

**EBR Application for Investigation
Sale of Plants Containing Residues of Class 9 Pesticides, Ottawa
Decision Summary**

EBRO File No.: **18EBR004.I**

Issue: The Ministry of the Environment and Climate Change (ministry) has received an Application for Investigation (Application) pursuant to the *Environmental Bill of Rights, 1993* (EBR) alleging that specified retailers sold flowering plants containing residues of Class 9 pesticides, contrary to subsection 7.1(1) of the Pesticides Act and section 16 of Ontario Regulation 63/09, and permitted the discharge of a pesticide into the environment that causes or is likely to cause impairment of the quality of the environment, contrary to clauses 4(a) and 49(3)(a) as well as subsection 49(1) of the Pesticides Act.

Review Decision:

The ministry has completed its assessment of the Application based upon the information contained in the Application as well as the ministry's knowledge of this issue. Based on this review, the Assistant Deputy Minister of Drinking Water and Environmental Compliance Division has concluded that an investigation in response to the EBR Application is not required on the basis that the alleged contraventions are not, in fact, violations of the requirements of the Pesticide Act and Ontario Regulation 63/09.

Summary of the Request:

The applicants allege that by selling flowering plants containing residues of Class 9 pesticides that are not permitted to be used in Ontario for cosmetic purposes the specified retail vendors have contravened the Pesticides Act and Ontario Regulation 63/09 as follows:

1. The retailers have violated subsection 7.1(1) of the Pesticides Act by permitting the use of pesticides that are not permitted to be used for cosmetic purposes;
2. The retailers have violated clause (a) of section 4 of the Pesticides Act by permitting the discharge of a pesticide into the environment that is likely to cause impairment to the quality of the environment for any use that can be made of it greater than the impairment, if any, that would necessarily result from the proper use of the pesticide; and
3. The directors and officers of the retailers have violated subsection 49(1) and clause (a) of subsection 49(3) of the Pesticides Act by failing to take all reasonable care to prevent their respective corporations from engaging in

activities that may cause unlawful effects, namely the impairment of the quality of the environment for any use that can be made of it from a pesticide or any substance or thing containing a pesticide to a greater degree than would result from the proper use of the pesticide.

Background:

- The regulation of pesticides in Canada is a shared responsibility of the federal and provincial governments. Health Canada's Pest Management Regulatory Agency (PMRA) is responsible for approving the registration of pesticides in Canada. Provincial governments have the authority to regulate the sale, use, transportation, storage and disposal of federally registered pesticides within their respective provinces. In Ontario the Pesticides Act and Ontario Regulation 63/09 provide a comprehensive regulatory framework for the sale and use of pesticides.
- Under the Pesticides Act:
 - section 4 prescribes the general prohibited uses of pesticides, including that no person shall discharge or cause or permit the discharge of a pesticide or of any substance or thing containing a pesticide into the environment that causes or is likely to cause a negative impact greater than the impact, if any, for such use that would necessarily result from the proper use of the pesticide;
 - subsection 7.1(1) sets out the prohibition of the use of pesticides that are prescribed for cosmetic purposes;
 - subsection 7.1(2) sets out the uses of pesticides that are excepted from the cosmetic ban; and,
 - section 49 outlines that a director or officer of a corporation that engages in an activity that may cause an effect contrary to Pesticides Act or Ontario Regulation 63/09 has a duty to take all reasonable care to prevent the corporation from causing or permitting such unlawful effect.
- Under Ontario Regulation 63/09:
 - section 16 states that Class 9 pesticides are prescribed for the purposes of subsection 7.1 (1) of the Pesticides Act; and,
 - section 17 provides the definition of terms related to the excepted uses mentioned in subsection 7.1 (2) of the Pesticides Act.
- A concern raised by the applicants is the use of pesticides and their effects on human health and the environment, and in particular their effects on pollinators.
- An organization referenced by one of the applicants (Friends of the Earth) has encouraged major garden centre retailers, such as the retail vendors specified in this application, to phase out the sale of nursery plants treated with neonicotinoid pesticides. As part of that campaign, samples of flowering (ornamental) plants were

purchased from retail garden centres in the Ottawa area in May 2017 and analyzed for residues of pesticides.

- The results of the analysis indicate that samples of flowering plants collected from the specified retail vendors contain the residue of five (5) Class 9 pesticides that are not permitted to be used for cosmetic purpose under Ontario's cosmetic pesticide ban.
- The Application alleges the sale of flowering plants containing residues of Class 9 pesticides by the specified retail vendors is a contravention of subsection 7.1(1) of the Pesticides Act as the retail vendors are permitting the cosmetic use of a pesticide that has been prescribed under section 16 of Ontario Regulation 63/09 as being prohibited for use for cosmetic purposes under subsection 7.1(1) of the Act.
- The Application also alleges the sale of flowering plants containing residues of Class 9 pesticides by the specified retail vendors is a contravention of clause (a) of section 4 of the Pesticides Act as the retail vendors are permitting the discharge of a pesticide into the environment that is likely to cause impairment to the quality of the environment for any use that can be made of it greater than the impairment, if any, that would necessarily result from the proper use of the pesticide.
- The Application also alleges the sale of flowering plants containing residues of Class 9 pesticides by the specified retail vendors is a contravention of subsection 49(1) and clause (a) of subsection 49(3) of the Pesticides Act due to the directors and officers of the retailers failing to take all reasonable care to prevent their respective corporations from engaging in activities that may cause unlawful effects, namely the impairment of the quality of the environment for any use that can be made of it from a pesticide or any substance or thing containing a pesticide to a greater degree than would result from the proper use of the pesticide.

Chronology

- Samples of flowering (ornamental) plants were reported as being purchased from retail garden centres in the Ottawa area on or around May 27, 2017 and subsequently shipped to a laboratory to be analyzed for residues of pesticides.
- On June 21, 2017, the results of the pesticides analysis were reported as being issued by the laboratory that completed the analysis. It was reported that the testing detected residues of permitted neonicotinoids, such as flonicamid, as well as residues of five (5) Class 9 pesticides, namely napropamide, spinosad, boscalid, pyraclostrobin, and imidacloprid (also a neonicotinoid).

- On April 19, 2018, the ministry received this EBR Application from the office of the Environmental Commissioner of Ontario.
- The Application indicates that the ongoing sale of flowering plants containing residues of Class 9 pesticides by retail vendors may constitute ongoing contraventions of the Pesticides Act and the cosmetic pesticide ban requirements prescribed under the Pesticides Act and Ontario Regulation 63/09.
- The ministry has not received any complaints previously regarding this matter.

Applicable Legislation

Clause (a) of section 4 of the Pesticides Act:

Prohibited use of pesticides

4. No person, whether acting or not acting under the authority of a licence or permit under this Act or an exemption under the regulations, shall discharge or cause or permit the discharge of a pesticide or of any substance or thing containing a pesticide into the environment that,
 - (a) causes or is likely to cause impairment of the quality of the environment for any use that can be made of it greater than the impairment, if any, for such use that would necessarily result from the proper use of the pesticide.

Subsections 7.1(1), (2) and (3) of the Pesticides Act:

Prohibitions – pesticides used for cosmetic purposes

- 7.1 (1) No person shall use or cause or permit the use in, on or over land of a pesticide that has been prescribed for the purpose of this subsection.

Excepted uses

- (2) Subject to the regulations, subsection (1) does not apply to the following uses of a pesticide:
 2. Uses related to agriculture.

Requirements related to excepted uses

- (3) A person who, pursuant to subsection (2), uses or causes or permits the use of a pesticide prescribed for the purpose of subsection (1) shall comply with such requirements as may be prescribed.

Subsection 49(1) and clause (a) of subsection 49(3) of the Pesticides Act:

Duty of director or officer of corporation

49 (1) Every director or officer of a corporation that engages in an activity that may cause an effect mentioned in subsection (3) contrary to this Act or the regulations has a duty to take all reasonable care to prevent the corporation from causing or permitting such unlawful effect.

Effects

(3) The effect referred to in subsection (1) is any one or more of,
(a) impairment of the quality of the environment for any use that can be made of it from a pesticide or any substance or thing containing a pesticide to a greater degree than would necessarily result from the proper use or storage of the pesticide.

Subsection 1(1) of Ontario Regulation 63/09:

Definitions

- 1(1) “agricultural operation” means an agricultural, aquacultural or horticultural operation and, subject to subsection (2), includes any of the following activities done for the purposes of any of those operations:
2. The production of agricultural crops, including greenhouse crops, maple syrup, mushrooms, nursery stock, tobacco, trees and turf grass, and any additional agricultural crops prescribed by the regulations made under the *Nutrient Management Act, 2002*.
- (2) For the purposes of the definition of “agricultural operation” in subsection (1), production does not include,
- (a) production primarily for use or consumption by members of the household of the owner or operator of the agricultural operation;
 - (b) production primarily for the purposes of a pastime or recreation;
 - (c) production related to the growing of trees in a Crown forest;
 - (d) production related to the growing of plants in a park, cemetery, on a lawn or similar location where the plants are grown primarily for display purposes; or
 - (e) production related to the growing of agricultural crops in a park, on a property used primarily for residential purposes or in a garden located in a public space.

Sections 16 and 17 of Ontario Regulation 63/09:

Prescribed pesticides, s. 7.1 (1) of the Pesticides Act

16. Class 9 pesticides are prescribed for the purposes of subsection 7.1(1) of the Act.

Definitions of terms used in the Pesticides Act

17. For the purposes of subsection 7.1 (2) of the Act,

“agriculture” means an agricultural operation as defined in subsection 1(1) that is carried out in, on or over land.

Definitions in the Pesticides Act:

“cosmetic” means non-essential.

“discharge”, when used as a verb, includes add, deposit, emit or leak and, when used as a noun, includes addition, deposit, emission or leak.

“extermination” means a land extermination, structural extermination or a water extermination.

“exterminator” means a person who, personally or through employees, assistants or agents, performs or enters into a contract to perform an extermination.

“land extermination” means the destruction, prevention or control in, on or over land of a pest or pests by the use of a pesticide but does not include a structural extermination, a water extermination or the destruction, prevention or control of termites.

“pesticide” means any organism, substance or thing that is manufactured, represented, sold or used as a means of directly or indirectly controlling, preventing, destroying, mitigating, attracting or repelling any pest or of altering the growth, development or characteristics of any plant life that is not a pest and includes any organism, substance or thing registered under the *Pest Control Products Act* (Canada).

Decision Summary:

The following describes the alleged contraventions as identified in the Application, followed by the ministry's response and position:

Alleged Contravention No. 1 - By selling flowering plants containing residues of Class 9 pesticides the specified retail vendors have violated subsection 7.1(1) of the Pesticides Act by permitting the use of pesticides that are not permitted to be used for cosmetic purposes.

Ministry's Response:

- The ministry's understanding is that the applicants consider a flowering plant containing pesticide residue to be a "pesticide" as defined under the Pesticides Act. The ministry does not consider the definition of "pesticide" to include a plant containing a pesticide residue. Therefore, it is the ministry's position that requirements of the Pesticides Act and Ontario Regulation 63/09 do not apply to the retail sale or subsequent use of flowering (ornamental) plants that contain a pesticide residue.
- Even if a flowering plant containing a pesticide residue was to be considered a "pesticide" there is a need to consider the distinct and different requirements pertaining to the sale and use of a pesticide under the Pesticides Act and Ontario Regulation 63/09. Section 7.1 of the Pesticides Act prohibits the use of Class 9 pesticides for cosmetic purposes. The specified retail vendors are *selling* flowering plants containing a pesticide residue and not *using* the flowering plants that contain a pesticide residue. Therefore, section 7.1 of the Pesticides Act does not apply to the sale of the plants by the specified retailer vendors.
- The ministry does not agree that it is reasonable to suggest that the selling of flowering plants that contain a pesticide residue is to be interpreted as the vendor "permitting the use" of a pesticide. As noted above, this is particularly relevant in the context of section 7.1 of the Pesticides Act and Ontario Regulation 63/09 that are distinct on the different requirements for *selling* and *using* a pesticide.
- It is the ministry's position that the actual use of a pesticide during the production of the flowering plants would have occurred where the plants were grown as part of a horticultural operation (e.g. at a greenhouse). If that horticultural operation was located within Ontario, the use of any pesticide as part of the operation would be subject to the requirements of the Pesticides Act and Ontario Regulation 63/09, including section 7.1 of the Pesticides Act. Subsection 7.1(2) of the Pesticides Act provides for an exception from subsection 7.1(1) of the Act for the use of Class 9 pesticides in "agricultural operations". The definition of "agricultural operation" provided in the legislation includes a horticultural operation. Therefore, it is the ministry's position that any application of federally registered and provincially classified pesticides to the sampled flowering plants that occurred in Ontario as part of a horticultural operation would have been allowed under the "agricultural" exception to subsection 7.1(1) of the Pesticides Act.

- In summary, it is the ministry's position that there is no reasonable basis for concluding that the specified retail vendors have contravened subsection 7.1(1) of the Pesticides Act.

Alleged Contravention No. 2 - By selling flowering plants containing residues of Class 9 pesticides the specified retail vendors have violated clause (a) of section 4 of the Pesticides Act by permitting the discharge of a pesticide or of any substance or thing containing a pesticide into the environment that is likely to cause impairment to the quality of the environment for any use that can be made of it greater than the impairment, if any, that would necessarily result from the proper use of the pesticide

Ministry's Response:

- As discussed under Item 1, the ministry does not consider the definition of "pesticide" under the Pesticides Act to include a plant containing a pesticide residue. Therefore, it is the ministry's position that the provisions of the Pesticides Act and Ontario Regulation 63/09 do not apply to the retail sale or subsequent use of flowering (ornamental) plants that contain a pesticide residue.
- Also as noted under Item 1, the ministry does not agree that it is reasonable to suggest that the selling of flowering plants that contain a pesticide residue is to be interpreted as the vendor "discharging" or causing or permitting the "discharge" of a pesticide or of any substance or thing containing a pesticide into the environment.
- Furthermore, to demonstrate a violation of clause (a) of section 4 of the Pesticides Act it is a requirement to establish improper use of the pesticide that has caused or is likely to cause impairment of the quality of the environment for any use that can be made of it greater than the impairment, if any, for such use that would necessarily result from the proper use of the pesticide. The applicant suggests that the planting (use) of a flowering plant that contains residues of Class 9 pesticides in residential gardens is prohibited under subsection 7.1(1) of the Pesticides Act and therefore any use of these plants in these spaces is an improper use and any resulting impairment would be greater than what would have occurred as a result of the proper use of the pesticide. As outlined under Item 1 and above, the ministry's position is that a flowering plant that contains a residue of a pesticide is not considered a "pesticide". As such, the use of flowering plants that contain a residue of Class 9 pesticide in residential gardens is not prohibited under subsection 7.1(1) of the Pesticides Act, nor is the planting of flowering plants that contain a residue of Class 9 pesticide in residential gardens an improper use of a pesticide.
- In summary, it is the ministry's position that there is no reasonable basis for concluding that the specified retail vendors have contravened clause (a) of section 4 of the Pesticides Act.

Alleged Contravention No. 3 - By selling flowering plants containing residues of Class 9 pesticides the directors and officers of the specified retail vendors have violated subsection 49(1) and clause (a) of subsection 49(3) of the Pesticides Act by failing to take all reasonable care to prevent their respective corporations from engaging in activities that may cause unlawful effects, namely the impairment of the quality of the environment for any use that can be made of it from a pesticide or any substance or thing containing a pesticide to a greater degree than would result from the proper use of the pesticide.

Ministry's Response:

- As outlined under Items 1 and 2, it is the ministry's position that the specified retail vendors are not selling or causing or permitting the use or discharge of a "pesticide" by selling plants that contain the residue of a pesticide, and that there is no reasonable basis for concluding that the specified retail vendors have contravened subsection 7.1(1) or clause (a) of section 4 of the Pesticides Act.
- As there is no reasonable basis for concluding that there have been contraventions of the Pesticides Act, it is the ministry's position that there is no reasonable basis for concluding that the directors and officers of the specified retail vendors have contravened subsection 49(1) and clause (a) of subsection 49(3) of the Pesticides Act.

For these reasons, it is the ministry's position that there is no reasonable basis for concluding that there have been contraventions of the following provisions of the Pesticides Act: ss. 7.1(1), 4(a) and 49(1) and 49(3)(a), thus an investigation by the ministry is not required.

Conclusion:

In response to the EBR Application for Investigation, it is the ministry's position that an investigation is not required as the alleged contraventions are not in violation of the requirements of the Pesticides Act and Ontario Regulation 63/09.