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# "INTEGRATED PEST MANAGEMENT ACT" FALLS SHORT

*West Coast Environmental Law Association's Submissions on the proposed Integrated Pest Management Act*

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## INTRODUCTION

In early November the B.C. Ministry of Water, Land and Air Protection (the "Ministry") released a discussion paper (the "Discussion Paper") on proposed changes to the *Pesticide Control Act* (the "Current Act"). The Ministry invited public comment on this document until December 20, 2002, and indicated its intentions to submit the new legislation to the Legislature by the spring of 2003.

- The Discussion Paper itself is only 7 pages long, and includes a general discussion of what are identified as the problems with the current Act and what the Discussion Paper proposes as solutions. Appendices I to IV to the Discussion Paper, however, provide more meat – the actual legislation, regulations and exemptions proposed, as well as a sample of standards that can be set under an Act.

- While we appreciate that actual legislation and regulations are available for discussion, West Coast Environmental Law is concerned that many of the changes proposed in the legislation and regulation are not adequately reflected in the Discussion Paper itself, and that public input may be limited by the technical nature of the Appendices.

## GENERAL COMMENTS ON THE DISCUSSION PAPER

We agree with the authors of the Discussion Paper that there are some significant problems with the current Act and its regulations. We agree with some of the points raised in the Discussion Paper (for example, the recognition of the rights of tenants in a residence in which pesticides are used). However, the Discussion Paper represents a one-sided contribution to the debate, justifying decisions that are already reflected in the draft Legislation, rather than promoting genuine public consideration of the issues behind pesticide management. Before turning to the Legislation itself, it is worth commenting on some of the shortcomings of the Discussion Paper.

The Discussion Paper opens with a discussion apparently designed to highlight the safety of current pesticides. Reading the introduction one learns that regulatory change is required because pesticides are generally safer than they were when the Pesticide Control Act was introduced.

No particular evidence is provided of this assertion, beyond noting that a handful of the more harmful pesticides of the 1960s have been discontinued and others are under review.

The Discussion Paper does not mention that of the 500 active ingredients contained in currently registered pesticide products, over 300 were approved before 1981 and over 150 before 1960.[1] Because of new medical appreciation for the risks of pesticides, and the continuing difficulties in finding a pesticide which affects only the pest species, public

[1] Standing Committee on Environment and Sustainable Development. Pesticides: Making the Right Choice. House of Commons, 2000, at p. xix; While the federal government is currently replacing the federal *Pest Control Products Act*, acknowledging concerns that the current registration procedures are not sufficiently stringent, the amended Act will not ensure review of all federally registered pesticides until 15 years after the revised Act comes into force: Bill C-8, s. 16(2)(b)).

concern around pesticide use has, if anything, increased since the Pesticide Control Act was introduced. One need only quote from the federal Parliament's Standing Committee on Environment and Sustainable Development 2002 report on Pesticides, which, after presentations from almost a hundred experts in pesticide management, concluded:

We found, however, that pesticides are highly poisonous substances designed to kill living organisms and are thus potentially harmful to workers using them and to farming and urban communities unknowingly exposed as well as to consumers. Therefore, we asked ourselves whether a regulatory system could be designed that would give clear and absolute precedence to human health. Based on our findings, it must be designed as such.[2]

The Discussion Paper also provides a critique of the "inefficiencies" and "inflexible" nature of the Current Act. However, this discussion shows no real appreciation why stringent regulation of pesticides might benefit human health and the environment. A statute is only inefficient if (a) its economic costs are disproportionate to the benefit society receives; or (b) the same societal benefit can be achieved at less economic cost.

We would strongly contest (a). The provincial regulation of pesticides has had a significant social benefit. As to (b), we would not say that there is no way that the Act could be made more efficient and flexible without compromising real protection for health and the environment. However, the discussion paper proposes a general reduction of government oversight with no real assessment of whether the new model will protect the public interest.

To the extent that the alleged "inefficiencies" are about providing pesticides to users at a lower cost than is currently the case, the effect of a more efficient system will be to decrease the cost of pesticides, resulting, presumably, in more widespread use of these substances. In such a case, efficiency for efficiency's sake may not be in the public interest.

The Discussion Paper asserts that increases in efficiency will translate into "inspections and audits for enforcing legal requirements." We have doubts about this conclusion in light of current cutbacks in Ministry staff and the inability of the Ministry to provide us with numbers of audits or other details about how enforcements will be conducted. We would recommend that the government provide assurances that the funding and staff resources necessary to implement the Current Act will continue to be used for regulating and monitoring pesticide use.

Finally, it is difficult to comment on the Discussion Paper and Draft Legislation because of the absence of detailed standards. It appears that Standards will form a central piece in how the Proposed Act will work, and while sample Standards are provided, the actual requirements of the Act will vary widely depending on what other standards are developed.

Other concerns with the Discussion Paper will be addressed in the context of specific legislative problems with the Draft Legislation, discussed in detail below.

[2] Supra., note 1, p. xiv (Chair's Preface to the Report).

## TOP 10 PROBLEMS WITH THE PROPOSED ACT

### 1. "RISK" IGNORES USE AND SITE

The Discussion Paper criticizes "duplication" arising where applications are similar in nature and "inconsistencies" arising from the decisions of different decision-makers. This basically comes down to an allegation that the Current Act is inefficient because each request to use pesticides is dealt with as a distinct case.

However, this criticism completely fails to appreciate the fact that the safety of pesticide use frequently depends upon the circumstances of the individual case. Thus pesticide use near a community water supply in the interior may involve very different considerations than the same pesticide's application near a residential neighbourhood.

On a related theme, the Discussion Paper does not recognize that the circumstances under which pesticides are applied has a huge impact on the risks associated with the pesticide use. This is why under a proposed classification scheme developed by the Federal/Provincial/Territorial committee on Pest Management and Pesticides[3] (the "Federal Discussion Paper"), domestic pesticides (pesticides intended for use around the home) are classified as high risk at lower levels of toxicity than commercial pesticides are – people are more likely to come into direct contact with high risk domestic pesticides.

Far from being a "risk-based" approach, as the Discussion Paper claims, the Proposed Act is driven by a one-size fits all mentality.

Under the current Act, the courts have ruled that the Environmental Appeal Board may focus its investigation on whether "evidence on toxicity … showed that the specific site in question prevented safe application of the pesticide."[4] While the environmental movement has been frustrated with the reluctance of the EAB to look at general safety issues, environmentalists would never suggest that only general safety, rather than site-specific considerations, should be taken into account. Indeed, the Discussion Paper appears to suggest that the province's role under the Proposed Act will have an increased overlap with the federal government's responsibility for general pesticide safety.

This focus on general, rather than site, safety is reflected in the Proposed Act and its Regulations in a number of ways:

- The only one of the "high-risk " circumstances under which permits will be required that makes any reference to site specific criteria, rather than the type of pesticide used, is "urban aerial pesticide use". Other urban uses are not considered high risk, and nor are pesticide use on or near schoolyards and playgrounds, in community watersheds or near the habitat of endangered species or other sensitive ecosystems.

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[3] "A Proposal for a Harmonized Pesticide Classification System for Canada." (November, 2002).

[4] *Canadian Earthcare Society v. Environmental Appeal Board,* [1988] B.C.J. 3109, quoting with approval the decision of the trial judge. There is some doubt whether the decision of the Court of Appeal is correct in light of the Supreme Court of Canada decision in *114957 Canada Ltee (Spraytech) v. Hudson*, [2001] S.C.R. 241. However, that the Current Act has and should play a role in evaluating site specific implications of spraying seems obvious.

- The Sample Standards for Pest Management Plans do require PMPs to include information about the location of water sources and fish and wildlife resources, and the identification of measures to be taken to protect them. However, as noted in "Requirements for IPM unclear and ineffectual," there is no structure in place to evaluate the appropriateness of such measures, or to require government sign-off for such high-risk activities. There are no requirements in the Sample Standards around exposure of children or other high-risk populations, or other sensitive ecosystems.

- The Sample Standards for Using Pesticides do set out a number of buffers around some features that may pose special environmental or health problems (e.g. drinking water sources and waterbodies). However, other such requirements are vague or limited (e.g. the use of one pesticide, propoxur, is limited "near" schools, but no specific buffer requirements are provided.) In addition, these buffers represent a common sense precaution applied to all pesticide use falling within the Standard, and not an informed assessment of the risks associated with the pesticide use. It certainly does not deal with situations where the importance of such features is heightened by the human use, or environmental significance, of the area.

- Exemptions are made across the board with no recognition for the risks, or public concern about risks, associated with the particular use of an exempted pesticide (see "Excessive Use of Exemptions", below).

Assuming that the Proposed Act continues to limit government approvals to cases involving high-risk use, the Regulation must be amended to ensure that all high-risk situations are addressed. It is our strong recommendation that site-specific criteria that indicate a high risk should automatically invoke a government approval function. At a minimum the Administrator should have the discretion to require government approval in such cases and other procedural protections should be put in place. Features that should be recognized as increasing the risk of pesticide use include pesticide application:

a) On any large-scale basis in a residential or urban area (not just aerial spraying);

b) In or near schoolyards, playgrounds or other areas frequented by children;

c) In or near old-age homes, hospitals, care facilities and other institutions designed for the care of the sick, or those with compromised immune systems;

d) In community watersheds or fisheries sensitive watersheds (under the Forest and Range Practices Act);

e) In or near areas identified by First Nations as being used for food and medicinal plant gathering;

f) In or near Wildlife Management Areas, Designated wildlife areas and other designations designed to protect wildlife;

g) In or near the habitat of an endangered species; and

h) Under any circumstances that cause the Administrator to believe that the use of the pesticide poses a high level of risk to human health or the environment.

If the government does not take on an increased oversight role for such high-risk areas, the Proposed Act or Regulation should require a special level of care, and more stringent rules be developed, in respect of such sites.

## 2. LIMITED ROLE FOR GOVERNMENT APPROVAL

The Proposed Act would eliminate government approval of Pest Management Plans, and then limit the circumstances that will require use of permits (which still require approval).

In the place of PMP approvals, the Proposed Act would require the pesticide user to notify the government that a valid PMP has been developed, as well as providing some details about the PMP. A PMP would not become valid until the government had "confirmed" that it has received an appropriate notification, but the government does not examine whether the legal requirements for the development and content of a PMP have been followed (although there is a possibility that they may audit such compliance subsequently).

The Government can also choose to authorize an applicator to use pesticides without a permit or PMP by putting such authorization into the terms of a service licence.[5] A licence can be for up to 3 years. We are informed in the Discussion Paper that this type of approval will be limited to pesticide use "on landscapes and in structures on public land."[6] We are further advised that the terms will include requirements that standards (yet to be developed) be followed. Landscape and structural pesticide use frequently, and legitimately, creates real public health issues. Enclosed spaces, such as structures, are more – not less – likely to result in health problems resulting from inappropriate pesticide use.

There is no reason that parents concerned about the pesticides used in their child's school, for example, should be excluded from public consultation requirements. Indeed, one would have hoped that given the sensitivity of children to pesticide use (especially in enclosed spaces such as a school) would mean that government would retain approval functions in such cases.

The Discussion Paper's claim that permits and government approval will continue to be required under certain circumstances, is not reflected in the Draft Regulation. Section 9 of the Regulation says that the Administrator "may" require that a permit be obtained in certain high risk situations. We are told that the Administrator will make this requirement mandatory through the standards (not yet developed); we are unable to understand why this should be done through standards rather than regulations, unless there is an expectation that the Administrator may cease requiring even these permit approvals (See "Arbitrary and overly-flexible standards", below).

The Ministry argues that pesticide users can be trusted to comply with the standards because they could be audited for compliance. The concept that reliance on audits will protect the public interest has recently been called into question in the financial sphere with the Enron scandal.

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[5] Draft Regulation, s. 9(1).

[6] Discussion Paper, p. 6.

In any event, the theory fails to recognize several things:

a) Government employees are charged with protecting the public interest and are trained to understand both the literal and purposive requirements of the legislation they administer. Private pesticide users are generally not in a position to credibly interpret the legislation that governs them, tend to focus on the literal requirements of the law, and will be concerned with other competing demands, such as cost-efficiency and minimizing the risk that offences will be detected and/or prosecuted. Thus the best-intentioned pesticide user may not be in a position to ensure compliance with a relatively complicated planning regime.

b) Audits focus upon whether technical procedures were followed, rather than on whether the best decision for the public interest has been followed. This is fundamentally different from the government role of determining whether a plan is in the public interest.

c) After the fact audits are only likely to be a significant deterrent for would-be law breakers if: (i) enough audits are done in enough detail to catch a significant percentage of law-breakers; (ii) penalties are likely or certain on being caught; and (iii) the penalties are sufficiently high that they must be avoided. If any of these elements are missed, then the penalties can become a part of doing business. The Discussion Paper and conversations with the Ministry have not resulted in assurances being given on any of the above.

d) The history of relying on enforcement action to ensure compliance with the law has been poor. The Ministry publishes periodic lists of companies and individuals who have been caught polluting. A large number of the individuals have remained on the list for many years running, demonstrating a failure on the part of the Ministry to obtain compliance through the enforcement regime even when polluters are caught.

e) Audits in the field are more costly, particularly in inaccessible areas, than reviewing plans in advance (which is not to say that on the ground monitoring and audits are not also necessary).

With the removal of government approval requirements for PMPs, the public will have no assurances that planning is actually done before pesticide use (including relatively risky and/or widespread pesticide use) occurs. Moreover, even if a member of the public knows that the planning was not done correctly, there is no remedy available unless the individual can convince the Ministry to intervene, conduct an audit and suspend the PMP.

We question the appropriateness of removing government sign-off for PMPs. However, if this approach is being followed, we would recommend the following as minimum requirements of good public policy:

a) Government approval requirements must catch all areas of high concern over pesticide use, and not merely the four categories provided for in the Proposed Regulation. In particular, the types of sites and quantity of pesticides being used should figure into a calculation of what indicates risk and high concern;

f) The Administrator should have a residual discretion to require government approval for a pesticide use which in his or her opinion is of high concern but not otherwise caught by the categories set out in (a);

g) The current wording of the Proposed Regulation should be amended to make government approval for high concern uses mandatory;

h) The approval of pesticide use through the terms of service licences be removed; if it is retained in any form it should be explicitly limited (in the Regulation itself) to circumstances of low public concern (and that should be clearly defined);

i) Amend the Proposed Act so that on receiving a complaint by a member of the public that a PMP was not prepared according to the Act, the Administrator must cause the complaint to be investigated and, if it is substantiated, must revoke or suspend the PMP;

j) Require, as an initial step in preparing a PMP, the pesticide user to carry out one or more steps designed to identify public concern over the proposed pesticide use. In cases where a high level of public concern is revealed, require that a permit be obtained;

k) Create a category for high-risk uses not requiring a permit wherein an automatic review of whether a PMP complies with the Proposed Act will occur; and

l) Make provision in the Act and standards that the information necessary for a member of the public to make an informed assessment of the PMP is publicly available.

## 3. ELIMINATION OF ENVIRONMENTAL APPEAL BOARD APPEALS

A disturbing consequence of the removal of approvals for PMPs is the elimination of the public's right to appeal pesticide use decisions to the Environmental Appeal Board in the vast majority of cases. The Discussion Paper is quite clear that it considers the EAB to be an inefficiency in the Act, but the fact remains that it is the one clear opportunity for transparent and impartial adjudication between members of the public aggrieved by the pesticide use and the pesticide users.

Indeed, the Proposed Act eliminates the right of appeal not only in respect of the merits of PMPs (as were considered under approvals), but also their compliance with the Act and its Regulations (as would be considered in a confirmation under the Proposed Act). As a result, a concerned citizen who has not been consulted as required under the Proposed Act may seek recourse in the courts, or may have no recourse at all.

In cases where the government itself is using the pesticide, the option of appeal to an independent and impartial decision-maker becomes even more important.

We are fundamentally opposed to removing the public's right of appeal to the Environmental Appeal Board.

## 4. ARBITRARY AND OVERLY-FLEXIBLE STANDARDS

As noted, it is difficult to comment on the Discussion Paper because of the amount of detail not yet worked out which will be contained in the Standards (to be developed by the

Administrator). This, we are told, is an attempt to keep the legislation "flexible." We have also been told that the intention is to have anything that does not need to be dealt with in the regulation itself dealt with entirely in Standards.

We pause to note that the information we have been provided about the scope of the standards is not clear from the Proposed Act.[7] As currently worded, the Proposed Act seems to contemplate that Standards will be limited to rules for the use of a pesticide, and will not extend to plan development, plan content, etc. While it is possible that a court would interpret the provisions more broadly, it appears that some revisions may be advisable.

For the time being, however, we will assume that the Proposed Act does authorize the wide range of standards that we have been told about, concerning almost everything, including public consultation, notice of pesticide use, Integrated Pest Management, planning steps, First Nations Consultation, and on the ground pesticide use.

There is value in having legislation that can adjust to changing circumstances and situations that were not foreseen, the Draft Act and Regulations provide the Administrator with huge discretion with no real instructions from the elected Legislature about what he or she should do with it. For example, while we are assured that the Standards will provide for public involvement, the use of integrated pest management and good environmental protection, the reality is that neither the Proposed Act nor the Proposed Regulations provide such guarantees. An Administrator could set standards that reduce public consultation and promote increased use of pesticides in sensitive areas, and the public would have no recourse.

The usual approach in creating flexible legislation is to provide some direction to the Administrator as to what goals should be reflected in, or addressed by, the Administrator's powers. Not only does this help the public understand what to expect from the Administrator, but it allows the Administrator to focus more directly on implementation of the Act without being called upon to make controversial political choices. For example, the Integrated Pest Management Act could *require* (as opposed to merely authorize) the Administrator to develop Standards concerning (among other things):

a) requirements for public consultation in developing PMPs or other plans for pesticide use;

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[7] "Standards" is defined as "standards respecting the use of pesticides as established by the administrator", which might be taken to refer to the actual use, as opposed to the planning for such use. The definition of "valid pest management plan" does not refer to a requirement to abide by standards in preparing the plan. (s. 1). Section 12(2)(p) creates a general power to create "policies, guidelines, standards and procedures." Of these types of direction "policies and guidelines" are probably not legally enforceable without further requirements. "Standards" are, by virtue of the rest of the Act. "Procedures" are distinguished again from "standards" and may well not be enforceable. Section 12(2)(k) does allow the Administrator to set "procedures and requirements" related to the notification and public consultation of a PMP, and the use of the word "requirement" likely indicates an intention that such requirements be enforceable. However, this power does not extend to other procedures and requirements. Content requirements might be inferred from the ability to set standards for public consultation, but this is not at all clear. Nor is it clear what consequences are of a failure to abide by even a mandatory "requirement" that is not a standard. While the provision might form the basis of an offence, it might be that the Administrator could not use a failure to follow such a procedural requirement as the basis for the revocation or suspension of a PMP under s. 13(3)(a), as that section refers to "standards" only.

b) tests to be applied and steps taken to ensure that a PMP or other pesticide use reflect principles of Integrated Pest Management; and

c) results and rules which will ensure that pesticide use will not cause any unreasonable adverse effect on human health or the environment.

As these examples demonstrate, the Administrator could continue to have broad jurisdiction to set appropriate standards, while being constrained to demonstrate how the set standards meet goals established by the Legislature. The Act might also grant the Administrator discretion to develop some types of standards, but those standards required for fair process and protection of the public interest should be a given.

An additional tool in ensuring some public confidence in the standards developed would be to require the Administrator to make draft standards available for public comment prior to adopting the final Standards. This should be required in the Act itself.

To summarize our recommendations:

a) Amend the Proposed Act to clarify the role of Standards under the Act;

b) Provide clear legislative direction on when and how the Administrator's discretion should be exercised; and

c) Require the Administrator to make draft standards available for public comment prior to their adoption.

## 5. EXCESSIVE AND VAGUE ROLE FOR EXEMPTED PESTICIDES

Pesticides are designed to kill or inhibit life functions. As such, exemptions from regulatory requirements should not be given lightly.

The Discussion Paper overstates the difficulties inherent in amending a Regulation. In addition, we do not see that there is any benefit to expanding the exemption list unless this can be done while guaranteeing public safety and environmental protection. Allowing stores to carry a full range of exempted pesticides should not pre-empt this basic goal.

An expanded role for exempted pesticides raises some serious issues.

First, we are informed that the list contains two types of pesticides. The first are those pesticides which are considered low risk, and therefore which the Administrator does not believe should be regulated. The second are those which are, in fact, higher risk but which are regulated through other mechanisms or are not conventional pesticides and which there are policy reasons not to regulate. These are two entirely different classes. To the extent that the Ministry maintains that an expanded exemption list would encourage people to use less harmful pesticides, the exemption list must allow the user to identify the more harmful pesticides.

We are concerned that the exemption lists (both current and Proposed) list not only specific pesticides and family groups, but classes of pesticides intended for a particular use. For example, "wood preservatives" include a range of chemicals of varying toxicity. In the

United States, the EPA has recently deregistered a series of arsenic-based wood preservatives because of human health concerns, but equivalent pesticides remain registered in Canada. It is not at all clear what the justification would be for exempting them, although we suspect that they are one of the classes of pesticides that the Ministry believes are regulated through other legislation. Assuming this is the case, it should be clarified and the source of the alternative regulation identified.

Second, the Act itself does not set out any requirements or tests that must be applied before an Administrator can exempt a pesticide. As with the development of standards, some direction from the Legislature should be given to ensure that exempted pesticides will not pose a significant threat to human health or the environment. We recommend that the Act provide clear directions and criteria as to what must be considered before a pesticide is exempted. Exemptions should be for specific products and should only be made after evaluation of health and environmental effects. Provisions requiring public comment and peer review and comment would be advisable and consistent with provincial government promises of openness and science-based decision-making.

Third, the blanket exemptions approach does not recognize that the most harmless pesticide can cause great harm to the environment or even human health depending upon the scope of the application and the character of the site. For example, pheromones, while having limited effect on humans, are extremely potent chemicals and could easily be used to literally extirpate a species from an area, if used sufficiently broadly; there is no way to pretend that this would not have huge environmental repercussions.

Ministry staff have suggested to us that section 9(5) of the proposed Regulations mean that permits will be required even for exempted pesticides in the four cases identified in that section (described in the Discussion Paper as uses of "high concern"). It is not clear that this interpretation is correct,[8] and the meaning of this section should be clarified accordingly. We note that if s. 9(5) does not cover exempted pesticides then the controversial aerial spraying of BtK for the Gypsy Moth over urban areas would not require any government approval under the Proposed Act. Even if that section does cover urban aerial spraying, we are concerned that large tracts of non-urban areas could be sprayed with no statutory requirements, notwithstanding the presence of residences and the fact that the impact of BtK on the environment is well documented.

In cases affecting a large area or a large number of people, or environmentally sensitive areas or high-risk populations, the public has a legitimate right that some form of planning will be done, even for pesticides considered generally to be low risk. We are certainly of the opinion that the Act must provide for situations in which use of a generally exempted pesticide will require either a permit or a Pest Management Plan. These circumstances should not be limited to the four categories in s. 9(5), but the exemption should also be no exemption in

[8] Section 9(5) begins with the phrase "if not otherwise authorized by the regulations". This is a peculiar phrase given that (a) it appears in the regulations; and (b) it does not appear to add anything to powers given to the Administrator by the section. It is possible that it would be interpreted as referring to authorization given to a pesticide user to use the pesticide without a permit, which is provided for in section 9(1). Moreover, if the interpretation suggested by the Ministry is correct, then the Administrator would apparently have an obligation to set standards (referred to in s. 9(5)(d)) even for exempted pesticides, failing which they would require a permit.

cases involving the use of large quantities of pesticide, large geographic scale of pesticide use and the character of the site.

Indeed, the issue of the quantity of pesticide used are probably one reason why, in the Federal Discussion Paper on a pesticide classification scheme, it is recommended that low-risk commercial pesticides should continue to be subject to regulation, and only domestic low-risk pesticides should be exempted. Domestic low-risk pesticides are limited by the quantity of pesticide likely to be used. The presumption against exempting commercial pesticides can be seen in the current list of exempted pesticides also.

To summarize, any exemption powers should:

a) Require evaluation of the health and environmental risks associated with the exemptions before an exemption is granted; if exemptions are to be granted for other reasons, this should be clearly reflected in the legislation and in the exemption list;

b) Not apply in circumstances where the use will likely result in a high level of concern over the use, notwithstanding the general low risk nature of the pesticide in other contexts; and

c) Commercially used pesticides use generally should not be exempted.

## 6. REQUIREMENTS FOR IPM ARE UNCLEAR AND INEFFECTUAL

The Discussion Paper correctly observes that the requirements for Integrated Pest Management are not included in the Regulation and comments that "without clear regulatory directions, the use of IPM under pest management plans cannot be appropriately enforced for environmental protection." We agree. However, the proposed Act and Regulation also do not provide any requirements for IPM (beyond the definition provided in the current Act). Instead the Proposed Act would contemplate the Administrator providing "Standards" which can be amended easily.

The decision to promote integrated Pest Management should be clear and mandatory from the Act itself. While the details of IPM could be determined by the Administrator, the Act should not allow for a weak or ineffectual set of requirements.

This concern is heightened by the sample standards provided as an Appendix to the Discussion Paper. Rather than setting out requirements around how IPM must be carried out, the Sample Standards contain only bare informational requirements for Pest Management Plans. For example, the Standards in Appendix IV require information about what preventative measures will be taken, but neither the Standards nor the Proposed Act and Regulations provide any circumstances under which a PMP could be refused where the preventative measures were inadequate. Thus, a user could indicate that manual trapping would occur when hell freezes over and would technically meet the requirements of the draft standards.

IPM is an approach to pest management that depends on flexibility, and is therefore difficult to define and legislate. However, there must be some attempt to do so if the PMP procedure is to provide any meaningful protection to the public and the environment. It is our suggestion that part of the substantive test be that the PMP demonstrate in a meaningful way

why it was not possible to eliminate pesticide use, or to reduce it any further, within the context of IPM. A variety of answers would, of course, be acceptable, including cost (although we would hope that the standards would recognize that some level of cost increase may be in the public interest), the limited area under the control of the pesticide user, the recent introduction of the programme, the nature of the pest, etc. But the public would have some confidence that the eventual goal of the plan was the reduction of the pesticide use.

Also of concern is the fact that even the information requirements are weak. For example, subsection (a) of the definition of IPM specifies that IPM must include "planning and management of ecosystems to prevent organisms from becoming pests." However, in the Sample Standards, this requirement does not mention ecosystem planning or management, but refers only to "preventative measures". Preventative measures are certainly a part of IPM (mandated by subsection (a),(b),(c) and (e) of the definition), but the Sample Standards totally fail to recognize the ecosystem-based approach to pesticide management. This is not a hypothetical problem, as many of the current, government-approved, PMPs fail to meaningfully address ecosystem-based management. For example, concerned citizens have noted the failure of current PMP held by forest companies to require their holders to modify logging practices that increase the need for pesticide-use.[9] (If there are concerns over conflicts between the two statutes, we would suggest that the Proposed Act amend the *Forest and Range Practices Act* to require that forest health under that Act also be dealt with on the basis of Integrated Pest Management.)

While we approve of a true IPM approach to pesticide management, the model set out in the Discussion Paper provides no guarantees that such an approach will be used. For a true IPM approach to work the following will be required:

a) The Proposed Act or Regulations should contain clear direction as to how Integrated Pest Management must be carried out under a PMP, including an evaluation of how the goal of pesticide elimination or minimization is to be met, and why the PMP has not been successful in reaching the goal of elimination;

b) Any Standards developed by the Administrator must be consistent with the directions given in (a);

c) There must be some confirmation that a PMP actually meets the Directions and Standards described in (a) and (b) above. This role is a governmental one, and we oppose allowing pesticide users to make their own determination. However, if this recommendation is disregarded, then at a minimum the determination should be made by an individual who is arms length from the pesticide user, with clear consequences (possibly through a professional disciplinary process) for confirming that a PMP meets those requirements when, in fact, is does not.

[9] This question is somewhat complicated by the fact that the companies are also operating under the Forest Practices Code which has its own requirements for forest health. However, we have no reason to believe that PMPs in other contexts better reflect the ecosystem-based aspect of IPM.

## 7. MONITORING AND ENFORCEMENT

Under the Proposed Act much of the requirements for pesticide use will be contained in "standards" developed by the Administrator. It will be up to pesticide users to ensure that they meet these standards, and to the Ministry to catch them if they don't. But we are concerned that it will often be extremely difficult, if not impossible, to determine whether standards have been followed after the fact. This will become even more difficult where the site is isolated.

To this end, the Draft Act contemplates the use of "monitors", qualified by government but hired, in many cases, by the pesticide user. While we have some reservations about this approach, the need for someone to monitor use is clear, and this feature of the Act made our "Good things about the Act" list, below.

Nonetheless, the Act does not set out when Monitors will be required, and we are concerned that in all cases where Monitors are not present the standards will become virtually unenforceable. It appears that Monitors will be required to monitor only the use of the pesticide, and not compliance with planning processes. It is also not totally clear when Monitors will be required to report to WLAP or the public that offences have occurred.

In addition, we hope that the Act will be adjusted to put in place structures and rules designed to keep Monitors accountable to the public, and not only to their employer. The perceived conflict inherent in having a private company hire someone to monitor its compliance with the law is a major reason why this role is usually carried out by government.

Ministry staff have not been able to provide any information about how many audits and what enforcement staff they will be able to provide, and we are left concerned that this new Act will not be effectively enforced.

## 8. FAILURE TO USE PESTICIDE SALES STAFF

The Discussion Paper takes issue with the vagueness of the requirement that a certified dispenser must "confirm to the purchaser that the pesticide is suitable for the intended use." It is true that this requirement is vague, but the solution is to provide direction, rather than to eliminate the requirement altogether. It is important that users of pesticides be informed as to whether the pesticide is appropriate to their problem, and whether non-toxic alternatives exist. We do not believe that the use of such dispensers should be limited to notifying consumers "about safety precautions" but also about minimizing pesticide use through integrated pest management.

The *Proposal for a Harmonized Pesticide Classification System for Canada*, developed by the Federal/Provincial/Territorial Committee on Pest Management and Pesticides, emphasizes the availability of trained sales staff as a key role of the provinces to "ensure that the purchasers of these products are provided with appropriate pest control advice and product information."[10] Indeed, the paper notes that some stakeholders supported a system akin to the sale of pharmaceuticals. In light of the emphasis placed on the role of sales staff in the

[10] Supra., note 3, p. 12.

federal paper, it seems odd that the province is moving to reduce its requirements in this regard.

### 9. CHANGES IN LICENCE AND REPORTING REQUIREMENTS

The proposed Act would decrease reporting requirements to every three years. This raises concerns about public access to information. We are again assured that provisions under the standards will require that such information be available to the public on an ongoing basis. However, since we have not yet seen such standards, and since we do not believe that annual reporting is such an onerous requirement, we believe that this change is moving in the wrong direction.

### 10. STILL WAITING FOR DETAILS

There are a number of concerns that we expected to see addressed in the proposed Act and Regulations, but that aren't. We are assured that they will appear in the Standards, but since we can't comment on the standards yet, and since they seem of to be of enough significance to be included in the proposed Act or Regulations themselves, we will mention a couple of them here.

First, while the Discussion Paper correctly identifies the absence, in the Act or its Regulations, of any requirement to consult the public on the standards and conditions of pesticide use (and on whether a pesticide should be used at all in a given situation) as a problem,[11] the proposed Act and Regulations do not contain any such requirement either. This seems to be sufficiently important that it should be addressed in the Act itself. Further details around minimum requirements for consultation would then be provided through the standards.

Second, the Draft Act and Regulations make no mention of the duration of PMPs or Permits. Currently Pesticide Use Permits are valid for a period of 3 years from their issuance, while PMPs are valid for 5 years. We are informed that these durations will continue through the standards. We are of the view that this is better dealt with through the Proposed Regulations, particularly in light of concerns over the scope of standards, discussed above.

## FOUR GOOD THINGS ABOUT THE PROPOSED ACT

While we think that the above problems with the Proposed Act and Regulations outweigh any gains for the environment, there are features that we do appreciate and hope will be expanded as a result of the current consultations. These include:

### 1. BETTER NOTIFICATION FOR RESIDENTS

The Current Act fails to provide tenants with any rights should their landlord decide to use pesticides, and the requirement to provide notice to residents of a building where pesticides are to be used is a welcome first step.

[11] Although for PMPs, such a requirement is already present in Ministry policy. We agree that it should be in the regulations, but the Discussion Paper overstates the complete lack of public consultation requirements.

It is, however, only a first step. Tenants' rights should extend not only to notice, but also to some say in whether and how pesticides are used in immediate proximity to their living space. The Proposed Act should require users to accommodate the wishes and concerns of their tenants. Moreover, it is in precisely this type of conflict between lease and private property rights that an adjudicative body such as the Environmental Appeal Board makes the most sense.

Moreover, all people who are likely to be affected by pesticides use should receive notice (in the form of signage and in some cases publication in newspapers). The basic human right to determine what chemicals one is exposed to should not be limited to residents.

## 2. MONITORS

The Proposed Act gives the Administrator the power to order the use of qualified "monitors", either on a case-by-case basis or through Standards. Given the difficulties in determining where and how pesticides have been used after the fact, it is crucial to have someone to play this role, although we remain concerned about the privatization of what could be seen as a government function. Given the decision to reduce government oversight the requirement of monitors seems a reasonable way to go.

Unfortunately the Draft Act and Regulations are a little vague as to who can be monitors and what mechanisms will be in place to ensure their independence from the pesticide user. Nor is it clear when monitors will be required, or when they will need to report their findings to the Administrator. This will apparently be set out in more detail in the Standards.

We can only urge that the final version of the Act and Regulations recognize the potential for conflict between a monitor and his/her employer, and create mechanisms to minimize or eliminate that conflict. We further recommend that the final requirements for monitors be based on the health and environmental concerns they are intended to address.

## 3. CONTINUED ROLE FOR GOVERNMENT

Although we are concerned about reductions to government's role of overseeing pesticide use, we recognize that there will be other voices calling for an even smaller government role. We therefore do note that the continued role for government in approvals in certain high risk situations and in monitoring the effect of Pest Management Plans (to the point of including a power to revoke or suspend them where the pesticide user is likely to cause an unreasonable adverse effect) are positive features of the Proposed Act.

## 4. STANDARDS

The development of on the ground standards, which will apply to every pesticide use, is a good step forward. However, because of concerns about enforceability and the limitations of general rules such standards cannot be sufficient by themselves.

As we have noted above, the absence of more comprehensive draft standards has made it difficult to comment on how this Act will function. We recommend that the Proposed Act be reworked to require that public comment on draft standards occur before they are created under the Act. We further recommend that the Act identify crucial issues which must be addressed by the Standards and provide direction to the Administrator on how to do so.

## CONCLUSION

It is our conclusion that the *Integrated Pest Management Act*, as proposed, does not adequately address the risks associated with pesticide use, and the social and environmental benefits to be obtained from rules that ensure that they are only used when necessary and appropriate. The IPMA would reduce direct government supervision of pesticide use without replacing it with a meaningful requirement to use Integrated Pest Management.

The basic approach proposed for the IPMA will be effective only if it sets out meaningful and enforceable requirements for integrated pest management and retains a government role for all high-risk uses of pesticides. Exemptions from pesticide regulation should be introduced cautiously and should ensure that the public has a voice regarding any use that affects them. We have proposed a series of changes to the Act that would go a long way to addressing these concerns.

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