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.

August 22, 2013

Lara Tessaro
Solicitor for the Applicants
c/o Ecojustice Canada
550 Bayview Avenue, Suite 401
Toronto, ON M4W 3X8
Tel: 416-368-7533 ext. 531
Fax: 416-363-2746