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GOVERNOR

STATE OF MAINE
MAINE DEPARTMENT OF AGRICULTURE, FOOD & RURAL RESOURCES
BOARD OF PESTICIDES CONTROL
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BOARD OF PESTICIDES CONTROL

January 23, 2009

Colby Thomas Room, Hampton Inn
425 Kennedy Memorial Drive, Waterville
(Waterville/Oakland Exit 127 from I-95)

MINUTES

9:30 AM

Present: Eckert, Qualey, Stevenson, Ravis, Simonds and Jemison

1. Introductions of Board and Staff

The Board and staff introduced themselves

2. Public Hearing on Proposed Amendments to Chapters 24, 28, and 41

The Board will hear testimony on a series of amendments to three different rule chapters. The proposed amendment to Chapter 24 would incorporate, by reference, the federal pesticide management and disposal rule, which applies to pesticide containers and containment of bulk pesticides. The proposed amendments to Chapter 28 would create a Maine Aerial Pesticide Application Notification Registry. The proposed amendments to Chapter 41 would create a mechanism to regulate Bt sweet corn to prevent pollen drift to other non-Bt-corn crops and to restrict sales of Bt sweet corn seed only to quantities large enough to plant one acre or more.

Additional details of the proposed amendments were described in the public hearing notice published in major newspapers on December 31, 2008. Copies of the proposed amendments are available upon request or may be viewed at the Board's website, www.thinkfirstspraylast.org.

Sign-up sheets for each chapter will be available at the door for persons wishing to testify. Written comments may be submitted to the Board's address above until 5:00 PM on February 6, 2009.

A transcript of the hearing will be available sometime in February.

3. Minutes of the December 19, 2008, Board Meeting

Presentation By: Henry Jennings
Director

Action Needed: Amend and/or approve

- Ravis/Simonds: Moved and seconded approval of the minutes.

In Favor: Unanimous

4. Bayer Cropscience Request for 24(c) Registration for Ethrel® Brand Ethepon Plant Regulator (EPA #264-267) on Greenhouse Tomatoes

At the request of Backyard Farms, Bayer Cropscience is supporting a Special Local Need [24(c)] Registration to allow the use of Ethrel® Brand Ethepon Plant Regulator, for use on greenhouse tomatoes. Use of this product would aid in providing consistent quality of tomatoes year-round, by accelerating ripening and minimizing crop loss due to softness, cracking, and other deformities.

Presentation By: Wesley Smith
Pesticides Registrar

Action Needed: Approve/Disapprove 24(c) Registration Request

- Simonds inquired about why the Board had regulatory jurisdiction over Ethrel. Hicks explained that the definition of pesticides includes plant growth regulators. A short discussion about the circumstances that require a special local needs label versus federally approved labels ensued. Hicks discussed her evaluation of the acute toxicity concerns and how they are adequately mitigated through the use of protective clothing. She inquired about how the product would be applied. Erika Roderick and Mark Queenan were present representing Backyard Farms. Roderick stated they planned to paint the material on the foliage adjacent to the fruit using a sponge. Applicators will use full protective clothing including nitrile gloves, Tyvek suits and respirators. Applications are timed for late Friday or on Saturday to allow the maximum time to elapse prior to worker re-entry. Roderick explained the intercropping process used by Backyard Farms and how Ethrel would be useful during transition periods. The Board briefly discussed conditioning the approval to limit the use to the sponge-on method or to require use of a respirator, but they eventually decided against any conditions.

Qualey/Simonds: Moved and seconded approval of the 24(c) request

In Favor: Unanimous

5. Adoption of Amendments to Chapters 10 and 22

A public hearing was held on November 21, 2008, on a series of amendments to three different rule chapters. Eighteen people testified at the public hearing and 137 written comments were received prior to the December 10, 2008, deadline. At its December 19, 2008, meeting the Board reviewed the comments and followed with extensive discussion. Members decided to make substantial changes to Chapter 28, which would require a new rulemaking period and public hearing. The Board made several changes to Chapters 10 and 22 and then directed the staff bring the two revised rules back for adoption at the next meeting on January 23, 2009.

Presentation By: Henry Jennings
Director

Action Needed: Adoption of the Rule, Basis Statement, Rulemaking Statement of Impact on Small Business, and Response to Comments for each of the two rules

- ☑ Jennings reminded Board members that they should consider each rule separately. If they elect to adopt either proposed amendment, they need to adopt the basis statement, the response to comments, and the statement of impact on small business.

Board members briefly discussed the proposed amendments to Chapter 10, which had been revised based on comments and in accordance with Board instruction. The significant changes involved deleting reference to public roads and exempting trails crossing private lands by permission of the landowner. Members were satisfied that the revised language reflected their intent.

Simonds/Jemison: Moved and seconded adoption of the revised rule amendment, the basis statement, the response to comments, and the statement of impact on small business.

In Favor: Unanimous

Next, the Board moved on to reviewing proposed changes to Chapter 22. Jennings reviewed the changes Board members requested from the previous meeting. Significant changes included allowing either a map or another record of sensitive areas, changing the “detectable residue” standard to a prima facie evidence standard and making it only applicable to Sensitive Areas Likely to Be Occupied, and adding a standard of harm for persons and vehicles using public roads.

Simonds lead a discussion about adding clarification of the Board’s rationale, as described in the basis statement, for designating the “detectable residue” standard as a “prima facie evidence” standard and what the practical effect is. Members wanted to ensure that the Legislature fully understood that a prima facie standard only constitutes evidence of a violation of the general standard, and that the Board would need to review all the circumstances relative to a given incident before determining whether a violation occurred. Fish drafted an additional sentence to add to the basis statement, which the Board reviewed and agreed to incorporate.

Simonds also commented on the projected administrative costs as described in the statement of impact on small business. The estimates were based on an hourly cost of \$20/hour. Consensus was reached to double the estimated costs.

Jemison/Ravis: Moved and seconded adoption of the amendments to Chapter 22, the basis statement as amended, the response to comments, and the statement of impact on small business.

In Favor: Unanimous

6. Updates on Bt Corn

- a. The Medical Advisory Committee (MAC) will be meeting on January 28, 2009, to review the literature on Bt sweet corn (with pending registrations from Syngenta and Monsanto) and potential human health effects. Nancy Oden of Jonesboro sent an e-mail to the Board referring to three Bt corn reports, two regarding effects in mammals and the third regarding honey bee exposure and Colony Collapse Disorder. The first two studies will be included in the MAC review and the third has been shared with Tony Jadczyk, State Apiarist.

- b. A label amendment has been approved by EPA, allowing sales of Attribute (Syngenta's Bt sweet corn) for home garden or educational use (under 20 acres). The new uses will not require a grower agreement and corresponding refuge requirements.
- c. Syngenta has requested registration for another Bt corn product (MIR 162), involving a different type of protein than the Cry proteins, currently registered for field corn and under consideration for sweet corn. Based on the label review, this product is intended for seed production and will not likely be used in Maine.
- d. As of December 15, 2008, EPA approved amendments to Monsanto's next generation Bt corn products, originally submitted to the Board for registration in August 2008. These amendments would allow seed production and have different refuge requirements. Similar to the Syngenta product above, the seed production use would not likely be relevant to Maine.

Presentation By: Lebelle Hicks
Board Toxicologist

Action Needed: Decide how to handle new products and uses

- Hicks updated Board members about recent events concerning Bt corn. She pointed out that the Medical Advisory Committee (MAC) is scheduled to review Bt sweet corn on January 28, 2009. Two studies referenced by Nancy Oden (and others) will be included in the MAC review. A third study about Bt corn effects on bees was forwarded to Tony Jadczyk, the State Apiarist.

Board members expressed frustration with the series of changes involving Bt corn. Simonds commented that the Board cannot change Chapter 41 every time a new Bt corn product is introduced. Jemison expressed concern about the potential for homeowner use of Bt corn. He felt the likelihood was low that homeowners would adhere to stewardship requirements. Jemison also did not see the logic to registering Bt corn products in Maine that are only intended for seed production.

7. Consideration of Staff Negotiated Consent Agreement with Scotts Lawn Service of Hermon

On June 3, 1998, the Board amended its Enforcement Protocol to authorize staff to work with the Attorney General and negotiate consent agreements in advance in matters not involving substantial threats to the environment or public health. This procedure was designed for cases where there is no dispute of material facts or law, and the violator admits to the violation and acknowledges a willingness to pay a fine and resolve the matter. This case involved the misreading of a work slip which led to the application of two lawn insecticides on two consecutive days to the wrong customer's property. Other than the address, there was no positive means of identification; sensitive areas were not identified, as required for this type of application; and there were also violations of the label rates.

Presentation By: Raymond Connors
Manager of Compliance

Action Needed: Approve/disapprove the consent agreement negotiated by staff

- Connors explained the circumstances of the violations. A company employee made two separate applications to the wrong customer's property. The violations were then self-reported. Board members expressed dismay that commercial pesticide applicators continue to make applications at the wrong

site. Ravis and Jemison commented that the penalties are not high enough. Jennings explained that the staff and Assistant Attorney General Randlett always struggle to balance the need to present an effective deterrent to violations with the need to encourage companies to self report violations when formulating a proposed consent agreement. Board members inquired if the staff had received a positive identification policy from the company. Connors reported that the staff had not yet received it.

Simonds/Stevenson: Moved and seconded to table the item pending receipt of the positive identification policy

In Favor: Unanimous

8. Consideration of Staff Negotiated Consent Agreement with Michael Rowell of Levant

This case is similar to the preceding agenda topic where there is no dispute of material facts or law, and the violator admits to the violation and acknowledges a willingness to pay a fine and resolve the matter. It involved a grower with no private applicator license who purchased and used two restricted-use pesticides.

Presentation By: Raymond Connors
Manager of Compliance

Action Needed: Approve/disapprove the consent agreement negotiated by staff

- Connors explained that the case was another arising from a series of restricted-use pesticide sales made by an agricultural supply company to growers without a current private applicator's license. The penalty is the same as with the other cases.

Qualey/Jemison: Moved and seconded approval of the consent agreement

In Favor: Unanimous

9. Election of Officers

The Board's statute requires an annual election of officers. The members will choose a chair and vice-chair to serve for the coming year.

Presentation By: Henry Jennings
Director

Action Needed: Nominations and election of officers

- Simonds indicated that he has more control over his schedule at this point and would be willing to take on more responsibility if the Board desires. Eckert stated she is willing to continue for one more year. Eckert and Simonds left the room briefly while the rest of the Board discussed ideas.

Qualey/Ravis: Moved and seconded Eckert as chair and Simonds as vice-chair.

In Favor: Unanimous

10. Other Old or New Business

a. Legislative Update—H. Jennings

- Jennings mentioned LD 68, which would add an eighth member to the Board, representing a statewide agency of organic gardeners and farmers. While Board members were split on the merits of the bill, there was consensus that the Board's priority is to fill the existing vacancy first.

LD 182 is the same bill that was submitted two years ago to institute buffer zones for aerial spraying. Board members thought it would be confusing to have a statute and rule regulating the same activity. There was sentiment that the Board's newly adopted drift rule needs a chance to see how it's going to work. Consensus was reached to oppose LD 182 for those reasons.

LD 183 affects genetically modified crops, but doesn't appear to affect Board activities.

b. Other?

Fish mentioned a recent appeals court decision that overturns EPA's rule on the use of pesticides in or near water. Based on this decision, it appears that any pesticides that end up in navigable waters will need a National Pollution Discharge Elimination System permit in the future.

11. Schedule and Location of Future Meetings

February 20, March 27 and May 8, 2009, are the tentative dates for the next Board Meetings. The Board will decide whether to change and/or add dates.

Adjustments and/or Additional Dates?

- Board members added June 12 and July 17 as tentative meeting dates.

12. Adjourn

- Jemison/Ravis: Moved and seconded that meeting adjourn at 1:53 PM.

In Favor: Unanimous