



Brief to the Standing Committee on Health
in its
Statutory Review of the *Pest Control Products Act*

Submitted by:

**Lara Tessaro and Tanya Nayler, Staff Lawyers
Ecojustice Canada**

Suite 401, Centre for Green Cities
550 Bayview Avenue
Toronto, ON M4W 3X8

(p) 416-368-7533

(e) ltessaro@ecojustice.ca
tnayler@ecojustice.ca

Introduction

Ecojustice Canada (“Ecojustice”) is Canada’s premier charitable organization dedicated to defending Canadians’ right to a healthy environment. Our lawyers and scientists work on leading environmental issues across the country. We advocate in courts for legal precedents, and we work outside the courtroom to strengthen and promote effective laws that protect and restore the environment. Ecojustice has a long history of working on pesticide regulation at the national, provincial and municipal level, including through successful litigation in Federal Court under the *Pest Control Products Act* (“the Act”).

We have prepared this short brief to assist members of the Standing Committee on Health with their statutory review of the Act, undertaken pursuant to s. 80.1.

Overall, our view is that the Act is important legislation that, if actually implemented properly by the Pest Management Regulatory Agency (“the Agency”), could achieve its primary objective of preventing unacceptable risks to people and the environment. Until there have been further efforts at precautionary and meaningful implementation of the Act, no significant amendments currently appear to be required.

That being said, for the purpose of assisting the Standing Committee, we have identified three areas where minor amendments may improve implementation and better achieve the Act's primary objective. Those three issues are summarized briefly below.

Issue 1: “Conditional Registrations” can be inconsistent with a precautionary approach to pesticide registration

Ecojustice has grave concerns with the Agency's approach to granting “conditional registration” to certain pest control products and their active ingredients.¹

Section 12 of the Act quite appropriately provides the Agency with the power to require registrants to compile, test, monitor and report additional information, as a “condition of registration” for a pest control product.² However, the Agency has then allowed many pest control products to remain registered and in use in Canada – for years, or even for decades – without the registrants compiling or reporting additional data in a timely way.

As came to light recently in the Senate,³ the Agency has most heavily employed conditional registration for a controversial class of pesticides called neonicotinoids (or neonics). Of 88 pest control products conditionally registered as of 2014, 35 contained the neonic ingredients imidaclopryd, clothianidin or thiamethoxam. Moreover, many of these neonic products were conditionally registered on the condition that the registrants must provide data on toxicity impacts on bees. The Agency deemed this data to be critical. Yet, as documented for clothianidin, these key data gaps are not always filled.⁴ Despite this, the Agency has typically extended the conditional registrations.

The Agency's practice of conditional registration is inconsistent with a precautionary approach. In allowing neonics to be registered despite an acknowledged lack of critical data necessary to evaluate risks to pollinators, the Agency “leaps before it looks”. A precautionary approach would require industry to demonstrate that a product is safe **before** the Agency registers it for use. Further, the Agency's practice frustrates the Act's primary objective, in section 4, of preventing “unacceptable risks” to people and the environment from the use of pest control products – as without critical data, there cannot

¹ We note that “conditional registration” is not, in fact, a term found in the Act. Generally, this phrase is informally used to refer to pest control product registrations where the Agency has issued a “Section 12 Notice” requiring a registrant to compile additional information and report it to the Agency [s. 12(1)], which requirement is a “condition of registration” [s. 12(2)]

² The phrase “conditions of registration” is a defined term in the Act, at s. 2(1).

³ Proceedings of the Standing Senate Committee on Agriculture and Forestry, Issue 14, Evidence, (16 September, 2014) (Julie Gelfand, Commissioner of the Environment and Sustainable Development, Office of the Auditor General of Canada).

⁴ See September 19, 2013 Notice of Objection to Registration Decision RD2013-14 – Clutch 50 WDG, Arena 50 WDG and Clothianidin Insecticide, at http://www.ecojustice.ca/cases/notice-of-objection-2014-clothianidin-insecticides-september-19-2013/at_download/file

be “reasonable certainty that no harm to human health, future generations or the environment will result from exposure to or use of the product, taking into account its conditions or proposed conditions of registration”.⁵

Of concern, the Agency often extends both the time period and uses covered by conditional registrations, without any public notice or consultation. We provide an example in Issue 2 below.

It is not just environmental organizations that are concerned with the Agency’s practice of conditional registration. The Commissioner of Environment and Sustainable Development has audited the Agency’s conditional (temporary) registration practices, in 2003 and again in 2008. The 2008 audit found that the Agency had made unsatisfactory progress in addressing its heavy use of temporary conditional registrations.⁶

Moreover, conditional registrations are not just a concern in Canada. In the United States, the Environmental Protection Agency (“EPA”) has faced similar concerns with the lack of transparency and outstanding data requirements in conditional registration. As a result, the EPA now publically tracks conditional registrations, through a chart that it maintains and publishes online. For every single active ingredient initially registered under conditional registration, the EPA chart discloses the registration status of the active ingredient, the conditional data requirements, the date the data is due, the date the data is received and the status of the registrants’ satisfaction of the condition.⁷

Recommendation #1: Section 42 of the Act should be amended to require that the Register of Pest Control Products, and electronic public registry, shall include the following information (as in the US) and shall update the information annually:

- **a list of all active ingredients, found in pest control products, that were initially registered subject to conditional registration;**
- **data requirements for all conditionally registered pest control products;**
- **the date the data is due;**
- **the status of required data – whether it has been compiled by the registrant, whether it has been reported to the Agency, and when; and**
- **whether the conditions have been satisfied.**

⁵ Subsection 2(2) of the Act provides this definition of acceptable risk.

⁶ Office of the Auditor General. Status Report of the Commissioner of the Environment and Sustainable Development to the House of Commons. 2008. Chapter 2, pp. 4 and 9-10. See also Office of the Auditor General. *Report of the Commissioner of the Environment and Sustainable Development to the House of Commons*. 2003. Chapter 1, pp. 9-10 and 25-27.

⁷ See EPA website at <http://www2.epa.gov/pesticide-registration/conditional-pesticide-registration#intro>

Issue 2: The Agency gives public notice and allows public consultations only for a very small fraction of pesticide registration decisions

The primary objective of the Act is to prevent unacceptable risks to people and the environment from the use of pest control products [s. 4(1)]. In furthering that objective, the Agency must “encourage public awareness in relation to pest control products by informing the public, facilitating public access to relevant information and public participation in the decision-making process” [s. 4(2)].

Despite this, **for the vast majority of its pest control product registration decisions, including decisions to amend registrations**, the Agency has decided that it will not notify the public of registration applications. Nor does it notify the public of intended registrations or allow any opportunity to comment on intended registrations. The Agency does not even inform the public, after the fact, that it has made a registration decision.

Section 28 of the Act governs public consultation. Subsection 28(1) imposes a duty on the Agency to consult the public where any of the following four conditions are met:

- to grant or deny an application to register a pest control product that is or contains an unregistered active ingredient;
- to grant or deny an application to register, or to amend the registration of, a pest control product if the Minister considers that registration or amendment may result in significantly increased health or environmental risks;
- about the registration of a pest control product after a re-evaluation or special review; or
- about any other matter if the Minister considers it in the public interest.

A section 28 consultation requires the Agency to publish a consultation statement with a summary of the Agency’s evaluation of the pest control product, to invite written comments on the proposed decision, to consider comments received, and to publish a decision statement including reasons for the decision and a summary of comments.

In theory, section 28 provides for appropriate public consultation – although we agree with Sierra Club Canada that the provision would be improved by requiring public notice when applicants submit their applications for registration or amendment thereto, rather than months later and only after the Agency has written its proposed decision.⁸

But in practice, the Agency excludes the vast majority of registrations and amendments from any public notice or consultation. Its justification for doing so appears to be twofold.

⁸ Pursuant to ss. 42(2)(a), 42(4) and 42(6) of the Act, the Agency is required to maintain in its Register, and allow convenient public access to, all applications to register a pest control product or to amend registration. Therefore, if it is already *known* that an application has been made, the application may be found by searching the electronic public registry or submitting a request to the Agency. However, there is no mechanism by which the public may be notified of applications – apparent from the small percentage of applications for which the Agency allows s. 28 consultation.

First, the Agency relies on sections 14 and 15 of the Pest Control Product Regulations. Section 14 purports to exempt all conditional registrations of pest control products, and all amendments to conditional registrations, from the following duties: public consultation under section 28, objection or reconsideration under section 35, and some transparency provisions under section 42 of the Act.⁹ Likewise, section 15 shields from public notice, consultation, objection or transparency the registration of any pest control product that contains any active ingredient that has been conditionally registered.

Second, the Agency has published a Submissions Policy. It purports to decide that certain types of applications for registration are “minor” not “major” applications, and that the minor registrations will not receive section 28 notice or consultation.¹⁰

The following is but one example of our concerns with the Agency’s implementation of section 28. In September 2013, a number of environmental groups represented by lawyers at Ecojustice and at the Canadian Environmental Law Association filed a Notice of Objection under section 35 of the Act.¹¹ They objected to the Agency’s decision to renew the conditional registration of a number of pest control products containing the active ingredient clothianidin, a neonicotinoid. The Notice of Objection indicates that registration of these clothianidin pest control products may result in significant environmental risks to bees, and that this was a matter of public interest and concern.

Therefore, environmental groups were shocked to learn that, on an unknown date after the September 2013 Objection and before April 2014, the Agency quietly registered new uses of two clothianidin pest control products under objection. We only learned of this decision because the Agency obliquely referenced it in a July 31, 2014 document proposing maximum residue limits (“MRLs”) for the new uses.¹² According to this MRL document, the Agency did an evaluation concluding that registration of new uses on fruits and vegetables, and cucurbits, posed acceptable health and environmental risks. This conclusion was reached despite the outstanding Objection. No evaluation report and no registration decision have been posted to the electronic public registry.¹³

In our view, the Agency is undermining the public’s right to be notified of and consulted on registration decisions that present unacceptable environmental and health risks.

⁹ There are only three situations in which the Act’s consultation, objection and transparency provisions continue apply to conditional registrations. These are in relation to 1) the reinstatement of an expired conditional registration, 2) the continuation of a conditional registration after the evaluation of data, and 3) renewals of conditional registrations. See ss. 14(2) and 16 of Pest Control Product Regulations.

¹⁰ See Pest Management Regulatory Agency, Regulatory Directive DIR2013-01 Revised Management of Submissions Policy at pages 7 and 10.

¹¹ The Objectors were the David Suzuki Foundation, Equiterre, Western Canada Wilderness Committee and Sierra Club Canada. 16.5 months later, the Agency’s response is outstanding.

¹² See PMRL2014-49 at http://www.hc-sc.gc.ca/cps-spc/alt_formats/pdf/pest/part/consultations/pmrl2014-49/pmrl2014-49-eng.pdf.

¹³ Only by looking at the labels for these pest control products is it possible to infer when the decision was made – sometime before April 26, 2014, when labels were amended to refer to new uses.

Section 28 is being undermined by the Agency's unreasonable policy decision to deem certain types of applications – no matter how risky or controversial – to be “minor” and not subject to consultation. Section 28 is also being undermined by the provisions on conditional registration in sections 14, 15 and 16 of the Pest Control Products Regulation. Repeal of these regulatory provisions is necessary to ensure meaningful consultation on decisions that may adversely affect Canadians' health and environment.

Recommendation #2: The Standing Committee should recommend that all of sections 14, 15 and 16 of the Pest Control Product Regulations be repealed.

Issue 3: The electronic public registry is incomplete and inaccessible

Subsection 42(7) of the Act requires the Minister, or her delegate the Agency, to establish an electronic public registry and to include a variety of information in it. In particular, the Agency is required to post online all of the information that is required to be in the Registrar [s. 42(7(a)]. However, in practice, this does not occur.

Ecojustice scientists, researchers and lawyers have gained significant experience with how the Agency presents information in the electronic public registry. Despite our organizational expertise with it, the website often proves very difficult to use. We have numerous concerns with the completeness and accessibility of the information therein. Indeed, our consultations with clients, colleagues and the public confirm that the electronic public registry is widely perceived as frustrating and confusing. In part, this is due to the Agency's decision to present almost all information organized around registered pest control products themselves. This means that one cannot easily search or locate collections of reports or decisions (for example, it is difficult to use the electronic public registry to identify “all conditional registration decisions”).

Some of the most obvious and critical gaps include:

- applications for registrations, or amendments thereto, are not made available;
- the dates of application decisions, where there has been no public consultation, is unknown
- despite s. 42(2)(c), information that industry applicants provide in support of their applications is rarely provided;
- information is presented in a manner that makes it difficult to obtain a “complete picture” of all conditions of registration for a pest control product;
- despite s. 42(2)(e), it is difficult to identify what registrant information the Agency considered; and
- evaluation reports are often not available if the application falls into a type of registration application deemed “minor” by the Agency's Submission Policy

Recommendation: Section 42 should be amended so as to require the Agency to conduct, within two years, an audit of the completeness, accessibility and organization of its electronic public registry.

APPENDIX A: REFERENCED LEGISLATIVE PROVISIONS

Definitions

2(2) For the purposes of this Act, the health or environmental risks of a pest control product are acceptable if there is reasonable certainty that no harm to human health, future generations or the environment will result from exposure to or use of the product, taking into account its conditions or proposed conditions of registration.

MANDATE

4. (1) In the administration of this Act, the Minister's primary objective is to prevent unacceptable risks to people and the environment from the use of pest control products.

(2) Consistent with, and in furtherance of, the primary objective, the Minister shall

(a) support sustainable development designed to enable the needs of the present to be met without compromising the ability of future generations to meet their own needs;

(b) seek to minimize health and environmental risks posed by pest control products and encourage the development and implementation of innovative, sustainable pest management strategies by facilitating access to pest control products that pose lower risks and by other appropriate measures;

(c) encourage public awareness in relation to pest control products by informing the public, facilitating public access to relevant information and public participation in the decision-making process; and

(d) ensure that only those pest control products that are determined to be of acceptable value are approved for use in Canada.

4.1 For greater certainty, protection and consideration afforded to children in this Act shall also extend to future generations.

ADDITIONAL INFORMATION AND MANDATORY REPORTING

12. (1) The Minister may, by delivering a notice in writing, require a registrant

(a) to compile information, conduct tests and monitor experience with the pest control product for the purpose of obtaining additional information with respect to its effects on human health and safety or the environment or with respect to its value; and

(b) to report the additional information to the Minister within the time and in the form specified in the notice.

(2) A requirement under subsection (1) is a condition of registration.

PUBLIC CONSULTATION

28. (1) The Minister shall consult the public and federal and provincial government departments and agencies whose interests and concerns are affected by the federal regulatory system before making a decision

(a) to grant or deny an application

(i) to register a pest control product that is or contains an unregistered active ingredient, or

(ii) to register, or amend the registration of, a pest control product if the Minister considers that registration or amendment of the registration may result in significantly increased health or environmental risks;

(b) about the registration of a pest control product on completion of a re-evaluation or special review; or

(c) about any other matter if the Minister considers it in the public interest to do so.

(2) To initiate a consultation under subsection (1), the Minister shall make public a consultation statement and shall invite any person to send written comments on the proposed decision within the period specified in the statement.

(3) The consultation statement shall include

(a) a summary of any reports of the evaluation of the health and environmental risks and the value of the pest control product prepared or considered by the Minister;

(b) the proposed decision and the reasons for it; and

(c) any other information that the Minister considers necessary in the public interest.

(4) The Minister shall consider any comments received pursuant to subsection (2) before making a decision.

(5) After making a decision, the Minister shall make public a decision statement that shall include the decision, the reasons for it and a summary of any comments that the Minister received on the proposed decision.

(6) A consultation statement referred to in subsection (2) and a decision statement referred to in subsection (5) shall contain any confidential test data that the Minister considers to be in the public interest.

ACCESS TO INFORMATION

42. (1) The Minister shall establish and maintain a Register of Pest Control Products in accordance with the regulations, if any, that contains information about pest control products, including information about applications, registrations, re-evaluations and special reviews.

(2) The Register shall contain the following information:

(a) for each application to register or amend the registration of a pest control product,

(i) the active ingredient of the product, proposed new uses for it or any uses proposed to be withdrawn, and

(ii) how the application was disposed of or whether it was withdrawn;

(b) the conditions of registration, registration number and registration validity period for each registered pest control product;

(c) information, in respect of each registered pest control product, that is provided by applicants and registrants

(i) in support of an application for registration or for the amendment of a registration, or

(ii) for the purposes of a re-evaluation or special review;

(d) information provided by applicants and registrants that is used to specify maximum residue limits;

(e) information, in respect of each registered pest control product, that is considered by the Minister under paragraphs 7(6)(b) and 19(1)(c);

(f) any reports of the evaluation of the health and environmental risks and the value of registered pest control products prepared by the Minister;

(g) any advice from a person or body referred to in paragraph 44(1)(f), unless disclosure of the advice may be refused under section 23 of the [Access to Information Act](#);

(h) the status, including cancelled status, of all registrations to which this Act applies;

(i) information provided to the Minister pursuant to subsection 8(5);

(j) notices delivered under subsections 12(1), 16(3) and 18(1) and paragraph 19(1)(a);

(k) conclusions of the Minister that were made public under section 15;

(l) consultation statements and decision statements made public under subsections 28(2) and (5), respectively;

(m) notices of objection filed under subsections 35(1) and (2), public notices given under subsection 35(4) and the Minister's decisions and reasons under subsections 35(5) and 39(2);

(n) authorizations under sections 33 and 41 and amendments and cancellations under sections 34 and 41; and

(o) any other information required by this Act or the regulations to be included in the Register.

(3) An evaluation report referred to in paragraph (2)(f) shall contain a summary of the information considered and shall contain any confidential test data and confidential business information that the Minister considers appropriate.

(4) The Minister shall allow the public to have access to, and copies of, any information in the Register that

(a) is not confidential test data or confidential business information; or

(b) is confidential test data that has been made subject to public disclosure in accordance with the regulations made under paragraph 67(1)(m).

(5) The Minister shall allow the public to obtain a copy of any evaluation report in the Register, except for any confidential business information that it contains.

(6) Information in the Register that the public may obtain a copy of under this Act or the regulations shall be made available to the public in as convenient a manner as practicable.

(7) The Minister shall establish an electronic public registry, which shall include

(a) the information referred to in subsection (6), as soon as reasonably practicable;

(b) memoranda of understanding among federal government departments relating to the regulation of pest control products;

(c) reports of international harmonization activities relating to the regulation of pest control products;

(d) regulations and proposed regulations under this Act when published in the *Canada Gazette*; and

(e) policies, guidelines and codes of practice relating to the regulation of pest control products when proposed for public consultation, and their final texts when adopted.

42.1 The public shall be consulted as to policies, guidelines and codes of practice relating to the regulation of pest control products.