviews under subsection 17(2), it must first obtain and review the scientific reviews supporting the OECD countries' decisions. It also incorrectly relied on section 18 of the *PCPA* to justify its delay in initiating special reviews.

The Agency delayed for almost ten months, until August 2013, before making two additional decisions, in relation to another two of the 30 active ingredients

35. On August 9, 2013, almost ten months after the applicants' request, the Agency advised the applicants of its decision to refuse to initiate special reviews of bifenthrin and trichlorfon.

36. While not disputing that trichlorfon is prohibited in OECD countries for all uses for environmental or health reasons, the Agency nonetheless concluded that a special review of the registration of the pest control products registered in Canada that contain trichlorfon was "not warranted" under subsection 17(2).

37. The Agency's refusal to initiate a special review of the registration of pest control products containing trichlorfon is the subject of a separate application for judicial review (which the applicants will seek to consolidate or have heard together with their applications on trifluralin and chlorthal-dimethyl, and with this application).

38. The applicants do not challenge the Agency's decision refusing to initiate a special review of pest control products containing bifenthrin. In July 2012, the applicants had completed their regulatory research for their special review request. In August 2012, the European Union Pesticides Database was updated. This update disclosed that the European Union had removed its prohibition on bifenthrin in July 2012. Thus, as of October 15, 2012, when the applicants made their request, a special review of registered pest control products containing bifenthrin was no longer legally required pursuant to subsection 17(2).

For the remaining 26 active ingredients at issue, the Agency has not yet initiated mandatory special reviews of pest control products

39. As of August 23, 2013, the Agency has yet to initiate, or to decide whether to initiate, mandatory special reviews of the pest control products containing the remaining 26 active ingredients at issue in the applicants' request.

40. As of August 23, 2013, the Agency has not communicated any dates by which it will initiate, or decide whether to initiate, the mandatory special reviews of the pest control products containing the remaining 26 active ingredients.

The Agency has unreasonably delayed initiating mandatory special reviews required by subsection 17(2)

41. Subsection 17(5) of the *PCPA* provides that, within a reasonable time after receiving a request, the Minister shall decide whether to initiate a special review and shall respond to the request with written reasons for her decision.

42. Whether an administrative decision-maker has failed to perform a duty within a reasonable time depends on the time inherently necessary to make the decision, the causes of the delay and the impact of the delay.

The time inherently necessary to make the decision and provide written reasons

43. Parliament understood that the Agency would *complete* special reviews, including the considerations and processes required by sections 18 and 19, and consultation of the applicants and others required by section 28, within a year. This intention would be defeated if the Agency were permitted to take nearly a year, or more, to simply determine whether to *initiate* special reviews, as has occurred here.

44. Where a request to initiate a special review is specifically based on the conditions set out in subsection 17(2), the time inherently required by the Agency is short.

45. The only three facts that the Agency must ascertain—indeed the only facts that the Agency may lawfully consider—in determining whether it is legally required under subsection 17(2) to initiate a special review of registered pest control products containing a certain active ingredient are:

    a. whether the active ingredient is contained in pest control products that are registered in Canada;

    b. whether an OECD member country prohibits all uses of the active ingredient at issue; and

    c. whether that prohibition is for health or environmental reasons or both.

46. To ascertain these two facts, the Agency must engage in a straightforward, factual confirmation of the status and content of OECD countries' regulatory decisions. The Agency must obtain and read the relevant decisions, to confirm that the active ingredients are prohibited for all uses and for environmental or health reasons.

47. Here, the applicants' request provided the Agency with citations to all necessary, relevant regulatory decisions of OECD countries and to the supporting reasons.

48. Given the simple nature of the factual confirmation required by subsection 17(2), in these circumstances, the inherent time required for the Agency to determine whether to initiate a special review of the registered pest control products containing the 30 active ingredients at issue is no more than two months. Further, the inherent time required by the Agency to provide the applicants with written reasons of its decision is no more than three months from the date of their request.

The causes of delay

49. The Agency has not provided any valid or lawful justification for its delay. To the contrary, the cause of delay is the Agency's unlawful interpretation of the *PCPA*.

50. As the applicants allege in closely related applications for judicial review, the Agency has unlawfully insisted on examining scientific evidence underlying the OECD countries' regulatory decisions and on assessing if that evidence informed the Agency's earlier re-evaluation decisions. These considerations and processes are legally irrelevant to the Agency's determinations under subsection 17(2).

51. Relatedly, as the applicants have alleged in their related applications, in determining whether special reviews are legally required under subsection 17(2), the Agency unlawfully relies on section 18 to impose additional, time-intensive considerations as purported pre-conditions to initiating a special review. By engaging in considerations and processes that have no lawful application until *after* a special review has been initiated, the Agency causes delay.

52. The applicants did not cause or contribute to the Agency's delay in any way.

The impacts of delay

53. The Agency's delay in initiating special reviews—and thus in determining at the conclusion of those special reviews whether the pest control products should remain registered in Canada—potentially imposes serious impacts on Canadians.

54. Where the Agency delays initiating mandatory special reviews of pest control products containing active ingredients banned by OECD countries for environmental or health reasons, the Agency increases the chance that Canadians will face unacceptable health risks from these ingredients. It likewise increases the likelihood of unacceptable environmental risks to biodiversity in Canada.

The Agency has unreasonably delayed and failed to act within a reasonable time

55. In light of relevant factors including:

    - the inherently short time needed to make decisions under subsection 17(2),
    - the fact that the cause of delay is the Agency's unlawful consideration of irrelevant factors under subsection 17(2), and
    - a potentially serious impact of delay on Canadians and their biodiversity,

    the Agency's delay in initiating mandatory special reviews under subsection 17(2) constitutes unreasonable delay.

56. In the circumstances, the Agency required no more than two months to determine that it was legally obliged, under subsection 17(2) of the *PCPA*, to initiate special reviews of registered pest control products containing 29 of the 30 active ingredients addressed in the applicants' special review request.

57. In the circumstances, the Agency required no more than three months to respond to the applicants, under subsection 17(5) of the *PCPA*, with written reasons for its mandatory decision to initiate special reviews of registered pest control products containing 29 of the 30 active ingredients addressed in the applicants' request.

The Agency's unreasonable delay necessitates the relief sought by the applicants

58. The Agency is under a public legal duty to initiate special reviews of these active ingredients, a duty that it owes both to the public and to these applicants.

59. The applicants have a clear right to performance of that duty, including as a result of their special review request made on October 15, 2012.

60. No equitable bar exists, in the circumstances, to relief in the nature of *mandamus*.

61. Pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, this Court has jurisdiction to hear this application and to grant the relief sought.

62. In particular, this Court has the express jurisdiction under paragraph 18.1(3)(a) of the *Federal Courts Act* to order the Agency to initiate mandatory special reviews, under subsection 17(2) of the *PCPA*, of pest control products containing any of the remaining 26 active ingredients at issue.

63. In addition, this Court has the express jurisdiction under paragraph 18.1(3)(a) of the *Federal Courts Act* to order the Agency to immediately decide whether it is obliged to initiate special reviews, under subsection 17(2) of the *PCPA*, of pest control products containing any of the remaining 26 active ingredients at issue.

64. The applicants further rely on the *Federal Courts Rules*, the *PCPA*, and such additional grounds as counsel may identify.

This application will be supported by the following material:

1. An affidavit of Dr. Elaine MacDonald, on behalf of the Applicants, to be served;
2. An affidavit of Mara Kerry, on behalf of David Suzuki Foundation, to be served;
3. An affidavit of Nadine Bachand, on behalf of Équiterre, to be served; and
4. Such additional materials as counsel may advise and the Court may allow.

August 22, 2013

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Court File Number: T-1423-13

FEDERAL COURT

ÉQUITERRE and
DAVID SUZUKI FOUNDATION

Applicants

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MINISTER OF HEALTH

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APPLICATION UNDER sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7

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TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at Ottawa, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicants' solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

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Date: AUG 23 2013

Issued by: _____

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APPLICATION

This is an application for judicial review seeking to quash the unlawful decision of the Pest Management Regulatory Agency ("the Agency") to refuse to initiate a mandatory special review, under subsection 17(2) of the *Pest Control Products Act*, SC 2002, c 28 ("*PCPA*"), of the registration of pest control products containing chlorthal-dimethyl. The Agency communicated this decision to the applicants in writing on July 24, 2013.

Reference Number 2012-4494 HM

The application further seeks to order the Minister of Health or the Agency to initiate a special review of registered pest control products containing chlorthal-dimethyl.

The applicants apply for the following orders:

1. An order declaring that the Agency erred in law when it refused to initiate a mandatory special review, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing chlorthal-dimethyl.

2. An order in the nature of *certiorari* quashing and setting aside the Agency's decision refusing to initiate a mandatory special review, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing chlorthal-dimethyl.

3. An order in the nature of *mandamus* ordering the Minister of Health or her delegate the Agency to immediately initiate a mandatory special review, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing chlorthal-dimethyl.

4. Pursuant to Rule 105 of the *Federal Courts Rules*, an order that this application be consolidated or heard together with three other closely related applications issued by these applicants on or about August 23, 2013.

5. An order requiring the respondent to pay the applicants' costs of this application.

6. Such further or other relief as this Honourable Court may deem just.

The grounds for the application are:

The Parties and Related Proceedings

1. The Minister of Health is the minister responsible for administering the *PCPA* generally and for implementing section 17 of the *PCPA* specifically.

2. The Minister of Health has delegated responsibility for the *PCPA* to the Agency. The Agency is responsible for administering the *PCPA* on behalf of the Minister of Health. Specifically, the Agency is responsible for performing the Minister's duties under section 17, including under subsection 17(2), of the *PCPA*.

3. The applicants Équiterre and David Suzuki Foundation are environmental non-governmental organizations working to protect Canada's natural environment.

4. The applicants have genuine interests in protecting Canadians and their biodiversity from pesticides that are harmful to the environment or health. They have genuine interests in ensuring that the Minister of Health complies with the mandatory duties that Parliament has imposed upon him or her under the *PCPA*.

5. The applicants are public interest litigants and have no personal, proprietary or pecuniary interest in the outcome of this Application.

6. On or about August 23, 2013, the applicants issued three other closely related applications for judicial review. These four applications share common parties, legal issues and factual issues.

7. The four applications all arise out of the applicants' request on October 15, 2012, to the Minister of Health. That request addressed 30 active ingredients contained in various registered pest control products. This application regarding chlorthal-dimethyl, and two other applications regarding trifluralin and trichlorfon, seek orders in the nature of *certiorari* and *mandamus,* quashing the Agency's decisions refusing to initiate mandatory special reviews in relation to these 3 of the 30 active ingredients and requiring the Minister or her delegate to initiate these special reviews. The fourth application seeks an order in the nature of *mandamus* requiring the Minister or her delegate to initiate mandatory special reviews in relation to 26 of the 30 active ingredients.

The Agency assigned the closely related decisions the same reference number. AM

Section 17 of the *PCPA* imposes a duty to initiate special reviews

8. The primary, overarching objective of the Agency in administrating the *PCPA* is to prevent unacceptable risks to people and the environment from the use of pest control products [s. 4(1)]. This statutory object must guide all decisions made under the *PCPA*, including the Agency's determinations whether it must initiate special reviews under section 17 generally or under subsection 17(2) specifically.

9. A "pest control product" is defined, in section 2, to mean:

    a. a product, an organism or a substance, including a product, an organism or a substance derived through biotechnology, that consists of its active ingredient, formulants and contaminants, and that is manufactured, represented, distributed or used as a means for directly or indirectly controlling, destroying, attracting or repelling a pest or for mitigating or preventing its injurious, noxious or troublesome effects;

    b. an active ingredient that is used to manufacture anything described in paragraph (*a*); or

    c. any other thing that is prescribed to be a pest control product.

10. An "active ingredient" is defined, in section 2, to mean a component of a pest control product to which the intended effects of the product are attributed and includes a synergist but does not include a solvent, diluent, emulsifier or other component that is not primarily responsible for those effects.

11. Section 17 governs the circumstances in which the Agency is legally obliged to initiate a special review of the registration of a pest control product. Whenever the conditions set out in subsections 17(1), (2) or (3) are satisfied, the Agency is obliged to initiate a special review of the registration of a pest control product.

12. At issue in this application are the duties of the Agency under subsection 17(2). Subsection 17(2) obliges the Agency, when an OECD country prohibits all uses of an active ingredient for health or environmental reasons, to initiate a special review of registered pest control products containing that active ingredient.

13. If an active ingredient in a pest control product that is registered for use in Canada has been banned by an OECD country for all uses, for environmental or health reasons or both, the Agency lacks any discretion or jurisdiction to refuse to initiate a special review or to conclude that a special review is "not warranted".

The specific duty under subsection 17(2) to initiate a special review is not limited by subsection 17(1) or by section 18

14. Subsection 17(1) creates a more general, somewhat more discretionary duty than the specific, mandatory duty created under subsection 17(2). Subsection 17(1) obliges the Agency to initiate a special review "of the registration of a pest control product if the Minister has reasonable grounds to believe that the health or environmental risks of the product are, or its value is, unacceptable."

15. The specific duty under subsection 17(2), to initiate a special review whenever an OECD country has banned an active ingredient for all uses for environmental or health reasons, is separate from and not subsumed under the general duty in subsection 17(1). The specific duty under subsection 17(2) is not limited by the generality of subsection 17(1).

16. The Agency may be obliged to initiate a special review under subsection 17(2) even where the conditions triggering a special review under subsection 17(1), or the conditions under subsection 17(3), are not satisfied.

17. In addition, the Agency's duty to initiate a special review under subsection 17(2) is not limited by section 18 of the *PCPA*. Section 18 imposes procedural duties that the Agency must comply with in the course of a special review and does not apply until *after* the Agency has initiated a special review under section 17.

The duty to initiate special review under section 17 is triggered in two distinct ways

18. The Agency's duty to initiate special reviews under section 17 is a continuing duty. This duty is triggered at any time that any of the conditions set out in subsections 17(1), (2) or (3) are present.

19. In particular, this duty exists regardless of whether any person has submitted a request to the Agency to initiate a special review.

20. However, subsection 17(4) of the *PCPA* also expressly permits any person to request a special review of the registration of a pest control product.

21. Where a person does request a special review under subsection 17(4), the Agency is obliged under subsection 17(5) to decide whether to initiate a special review and must respond to the person with written reasons for its decision within "a reasonable time after receiving a request."

The applicants submitted a request for special review in October 2012, in relation to chlorthal-dimethyl

22. On October 15, 2012, the applicants submitted a request, under subsection 17(4), to the Minister of Health. They requested that she initiate special reviews of the registration of pest control products containing 30 active ingredients that were prohibited in OECD countries for all uses, for environmental or health reasons.

23. The applicants' request provided the Agency all information legally relevant to a determination, under subsection 17(2), that these 30 active ingredients, including chlorthal-dimethyl, were banned by OECD countries for environmental or health reasons. It provided the Agency with citations to all relevant regulatory decisions of OECD countries on the 30 active ingredients, including for chlorthal-dimethyl, and to the supporting reasons.

24. The applicants' request did not provide the Agency with any information that is legally irrelevant to a determination under subsection 17(2)—such as scientific studies relied on by OECD countries when banning these active ingredients for environmental or health reasons or any previous re-evaluations by the Agency.

25. On October 25, 2012, the applicants received a letter from the Agency acknowledging receipt of their request, confirming that the Agency was responsible for administering the *PCPA* on behalf of the Minister of Health, and advising that the applicants would be notified, in due course, of the Agency's determination.

In July 2013, the Agency refused to initiate a mandatory special review in relation to chlorthal-dimethyl

26. Four and a half months after submitting their special review request, the applicants had still received no response from the Agency advising of its decision.

27. On February 27, 2013, out of concern with the Agency's delay in responding, the applicants wrote the Agency seeking an update. They requested that the Agency communicate the anticipated timing of its response to their special review request.

28. On March 8, 2013, the Agency replied, acknowledging receipt of the applicants' letter dated February 27, 2013. It did not indicate any date by which it anticipated responding to their special review request ("Agency's March 2013 Letter").

29. The Agency's March 2013 Letter described processes purportedly necessary for the Agency to follow when making determinations under subsection 17(2). It incorrectly suggested that, as a precondition to determining if a special review must be initiated under subsection 17(2), the Agency was required to go behind OECD countries' regulatory decisions by gathering and reviewing the scientific reviews forming the basis for those decisions. It also incorrectly asserted that the Agency was first required to investigate previous Canadian regulatory decisions and whether the OECD countries' decisions were based on new scientific evidence.

30. On June 11, 2013, the Agency wrote to the applicants advising that it would notify them of *some* decisions for the 30 ingredients in early July 2013.

31. On July 9, 2013, the applicants wrote the Agency to express concern about its delay in deciding to initiate special reviews under subsection 17(2).

32. On July 24, 2013, the Agency advised the applicants of its decision to refuse to initiate any special review in relation to chlorthal-dimethyl, despite accepting that this active ingredient is prohibited in OECD countries for all uses and for environmental or health reasons.

33. On July 26, 2013, the Agency responded to the applicants' letter of July 9, 2013. In its letter, the Agency again set out processes that it purportedly must follow in making determinations under subsection 17(2). As in the Agency's March 2013 Letter, the Agency incorrectly asserted that it must go behind the OECD countries' decisions and obtain the detailed scientific reviews supporting those decisions. The Agency also incorrectly relied on section 18 to justify its consideration of information that is legally irrelevant to subsection 17(2).

The Agency's refusal to initiate a special review under subsection 17(2) of the *PCPA* of registered pest control products containing chlorthal-dimethyl was unlawful

34. The only three facts that the Agency must ascertain—indeed the only facts that the Agency may lawfully consider—in determining whether it is legally required under subsection 17(2) to initiate a special review of registered pest control products containing a certain active ingredient are:

    a. whether the active ingredient is contained in pest control products that are registered in Canada;

    b. whether an OECD member country prohibits all uses of the active ingredient at issue; and

    c. whether that prohibition is for health or environmental reasons or both.

35. To ascertain these facts, the Agency must engage in a straightforward, factual confirmation of the status and content of OECD countries' regulatory decisions. The Agency must obtain and read the relevant decisions to confirm that the active ingredients are prohibited for all uses and for environmental or health reasons.

36. In their request for special review, the applicants provided the Agency with citations to all necessary, relevant regulatory decisions of OECD countries and to the supporting reasons.

37. While not disputing that chlorthal-dimethyl is contained in pest control products registered in Canada, is prohibited in OECD countries for all uses and that this ban is for environmental or health reasons, the Agency nonetheless concluded that a special review was "not warranted" under subsection 17(2).

38. In reaching this conclusion, the Agency made numerous legal errors.

The Agency misdirected itself on what information it may lawfully consider

39. The Agency insisted on examining scientific evidence underlying the OECD countries' regulatory decisions and on assessing whether and how that evidence may have informed the Agency's own earlier re-evaluation decision in 2008.

40. In so doing, the Agency misdirected itself and erred in law. These considerations are legally irrelevant to the Agency's determination of whether to initiate a special review under subsection 17(2).

41. Subsection 17(2) permits the Agency to consider regulatory evidence of whether an OECD country has made a regulatory decision to ban pest control products. It does not permit the Agency to evaluate scientific evidence concerning the risks and acceptability of those pest control products—this evaluation is the objective of the special review itself.

42. Only *after* a special review has been initiated under subsection 17(2), and during the course of the special review, is the Agency permitted to consider scientific evidence and other information relevant to evaluating whether pest control products containing chlorthal-dimethyl should continue to be registered in Canada.

The Agency prejudged the outcome of a mandatory special review and deprived the applicants of their right to be consulted about the outcome of that special review

43. Pursuant to sections 19 and 28, the Agency is required to evaluate risks and acceptability of pest control products *during* its special review of the registration of those pest control products, as initiated under subsection 17(2).

44. In concluding that a special review of registered pest control products containing chlorthal-dimethyl was "not warranted," the Agency relied on its own earlier

regulatory decisions regarding the registration of such pest control products. Specifically, the Agency relied on its own re-evaluation decision from 2008.

45. In so doing, the Agency unlawfully prejudged the outcome of a mandatory special review of the registration of pest control products containing chlorthal-dimethyl.

46. Further, the Agency unlawfully deprived the applicants of their statutory rights under sections 18, 19 and 28 to participate in and seek to influence the outcome of that special review, including by opposing the continued registration of these pest control products.

47. The Agency has a legal duty to consult the public in any special review of registered pest control products, and the applicants are legally entitled to be consulted by the Agency in a special review of registered pest control products containing chlorthal-dimethyl, pursuant to subsection 18(4) and section 28.

48. In that consultation, the applicants would be entitled to provide the Agency with existing or new information about the health and environmental risks of registered pest control products containing chlorthal-dimethyl. Specifically, the applicants would be entitled to provide existing or new information showing that these pest control products present unacceptable risks to Canadians or to their biodiversity.

49. The applicants would also be entitled to explain why the Agency should reconsider and rescind its 2008 re-evaluation decision allowing the registration of these pest control products and why it should cancel or amend their registration.

The Agency erroneously relied on section 18 to limit its duty under subsection 17(2)

50. In refusing to initiate a special review of pest control products containing chlorthal-dimethyl, the Agency relied on subsection 18(1). Specifically, the Agency asserts that, for the purpose of subsection 18(1), it must first engage in time-intensive analysis of various information underlying OECD countries' decisions before it can initiate any special review under subsection 17(2).

51. In relying on compliance with section 18 as a precondition to initiating a special review under subsection 17(2), the Agency errs in law. Section 18 does not apply until after a special review has been initiated. Rather, it sets out procedural duties that the Agency must comply with after it has initiated a special review.

The Agency misdirected itself on the required subject or focus of a special review

52. The Agency concluded that a special review of the active ingredient chlorthal-dimethyl was not warranted. Its decision letter of July 24, 2013 did not ask or answer whether a special review of the registered pest control products containing chlorthal-dimethyl was required.

53. In so doing, the Agency misdirected itself as to the correct subject matter or focus of a special review under section 17 and erred in law. A special review does not evaluate the active ingredient itself. Rather, a special review evaluates the registered pest control products containing that active ingredient.

The Agency's errors of law invalidate its decision

54. As registered pest control products containing chlorthal-dimethyl are prohibited by OECD countries for all uses for environmental reasons, the Agency did not have any discretion or authority, under subsection 17(2) of the *PCPA*, to conclude that special review of these pest control products was "not warranted."

55. The Agency erred in law and misdirected itself in deciding that a special review of the registration of pest control products containing chlorthal-dimethyl was "not warranted" under subsection 17(2) of the *PCPA*. In refusing to initiate a mandatory special review under subsection 17(2), the Agency acted unlawfully.

The applicants are entitled to the relief sought

56. The Agency is under a public legal duty to initiate special reviews of these active ingredients, a duty that it owes both to the public and to these applicants.

57. The applicants have a clear right to performance of that duty, including as a result of their special review request made on October 15, 2012.

58. No equitable bar exists, in the circumstances, to relief in the nature of *mandamus* or *certioriari.*

59. Pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, this Court has jurisdiction to hear this application and to grant the relief sought.

60. In particular, this Court has the jurisdiction under paragraph 18.1(3)(a) of the *Federal Courts Act* to order the Agency to initiate a mandatory special review, under subsection 17(2) of the *PCPA*, of registered pest control products containing chlorthal-dimethyl.

61. In addition, this Court has the jurisdiction under paragraph 18.1(3)(b) of the *Federal Courts Act* to declare invalid or unlawful, and to quash or set aside, the Agency's refusal to initiate a mandatory special review, under subsection 17(2) of the *PCPA*, of registered pest control products containing chlorthal-dimethyl.

62. The applicants further rely on the *Federal Courts Rules*, the *PCPA*, and such additional grounds as counsel may identify.

This application will be supported by the following material:

1. An affidavit of Dr. Elaine MacDonald, on behalf of the Applicants, to be served;
2. An affidavit of Mara Kerry, on behalf of David Suzuki Foundation, to be served;
3. An affidavit of Nadine Bachand, on behalf of Équiterre, to be served;
4. Material requested pursuant to Rule 317 of the *Federal Courts Rules* and produced to the applicants and to the Court pursuant to Rule 318; and
5. Such additional materials as counsel may advise and the Court may allow.

Pursuant to Rule 317 of the *Federal Courts Rules*, the applicants request the Minister of Health or her delegate send a certified copy of the following material that is not in the possession of the applicants but is in the possession of the Minister of Health or her delegate to the applicants and to the Registry:

1. The materials considered and relied on by the Agency in determining that a special review in relation to chlorthal-dimethyl was not warranted under subsection 17(2) of the *PCPA*, including but not limited to:
    i. The longer, underlying analysis upon which the Agency based the "Summary of Analysis" that it provided to the applicants as Attachment 1 to its decision letter of July 24, 2013;
    ii. All "relevant information" on which the Agency relied in conducting its analysis as referenced by the Agency in its decision letter of July 24, 2013, including but not limited to:
        - the 1998 US EPA assessment and the 2004 US EPA assessment;
        - any records containing the Agency's analysis described at paragraph 5 of "Attachment 1 – Summary of Analysis for Chlorthal-dimethyl" (as the analysis described at paragraph 5 does not appear in either PRVD 2008-18 or RVD2008-30, the two re-evaluation reports that are in the possession of the applicants); and

- any communications between the Agency, on one hand, and registrants, stakeholders, other agencies, or OECD member countries, on the other, that the Agency relied on in deciding that a special review in relation to chlorthal-dimethyl was not warranted.

iii. For chlorthal-dimethyl, any translations of scientific reviews forming the basis of the OECD countries' decisions, as referenced in the Agency's March 2013 Letter.

August 22, 2013

Lara Tessaro
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Court File Number: T-1431-13

FEDERAL COURT

BETWEEN:

ÉQUITERRE and
DAVID SUZUKI FOUNDATION

Applicants

and

MINISTER OF HEALTH

Respondent

APPLICATION UNDER sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at Ottawa, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicants' solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: AOUT AUG 2 6 2013

Issued by: ABIGAIL GRIMES
REGISTRY OFFICER
AGENT DU GREFFE

Address of local office:

180 Queen Street West
Suite 200
Toronto, ON M5V 3L6

TO:

MINISTER OF HEALTH
Health Canada
70 Colombine Driveway
16th Floor
Ottawa, ON K1A 0K9
Tel. (613) 957-0200
Fax (613) 952-1154

APPLICATION

This is an application for judicial review seeking to quash the unlawful decision of the Pest Management Regulatory Agency ("the Agency") to refuse to initiate a mandatory special review, under subsection 17(2) of the *Pest Control Products Act*, SC 2002, c 28 ("*PCPA*"), of the registration of pest control products containing trichlorfon. The Agency communicated this decision to the applicants in writing on August 9, 2013. Reference number 2013-4494 dll

The application further seeks to order the Minister of Health or the Agency to initiate a special review of registered pest control products containing trichlorfon.

The applicants apply for the following orders:

1. An order declaring that the Agency erred in law when it refused to initiate a mandatory special review, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing trichlorfon.

2. An order in the nature of *certiorari* quashing and setting aside the Agency's decision refusing to initiate a mandatory special review, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing trichlorfon.

3. An order in the nature of *mandamus* ordering the Minister of Health or her delegate the Agency to immediately initiate a mandatory special review, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing trichlorfon.

4. Pursuant to Rule 105 of the *Federal Courts Rules*, an order that this matter be consolidated or heard together with three other, related applications issued by these applicants on or about August 23, 2013.

5. An order requiring the respondent to pay the applicants' costs of this application.

6. Such further or other relief as this Honourable Court may deem just.

The grounds for the application are:

The Parties and Related Proceedings

1. The Minister of Health is the minister responsible for administering the *PCPA* generally and for implementing section 17 of the *PCPA* specifically.

2. The Minister of Health has delegated responsibility for the *PCPA* to the Agency. The Agency is responsible for administering the *PCPA* on behalf of the Minister of Health. Specifically, the Agency is responsible for performing the Minister's duties under section 17, including under subsection 17(2), of the *PCPA*.

3. The applicants Équiterre and David Suzuki Foundation are environmental non-governmental organizations working to protect Canada's natural environment.

4. The applicants have genuine interests in protecting Canadians and their biodiversity from pesticides that are harmful to the environment or health. They have genuine interests in ensuring that the Minister of Health complies with the mandatory duties that Parliament has imposed upon him or her under the *PCPA*.

5. The applicants are public interest litigants and have no personal, proprietary or pecuniary interest in the outcome of this Application.

6. On or about August 23, 2013, the applicants issued three other closely related applications for judicial review. These four applications share common parties, legal issues and factual issues.

7. The four applications all arise out of the applicants' request on October 15, 2012, to the Minister of Health. That request addressed 30 active ingredients contained in various registered pest control products. This application regarding trichlorfon, and two other applications regarding trifluralin and chlorthal-dimethyl, seek orders in the nature of *certiorari* and *mandamus*, quashing the Agency's decisions refusing to initiate mandatory special reviews in relation to these 3 of the 30 active ingredients and requiring the Minister or her delegate to initiate these special reviews. The fourth application seeks an order in the nature of *mandamus*, requiring the Minister or her delegate to initiate mandatory special reviews in relation to 26 of the 30 active ingredients.

The Agency assigned the decisions the same reference number. dll.

Section 17 of the *PCPA* imposes a duty to initiate special reviews

8. The primary, overarching objective of the Agency in administrating the *PCPA* is to prevent unacceptable risks to people and the environment from the use of pest control products [s. 4(1)]. This statutory object must guide all decisions made under the *PCPA*, including the Agency's determinations of whether it must initiate special reviews under section 17 generally or under subsection 17(2) specifically.

9. A "pest control product" is defined, in section 2, to mean:

    a. a product, an organism or a substance, including a product, an organism or a substance derived through biotechnology, that consists of its active ingredient, formulants and contaminants, and that is manufactured, represented, distributed or used as a means for directly or indirectly controlling, destroying, attracting or repelling a pest or for mitigating or preventing its injurious, noxious or troublesome effects;

    b. an active ingredient that is used to manufacture anything described in paragraph (*a*); or

    c. any other thing that is prescribed to be a pest control product.

10. An "active ingredient" is defined, in section 2, to mean a component of a pest control product to which the intended effects of the product are attributed and includes a synergist but does not include a solvent, diluent, emulsifier or other component that is not primarily responsible for those effects.

11. Section 17 governs the circumstances in which the Agency is legally obliged to initiate a special review of the registration of a pest control product. Whenever the conditions set out in subsections 17(1), (2) or (3) are satisfied, the Agency is obliged to initiate a special review of the registration of a pest control product.

12. At issue in this application are the duties of the Agency under subsection 17(2). Subsection 17(2) obliges the Agency, when an OECD country prohibits all uses of an active ingredient for health or environmental reasons, to initiate a special review of registered pest control products containing that active ingredient.

13. If an active ingredient in a pest control product that is registered for use in Canada has been banned by an OECD country, for all uses, for environmental or health reasons or both, the Agency lacks any discretion or jurisdiction to refuse to initiate a special review or to conclude that a special review is "not warranted".

The specific duty under subsection 17(2) to initiate a special review is not limited by subsection 17(1) or by section 18

14. Subsection 17(1) creates a more general, somewhat more discretionary duty than the specific, mandatory duty created under subsection 17(2). Subsection 17(1) obliges the Agency to initiate a special review "of the registration of a pest control product if the Minister has reasonable grounds to believe that the health or environmental risks of the product are, or its value is, unacceptable."

15. The specific duty under subsection 17(2), to initiate a special review whenever an OECD country has banned an active ingredient for all uses for environmental or health reasons, is separate from and not subsumed under the general duty in subsection 17(1). The specific duty under subsection 17(2) is not limited by the generality of subsection 17(1).

16. The Agency may be obliged to initiate a special review under subsection 17(2) even where the conditions triggering a special review under subsection 17(1), or the conditions under subsection 17(3), are not satisfied.

17. In addition, the Agency's duty to initiate a special review under subsection 17(2) is not limited by section 18 of the *PCPA*. Section 18 imposes procedural duties that the Agency must comply with in the course of a special review and does not apply until *after* the Agency has initiated a special review under section 17.

The duty to initiate special review under section 17 is triggered in two distinct ways

18. The Agency's duty to initiate special reviews under section 17 is a continuing duty. This duty is triggered at any time that any of the conditions set out in subsections 17(1), (2) or (3) are present.

19. In particular, this duty exists regardless of whether any person has submitted a request to the Agency to initiate a special review.

20. However, subsection 17(4) of the *PCPA* also expressly permits any person to request a special review of the registration of a pest control product.

21. Where a person does request a special review under subsection 17(4), the Agency is obliged under subsection 17(5) to decide whether to initiate a special review, and to respond to the person with written reasons for its decision, within "a reasonable time after receiving a request."

The applicants submitted a request for special review in October 2012, including in relation to trichlorfon

22. On October 15, 2012, the applicants submitted a request, under subsection 17(4), to the Minister of Health. They requested that she initiate special reviews of the registration of pest control products containing 30 active ingredients that were prohibited in OECD countries, for all uses, for environmental or health reasons.

23. The applicants' request provided the Agency all information legally relevant to a determination, under subsection 17(2), that these 30 active ingredients, including trichlorfon, were banned by OECD countries for environmental or health reasons. It provided the Agency with citations to all relevant regulatory decisions of OECD countries on the 30 active ingredients, including for trichlorfon, and to the supporting reasons.

24. The applicants' request did not provide the Agency with any information that is legally irrelevant to a determination under subsection 17(2)—such as scientific studies relied on by OECD countries when banning these active ingredients for environmental or health reasons, or any previous re-evaluations by the Agency – except to provide a decision banning trichlorfon by Brazil, a non-OECD country.

25. On October 25, 2012, the applicants received a letter from the Agency acknowledging receipt of their request, confirming that the Agency was responsible for administering the *PCPA* on behalf of the Minister of Health, and advising that the applicants would be notified, in due course, of the Agency's determination.

In August 2013, the Agency refused to initiate a mandatory special review in relation to trichlorfon

26. Four and a half months after submitting their special review request, the applicants had still received no response from the Agency advising of its decision.

27. On February 27, 2013, out of concern with the Agency's delay in responding, the applicants wrote the Agency seeking an update. They requested that the Agency communicate its anticipated timing of its response to their special review request.

28. On March 8, 2013, the Agency replied acknowledging receipt of the applicants' letter dated February 27, 2013. It did not indicate any date by which it anticipated responding to their special review request ("Agency's March 2013 Letter").

29. The Agency's March 2013 Letter described processes purportedly necessary for the Agency to follow when making determinations under subsection 17(2). It incorrectly suggests that, as a precondition to determining if a special review must be initiated under subsection 17(2), the Agency was required to go behind OECD countries' regulatory decisions, by gathering and reviewing the scientific reviews forming the basis for those decisions. It also incorrectly asserts that the Agency was first required to investigate previous Canadian regulatory decisions, and whether the OECD countries' decisions were based on new scientific evidence.

30. On June 11, 2013, the Agency wrote to the applicants advising that it would notify them of *some* decisions for the 30 ingredients in early July 2013.

31. On July 9, 2013, the applicants wrote the Agency to express concern about its delay in deciding to initiate special reviews under subsection 17(2).

32. On July 26, 2013, the Agency responded to the applicants' letter of July 9, 2013. In its letter, the Agency again sets out processes that it purportedly must follow in making determinations under subsection 17(2). As in the Agency's March 2013 Letter, the Agency incorrectly asserts that it must go behind the OECD countries' decisions and obtain the detailed scientific reviews supporting those decisions. The Agency also incorrectly relies on section 18 to justify its consideration of information that is legally irrelevant to subsection 17(2).

33. On August 9, 2013, the Agency advised the applicants of its decision to refuse to initiate any special review in relation to trichlorfon, despite accepting that this active ingredient is prohibited in OECD countries for all uses and for environmental or health reasons.

The Agency's refusal to initiate a special review under subsection 17(2) of the *PCPA* of registered pest control products containing trichlorfon was unlawful

34. The only three facts that the Agency must ascertain—indeed the only facts that the Agency may lawfully consider—in determining whether it is legally required under subsection 17(2) to initiate a special review of registered pest control products containing a certain active ingredient are:

    a. whether the active ingredient is contained in pest control products that are registered in Canada;

    b. whether an OECD member country prohibits all uses of the active ingredient at issue; and

    c. whether that prohibition is for health or environmental reasons or both.

35. To ascertain these facts, the Agency must engage in a straightforward, factual confirmation of the status and content of OECD countries' regulatory decisions. The Agency must obtain and read the relevant decisions so as to confirm that the active ingredients are prohibited for all uses and for environmental or health reasons.

36. In their request for special review, the applicants provided the Agency with citations to all necessary, relevant regulatory decisions of OECD countries and to the supporting reasons.

37. While not disputing that trichlorfon is contained in pest control products registered in Canada, is prohibited in OECD countries for all uses and that this ban is for environmental or health reasons, the Agency nonetheless concluded that a special review was "not warranted" under subsection 17(2).

38. In reaching this conclusion, the Agency made numerous legal errors.

The Agency misdirected itself on what information it may lawfully consider

39. The Agency insisted on considering what scientific evidence supported the OECD countries' regulatory decisions and on assessing whether and how that evidence may have informed the Agency's own earlier re-evaluation decision.

40. In so doing, the Agency misdirected itself and erred in law. These considerations are legally irrelevant to the Agency's determination of whether to initiate a special review under subsection 17(2).

41. Subsection 17(2) permits the Agency to consider regulatory evidence of OECD countries' decisions to ban pest control products. It does not permit the Agency to evaluate scientific evidence of the risks and acceptability of those pest control products—this evaluation is the objective of the special review itself.

42. Only *after* a special review has been initiated under subsection 17(2), and during the course of the special review, is the Agency able to consider scientific evidence and other information relevant to evaluating whether pest control products containing trichlorfon should continue to be registered in Canada.

The Agency prejudged the outcome of a mandatory special review, and deprived the applicants of their rights to be consulted about the outcome of that special review

43. Pursuant to sections 19 and 28, the Agency is required to evaluate risks and acceptability of pest control products *during* its special review of the registration of those pest control products, as initiated under subsection 17(2).

44. In concluding that a special review of registered pest control products containing trichlorfon was "not warranted", the Agency relied on an earlier non-statutory decision, by the registrant itself, to voluntarily discontinue the use of such pest control products in Canada. However, pest control products containing trichlorfon remain registered in Canada.

45. In so doing, the Agency unlawfully prejudged the outcome of a mandatory special review of the registration of pest control products containing trichlorfon.

46. Further, the Agency unlawfully deprived the applicants of their statutory rights under sections 18, 19 and 28 to participate in and seek to influence the outcome of that special review, including by opposing the continued registration of these pest control products.

47. The Agency has a legal duty to consult the public in any special review of registered pest control products, and the applicants are legally entitled to be consulted by the Agency in a mandatory special review of registered pest control products containing trichlorfon, pursuant to subsection 18(4) and section 28.

48. In that consultation, the applicants would be entitled to provide the Agency with existing or new information about the health and environmental risks of registered pest control products containing trichlorfon. Specifically, the applicants would be entitled to provide existing or new information showing that these pest control products present unacceptable risks to Canadians or to their biodiversity.

49. The applicants would also be entitled to explain why the Agency should reconsider and rescind its 2008 re-evaluation decision allowing the registration of these pest control products and why it should cancel or amend their registration.

The Agency erroneously relied on section 18 to limit its duty under subsection 17(2)

50. In refusing to initiate a special review of pest control products containing trichlorfon, the Agency relied on subsection 18(1). Specifically, the Agency asserts that, for the purpose of subsection 18(1), it must first engage in time-intensive analysis of various information underlying OECD countries' decisions before it can initiate any special review under subsection 17(2).

51. In relying on compliance with section 18 as a precondition to initiating a special review under subsection 17(2), the Agency errs in law. Section 18 does not apply until after a special review has been initiated. Rather, it sets out procedural duties that the Agency must comply with after it has initiated a special review.

The Agency misdirected itself on the required subject or focus of a special review

52. The Agency concluded that a special review of the active ingredient trichlorfon was not warranted. Its decision letter of August 9, 2013 did not ask or answer whether a special review of the registered pest control products containing trichlorfon was required, despite the fact that pest control products containing trichlorfon remain registered by the Agency.

53. In so doing, the Agency misdirected itself as to the correct subject matter or focus of a special review under section 17 and erred in law. A special review does not evaluate the active ingredient itself. Rather, a special review evaluates the registered pest control products containing that active ingredient.

The Agency's errors of law invalidate its decision

54. As registered pest control products containing trichlorfon are prohibited by OECD countries for all uses for environmental reasons, the Agency did not have any discretion or authority, under subsection 17(2) of the *PCPA*, to conclude that special review of these pest control products was "not warranted".

55. The Agency erred in law and misdirected itself in deciding that a special review of the registration of pest control products containing trichlorfon was "not warranted" under subsection 17(2) of the *PCPA*. In refusing to initiate a mandatory special review under subsection 17(2), the Agency acted unlawfully.

The applicants are entitled to the relief sought

56. The Agency is under a public legal duty to initiate special reviews of these active ingredients, a duty that it owes both to the public and to these applicants.

57. The applicants have a clear right to performance of that duty, including as a result of their special review request made on October 15, 2012.

58. No equitable bar exists, in the circumstances, to relief in the nature of *mandamus* or *certioriari.*

59. Pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, this Court has jurisdiction to hear this application and to grant the relief sought.

60. In particular, this Court has the jurisdiction under paragraph 18.1(3)(a) of the *Federal Courts Act* to order the Agency to initiate a mandatory special review, under subsection 17(2) of the *PCPA*, of registered pest control products containing trichlorfon.

61. In addition, this Court has the jurisdiction under paragraph 18.1(3)(b) of the *Federal Courts Act* to declare invalid or unlawful, and to quash or set aside, the Agency's refusal to initiate a mandatory special review, under subsection 17(2) of the *PCPA*, of registered pest control products containing trichlorfon.

62. The applicants further rely on the *Federal Courts Rules*, the *PCPA*, and such additional grounds as counsel may identify.

This application will be supported by the following material:

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4. Material requested pursuant to Rule 317 of the *Federal Courts Rules*, and produced to the applicants and to the Court pursuant to Rule 318; and
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Pursuant to Rule 317 of the *Federal Courts Rules,* the applicants request the Minister of Health or her delegate send a certified copy of the following material that is not in the possession of the applicants but is in the possession of the Minister of Health or her delegate to the applicants and to the Registry:

1. The materials considered and relied on by the Agency in determining that a special review in relation to trichlorfon was not warranted under subsection 17(2) of the *PCPA*, including but not limited to:

    i. The longer, underlying analysis on which the Agency based the "Summary of Analysis" that it provided to the applicants as Attachment 1 to its decision letter of August 9, 2013;

    ii. All "relevant information" on which the Agency relied in conducting its analysis as referenced by the Agency in its decision letter of August 9, 2013, including but not limited to:

        - any information or analysis not already contained within REV200705, PRVD2008-14 or RVD2008-27 (reports that are in the possession of the applicants);

- the materials relied on by the Agency that establish or document that:

  "Trichlorfan was voluntarily discontinued in Canada by the registrant in October 2008. The sale of products containing trichlorfon was stopped in Canada effective December 31, 2009. Products already purchased by users before that date could be used up until December 31, 2013."

- any communications between the Agency, on one hand, and registrants, stakeholders, other agencies, or OECD member countries, on the other, that the Agency relied on in deciding that a special review in relation to trichlorfon was not warranted.

iii. For trichlorfon, any translations of scientific reviews forming the basis of the OECD countries' decisions, as referenced in the Agency's March 2013 Letter.

August 22, 2013

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Court File Number: T-1424-13

FEDERAL COURT

ÉQUITERRE and
DAVID SUZUKI FOUNDATION

Applicants

and

MINISTER OF HEALTH

Respondent

APPLICATION UNDER sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at Ottawa, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicants' solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: AUG 23 2013

Issued by: _____

JOHN GORNICK
REGISTRY OFFICER
AGENT DU GREFFE

Address of local office:

180 Queen Street West
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TO:

MINISTER OF HEALTH
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APPLICATION

This is an application for judicial review seeking to quash the unlawful decision of the Pest Management Regulatory Agency ("the Agency") to refuse to initiate a mandatory special review, under subsection 17(2) of the *Pest Control Products Act*, SC 2002, c 28 ("*PCPA*"), of the registration of pest control products containing trifluralin. The Agency communicated this decision to the applicants in writing on July 24, 2013. Reference number 2012-4494 dlll.

The application further seeks to order the Minister of Health or the Agency to initiate a special review of registered pest control products containing trifluralin.

The applicants apply for the following orders:

1. An order declaring that the Agency erred in law when it refused to initiate a mandatory special review, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing trifluralin.

2. An order in the nature of *certiorari* quashing and setting aside the Agency's decision refusing to initiate a mandatory special review, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing trifluralin.

3. An order in the nature of *mandamus* ordering the Minister of Health or her delegate the Agency to immediately initiate a mandatory special review, under subsection 17(2) of the *PCPA*, of the registration of pest control products containing trifluralin.

4. Pursuant to Rule 105 of the *Federal Courts Rules*, an order that this application be consolidated or heard together with three other closely related applications issued by these applicants on or about August 23, 2013.

5. An order requiring the respondent to pay the applicants' costs of this application.

6. Such further or other relief as this Honourable Court may deem just.

The grounds for the application are:

The Parties and Related Proceedings

1. The Minister of Health is the minister responsible for administering the *PCPA* generally and for implementing section 17 of the *PCPA* specifically.

2. The Minister of Health has delegated responsibility for the *PCPA* to the Agency. The Agency is responsible for administering the *PCPA* on behalf of the Minister of Health. Specifically, the Agency is responsible for performing the Minister's duties under section 17, including under subsection 17(2), of the *PCPA*.

3. The applicants Équiterre and David Suzuki Foundation are environmental non-governmental organizations working to protect Canada's natural environment.

4. The applicants have genuine interests in protecting Canadians and their biodiversity from pesticides that are harmful to the environment or health. They have genuine interests in ensuring that the Minister of Health complies with the mandatory duties that Parliament has imposed upon him or her under the *PCPA*.

5. The applicants are public interest litigants and have no personal, proprietary or pecuniary interest in the outcome of this Application.

6. On or about August 23, 2013, the applicants issued three other closely related applications for judicial review. These four applications share common parties, legal issues and factual issues.

7. The four applications all arise out of the applicants' request on October 15, 2012, to the Minister of Health. That request addressed 30 active ingredients contained in various registered pest control products. This application regarding trifluralin, and two other applications regarding chlorthal-dimethyl and trichlorfon, seek orders in the nature of *certiorari* and *mandamus,* quashing the Agency's decisions refusing to initiate mandatory special reviews in relation to these 3 of the 30 active ingredients and requiring the Minister or her delegate to initiate these special reviews. The fourth application seeks an order in the nature of *mandamus* requiring the Minister or her delegate to initiate mandatory special reviews in relation to 26 of the 30 active ingredients.

The Agency assigned the closely related decisions the same reference number. dll

Section 17 of the *PCPA* imposes a duty to initiate special reviews

8. The primary, overarching objective of the Agency in administrating the *PCPA* is to prevent unacceptable risks to people and the environment from the use of pest control products [s. 4(1)]. This statutory object must guide all decisions made under the *PCPA*, including the Agency's determinations whether it must initiate special reviews under section 17 generally or under subsection 17(2) specifically.

9. A "pest control product" is defined, in section 2, to mean:

    a. a product, an organism or a substance, including a product, an organism or a substance derived through biotechnology, that consists of its active ingredient, formulants and contaminants, and that is manufactured, represented, distributed or used as a means for directly or indirectly controlling, destroying, attracting or repelling a pest or for mitigating or preventing its injurious, noxious or troublesome effects;

    b. an active ingredient that is used to manufacture anything described in paragraph (*a*); or

    c. any other thing that is prescribed to be a pest control product.

10. An "active ingredient" is defined, in section 2, to mean a component of a pest control product to which the intended effects of the product are attributed and includes a synergist but does not include a solvent, diluent, emulsifier or other component that is not primarily responsible for those effects.

11. Section 17 governs the circumstances in which the Agency is legally obliged to initiate a special review of the registration of a pest control product. Whenever the conditions set out in subsections 17(1), (2) or (3) are satisfied, the Agency is obliged to initiate a special review of the registration of a pest control product.

12. At issue in this application are the duties of the Agency under subsection 17(2). Subsection 17(2) obliges the Agency, when an OECD country prohibits all uses of an active ingredient for health or environmental reasons, to initiate a special review of registered pest control products containing that active ingredient.

13. If an active ingredient in a pest control product that is registered for use in Canada has been banned by an OECD country for all uses, for environmental or health reasons or both, the Agency lacks any discretion or jurisdiction to refuse to initiate a special review or to conclude that a special review is "not warranted".

The specific duty under subsection 17(2) to initiate a special review is not limited by subsection 17(1) or by section 18

14. Subsection 17(1) creates a more general, somewhat more discretionary duty than the specific, mandatory duty created under subsection 17(2). Subsection 17(1) obliges the Agency to initiate a special review "of the registration of a pest control product if the Minister has reasonable grounds to believe that the health or environmental risks of the product are, or its value is, unacceptable."

15. The specific duty under subsection 17(2), to initiate a special review whenever an OECD country has banned an active ingredient for all uses for environmental or health reasons, is separate from and not subsumed under the general duty in subsection 17(1). The specific duty under subsection 17(2) is not limited by the generality of subsection 17(1).

16. The Agency may be obliged to initiate a special review under subsection 17(2) even where the conditions triggering a special review under subsection 17(1), or the conditions under subsection 17(3), are not satisfied.

17. In addition, the Agency's duty to initiate a special review under subsection 17(2) is not limited by section 18 of the *PCPA.* Section 18 imposes procedural duties that the Agency must comply with in the course of a special review and does not apply until *after* the Agency has initiated a special review under section 17.

The duty to initiate special review under section 17 is triggered in two distinct ways

18. The Agency's duty to initiate special reviews under section 17 is a continuing duty. This duty is triggered at any time that any of the conditions set out in subsections 17(1), (2) or (3) are present.

19. In particular, this duty exists regardless of whether any person has submitted a request to the Agency to initiate a special review.

20. However, subsection 17(4) of the *PCPA* also expressly permits any person to request a special review of the registration of a pest control product.

21. Where a person does request a special review under subsection 17(4), the Agency is obliged under subsection 17(5) to decide whether to initiate a special review and must respond to the person with written reasons for its decision within "a reasonable time after receiving a request."

The applicants submitted a request for special review in October 2012, in relation to trifluralin

22. On October 15, 2012, the applicants submitted a request, under subsection 17(4), to the Minister of Health. They requested that she initiate special reviews of the registration of pest control products containing 30 active ingredients that were prohibited in OECD countries for all uses, for environmental or health reasons.

23. The applicants' request provided the Agency all information legally relevant to a determination, under subsection 17(2), that these 30 active ingredients, including trifluralin, were banned by OECD countries for environmental or health reasons. It provided the Agency with citations to all relevant regulatory decisions of OECD countries on the 30 active ingredients, including for trifluralin, and to the supporting reasons.

24. The applicants' request did not provide the Agency with any information that is legally irrelevant to a determination under subsection 17(2)—such as scientific studies relied on by OECD countries when banning these active ingredients for environmental or health reasons or any previous re-evaluations by the Agency.

25. On October 25, 2012, the applicants received a letter from the Agency acknowledging receipt of their request, confirming that the Agency was responsible for administering the *PCPA* on behalf of the Minister of Health, and advising that the applicants would be notified, in due course, of the Agency's determination.

In July 2013, the Agency refused to initiate a mandatory special review in relation to trifluralin

26. Four and a half months after submitting their special review request, the applicants had still received no response from the Agency advising of its decision.

27. On February 27, 2013, out of concern with the Agency's delay in responding, the applicants wrote the Agency seeking an update. They requested that the Agency communicate the anticipated timing of its response to their special review request.

28. On March 8, 2013, the Agency replied, acknowledging receipt of the applicants' letter dated February 27, 2013. It did not indicate any date by which it anticipated responding to their special review request ("Agency's March 2013 Letter").

29. The Agency's March 2013 Letter described processes purportedly necessary for the Agency to follow when making determinations under subsection 17(2). It incorrectly suggested that, as a precondition to determining if a special review must be initiated under subsection 17(2), the Agency was required to go behind OECD countries' regulatory decisions by gathering and reviewing the scientific reviews forming the basis for those decisions. It also incorrectly asserted that the Agency was first required to investigate previous Canadian regulatory decisions and whether the OECD countries' decisions were based on new scientific evidence.

30. On June 11, 2013, the Agency wrote to the applicants advising that it would notify them of *some* decisions for the 30 ingredients in early July 2013.

31. On July 9, 2013, the applicants wrote the Agency to express concern about its delay in deciding to initiate special reviews under subsection 17(2).

32. On July 24, 2013, the Agency advised the applicants of its decision to refuse to initiate any special review in relation to trifluralin, despite accepting that this active ingredient is prohibited in OECD countries for all uses and for environmental or health reasons.

33. On July 26, 2013, the Agency responded to the applicants' letter of July 9, 2013. In its letter, the Agency again set out processes that it purportedly must follow in making determinations under subsection 17(2). As in the Agency's March 2013 Letter, the Agency incorrectly asserted that it must go behind the OECD countries' decisions and obtain the detailed scientific reviews supporting those decisions. The Agency also incorrectly relied on section 18 to justify its consideration of information that is legally irrelevant to subsection 17(2).

The Agency's refusal to initiate a special review under subsection 17(2) of the *PCPA* of registered pest control products containing trifluralin was unlawful

34. The only three facts that the Agency must ascertain—indeed the only facts that the Agency may lawfully consider—in determining whether it is legally required under subsection 17(2) to initiate a special review of registered pest control products containing a certain active ingredient are:

    a. whether the active ingredient is contained in pest control products that are registered in Canada;

    b. whether an OECD member country prohibits all uses of the active ingredient at issue; and

    c. whether that prohibition is for health or environmental reasons or both.

35. To ascertain these facts, the Agency must engage in a straightforward, factual confirmation of the status and content of OECD countries' regulatory decisions. The Agency must obtain and read the relevant decisions to confirm that the active ingredients are prohibited for all uses and for environmental or health reasons.

36. In their request for special review, the applicants provided the Agency with citations to all necessary, relevant regulatory decisions of OECD countries and to the supporting reasons.

37. While not disputing that trifluralin is contained in pest control products registered in Canada, is prohibited in OECD countries for all uses and that this ban is for environmental or health reasons, the Agency nonetheless concluded that a special review was "not warranted" under subsection 17(2).

38. In reaching this conclusion, the Agency made numerous legal errors.

The Agency misdirected itself on what information it may lawfully consider

39. The Agency insisted on examining scientific evidence underlying the OECD countries' regulatory decisions and on assessing whether and how that evidence may have informed the Agency's own earlier re-evaluation decision in 2009.

40. In so doing, the Agency misdirected itself and erred in law. These considerations are legally irrelevant to the Agency's determination of whether to initiate a special review under subsection 17(2).

41. Subsection 17(2) permits the Agency to consider regulatory evidence of whether an OECD country has made a regulatory decision to ban pest control products. It does not permit the Agency to evaluate scientific evidence concerning the risks and acceptability of those pest control products—this evaluation is the objective of the special review itself.

42. Only *after* a special review has been initiated under subsection 17(2), and during the course of the special review, is the Agency permitted to consider scientific evidence and other information relevant to evaluating whether pest control products containing trifluralin should continue to be registered in Canada.

The Agency prejudged the outcome of a mandatory special review and deprived the applicants of their right to be consulted about the outcome of that special review

43. Pursuant to sections 19 and 28, the Agency is required to evaluate risks and acceptability of pest control products *during* its special review of the registration of those pest control products, as initiated under subsection 17(2).

44. In concluding that a special review of registered pest control products containing trifluralin was "not warranted," the Agency relied on its own earlier regulatory

decisions regarding the registration of such pest control products. Specifically, the Agency relied on its own re-evaluation decision from 2009.

45. In so doing, the Agency unlawfully prejudged the outcome of a mandatory special review of the registration of pest control products containing trifluralin.

46. Further, the Agency unlawfully deprived the applicants of their statutory rights under sections 18, 19 and 28 to participate in and seek to influence the outcome of that special review, including by opposing the continued registration of these pest control products.

47. The Agency has a legal duty to consult the public in any special review of registered pest control products, and the applicants are legally entitled to be consulted by the Agency in a special review of registered pest control products containing trifluralin, pursuant to subsection 18(4) and section 28.

48. In that consultation, the applicants would be entitled to provide the Agency with existing or new information about the health and environmental risks of registered pest control products containing trifluralin. Specifically, the applicants would be entitled to provide existing or new information showing that these pest control products present unacceptable risks to Canadians or to their biodiversity.

49. The applicants would also be entitled to explain why the Agency should reconsider and rescind its 2009 re-evaluation decision allowing the registration of these pest control products and why it should cancel or amend their registration.

The Agency erroneously relied on section 18 to limit its duty under subsection 17(2)

50. In refusing to initiate a special review of pest control products containing trifluralin, the Agency relied on subsection 18(1). Specifically, the Agency asserts that, for the purpose of subsection 18(1), it must first engage in time-intensive analysis of various information underlying OECD countries' decisions before it can initiate any special review under subsection 17(2).

51. In relying on compliance with section 18 as a precondition to initiating a special review under subsection 17(2), the Agency errs in law. Section 18 does not apply until after a special review has been initiated. Rather, it sets out procedural duties that the Agency must comply with after it has initiated a special review.

The Agency misdirected itself on the required subject or focus of a special review

52. The Agency concluded that a special review of the active ingredient trifluralin was not warranted. Its decision letter of July 24, 2013 did not ask or answer whether a special review of the registered pest control products containing trifluralin was required.

53. In so doing, the Agency misdirected itself as to the correct subject matter or focus of a special review under section 17 and erred in law. A special review does not evaluate the active ingredient itself. Rather, a special review evaluates the registered pest control products containing that active ingredient.

The Agency's errors of law invalidate its decision

54. As registered pest control products containing trifluralin are prohibited by OECD countries for all uses for environmental reasons, the Agency did not have any discretion or authority, under subsection 17(2) of the *PCPA*, to conclude that special review of these pest control products was "not warranted."

55. The Agency erred in law and misdirected itself in deciding that a special review of the registration of pest control products containing trifluralin was "not warranted" under subsection 17(2) of the *PCPA*. In refusing to initiate a mandatory special review under subsection 17(2), the Agency acted unlawfully.

The applicants are entitled to the relief sought

56. The Agency is under a public legal duty to initiate special reviews of these active ingredients, a duty that it owes both to the public and to these applicants.

57. The applicants have a clear right to performance of that duty, including as a result of their special review request made on October 15, 2012.

58. No equitable bar exists, in the circumstances, to relief in the nature of *mandamus* or *certioriari.*

59. Pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, this Court has jurisdiction to hear this application and to grant the relief sought.

60. In particular, this Court has the jurisdiction under paragraph 18.1(3)(a) of the *Federal Courts Act* to order the Agency to initiate a mandatory special review, under subsection 17(2) of the *PCPA*, of registered pest control products containing trifluralin.

61. In addition, this Court has the jurisdiction under paragraph 18.1(3)(b) of the *Federal Courts Act* to declare invalid or unlawful, and to quash or set aside, the Agency's refusal to initiate a mandatory special review, under subsection 17(2) of the *PCPA*, of registered pest control products containing trifluralin.

62. The applicants further rely on the *Federal Courts Rules*, the *PCPA*, and such additional grounds as counsel may identify.

This application will be supported by the following material:

1. An affidavit of Dr. Elaine MacDonald, on behalf of the Applicants, to be served;
2. An affidavit of Mara Kerry, on behalf of David Suzuki Foundation, to be served;
3. An affidavit of Nadine Bachand, on behalf of Équiterre, to be served;
4. Material requested pursuant to Rule 317 of the *Federal Courts Rules* and produced to the applicants and to the Court pursuant to Rule 318; and
5. Such additional materials as counsel may advise and the Court may allow.

Pursuant to Rule 317 of the *Federal Courts Rules*, the applicants request the Minister of Health or her delegate send a certified copy of the following material that is not in the possession of the applicants but is in the possession of the Minister of Health or her delegate to the applicants and to the Registry:

1. The materials considered and relied on by the Agency in determining that a special review in relation to trifluralin was not warranted under subsection 17(2) of the *PCPA*, including but not limited to:

    i. The longer, underlying analysis upon which the Agency based the "Summary of Analysis" that it provided to the applicants as Attachment 1 to its decision letter of July 24, 2013;

    ii. All "relevant information" on which the Agency relied in conducting its analysis as referenced by the Agency in its decision letter of July 24, 2013, including but not limited to:

        - any information or analysis not already contained within PRVD 2008-22 or RVD2009-09 (the two re-evaluation reports that are in the possession of the applicants); and

        - any communications between the Agency, on one hand, and registrants, stakeholders, other agencies, the United Nations

Economic Commission for Europe, or OECD member countries, on the other, that the Agency relied on in deciding that a special review in relation to trifluralin was not warranted.

iii. For trifluralin, any translations of scientific reviews forming the basis of the OECD countries' decisions, as referenced in the Agency's March 2013 Letter.

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