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BOARD OF PESTICIDES CONTROL
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TO: Board Members

FROM: Gary Fish, Manager of Pesticide Programs

SUBJECT: Discussion of Board Policy on the Use of Consumer Products as Pesticides

DATE: October 27, 2010

Periodically, the Board's staff receives inquiries about the legality of using common consumer products such as vinegar, dish soap and other mixtures as pesticides. Over the last year MOFGA Certification Services LLC has inquired about a number of products and a recent newspaper account about municipal employees applying homemade herbicides resulted in requests for the staff to investigate.

EPA's compliance staff indicates that anyone may produce a pesticide for their own use on their own property without registering the product (see Appendices A, B and C). However, use of an unregistered pesticide (like vinegar, salt, dish soap, etc.) on the property of another or for commercial purposes would be unlawful, according to these documents, and would require a commercial applicator license for legal application in Maine.

The most current examples of these practices include use of chamomile tea as a fungicide on organic vegetable crops; application of vinegar, essential oils, soaps and salt by municipal officials as an alternative to conventional herbicides; and application of compost tea on vegetable crops and ornamental and turf areas for fungal disease suppression.

While we are not looking for new areas to regulate, these unregistered products are being applied as pesticides by applicators that in similar situations must be licensed to apply registered products. Although many of these materials are exempt from full registration by EPA, they are not exempt from Maine's registration requirements. As we have seen in the past, even though some of these products are made from food-grade ingredients, they do pose potentially significant risks when the route of exposure is inhalation and not the customary exposure route of ingestion.

The Board has never taken an official position on this subject. In light of the recent level of interest in the topic, the staff is now requesting that the Board take a position and consider developing an enforcement policy until new regulations can be promulgated.

Appendices:

Appendix A—FIFRA Compliance Program Policy No. 3.5 (1982)

Appendix B—Email from Mary Frances Lowe, EPA Senior Program Advisor (June 3, 2010)

Appendix C—Response to email from Ray Connors from Donald Lott, EPA Associate Director of Waste and Chemical Enforcement Division (March 2010)

APPENDIX A

FIFRA COMPLIANCE PROGRAM POLICY NO. 3.5

Production of Pesticides for Personal Use

FIFRA Sections: 3, 7

Issue:

May a person lawfully produce a pesticide for his own use without registering his product or establishment?

Policy:

Generally, a person may lawfully produce a pesticide for his own use without registering his product or establishment.

Discussion:

Section 3 of FIFRA requires a pesticide producer to register his product only if he sells or distributes the pesticide. Furthermore, the regulations (40 CFR Part 167) which address the registration of pesticide producing establishments under FIFRA Section 7 state that persons who produce pesticides solely for application by themselves are not required to register their establishments. Thus, a person who produces a pesticide solely for personal use is not required under FIFRA to register the pesticide or the producing establishment.

The Agency considers any application of an unregistered pesticide for other than personal use to be distribution of an unregistered pesticide, a violation under Section 12(a) (I) (A) of FIFRA. This includes applying an unregistered pesticide to another person's property for other than monetary consideration. Furthermore, a person applying an unregistered pesticide for hire, only to provide a service of controlling pests without delivering any unapplied pesticide to any person so served, would be considered a distributor and, is therefore, subject to the higher penalties set forth in section 14 (a) (I) and 14(b) (1) of FIFRA. (see S. Rep. No. 95-1188, 95th Cong., 2nd Sess. 44-45. (1978)).

References:

Memorandum to Roy Clark, Region IV, dated April 9, 1981 titled "Interpretation of FIFRA §162.4(c)(6).

Senate Report No. 95-''88, 95th Congress, 2nd Session 44-45
(1978).

Key Words:

Establishment Registration, Product Registration.

A. E. Conroy II
A. E. Conroy II, Director
Pesticides and Toxic Substances
Enforcement Division
MAY 10 1982
Date

APPENDIX B

From: Lowe.MaryFrances@epamail.epa.gov
Sent: Thursday, June 03, 2010 7:10 PM
To: Grier Stayton (aapco-sfireg@comcast.net); Fish, Gary
Cc: Helfgott.Daniel@epamail.epa.gov; Zimmerman.Dea@epamail.epa.gov;
Havinga.Al@epamail.epa.gov; celeste.laurel@epamail.epa.gov
Subject: "Final answer" re Legality of applying home made pesticides to
food crops that will be sold for consumption

Dear Gary and Grier,

Following up on my interim email responses dated 4/28/10 and 3/31/10, I wanted to get back to you with the results of our attorneys' discussions with FDA about the situation you described involving the use of "home-made pesticides" by some growers in Maine, and to clarify our previous statement regarding the applicability of FIFRA.

If these pesticides are used on food and the food contains residues not covered by an EPA tolerance or exemption, and if that food can be considered to be in interstate commerce, it would be a violation of FFDCA subject to enforcement action by FDA. As we have heard from FDA representatives in recent PREP discussions, "interstate commerce" can be fairly broadly construed. In addition, many states may have their own authorities that allow them to take action with or without a finding of interstate commerce.

To reiterate regarding the applicability of FIFRA, it is not a violation of FIFRA for a person to use an unregistered pesticide on their own property. It would constitute a violation of FIFRA, however, if a commercial applicator used an unregistered pesticide to perform pest control for hire. This would be considered to be "distribution and sale" of an unregistered pesticide and would be an unlawful act pursuant to FIFRA 12(a)(1)(A).

I hope this is helpful.

Best regards,

Mary Frances

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RESPONSE TO QUESTIONS POSED BY RAYMOND G. CONNORS,
MANAGER OF COMPLIANCE, MAINE BOARD OF PESTICIDES CONTROL

Background

In an e-mail to Mary McDonnell on February 23, 2010, Ray Connors requested to know EPA's enforcement position regarding the following four scenarios:

1. A homeowner uses a product that is not registered as a pesticide on his own property in both ag and non-ag situations to control pests.
2. A commercial applicator uses a product that does not make pesticidal label claims as part of a service for hire where he makes verbal or written pesticidal claims for the product:
 - A) In a lawn care situation
 - B) For spraying an agricultural pest.
3. A commercial applicator uses a product that does not make pesticidal claims, nor does he make verbal or written claims for the product, but he uses it to control pest (sic) in both ag and non-ag situations. Similar products with the same active ingredient do make pesticidal claims on the label (diatomaceous earth for example).
4. A school maintenance person uses a product (say vinegar) to control weeds at the school he works at. He is not a licensed applicator. The product is food grade vinegar that makes no pesticidal claims.

Pertinent Statutory and Regulatory Requirements

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) defines the term "pesticide" at section 2(u) to mean, among other things:

- (1) Any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest.

The regulations at 40 CFR ¶152.15 describe the following situations, among others, when a substance is considered to be intended for a pesticidal purpose requiring registration:

- (a) The person who distributes or sells the substance claims, states, or implies (by labeling or otherwise) that the substance (either by itself or in combination with any other substance) can or should be used as a pesticide; or
- (b) The substance consists of or contains one or more active ingredients and has no significant commercially valuable use as distributed or sold other than (1) use for pesticidal purposes (by itself or in combination with any other substance); or
- (c) The person who distributes or sells the substance has actual or constructive knowledge that the substance will be used, or is intended to be used, for a pesticidal purpose.

In the two situations described above, the detection of the product's movement would be unlikely in our routine course of compliance activities and the documentation of a person's actual or constructive knowledge of the intended pesticide use at the time of purchase would be a challenge.

Scenario 2

In the second scenario, a commercial applicator uses a product that does not make pesticidal claims on the label; but the applicator makes written and verbal claims for the product as part of the pest control service. Pursuant to FIFRA section 2(gg), the application of an unregistered pesticide as part of a pest control service constitutes "distribution or sale." Unless the pesticide meets the terms of an exemption from registration, such as the Minimum Risk Pesticides exemption, the applicator is "distributing or selling" an unregistered pesticide. Note that if the product is diluted, mixed, or repackaged by the applicator, these activities may constitute production of a pesticide in an unregistered establishment.

Scenario 3

The commercial applicator in the third scenario uses a product as part of a pest control service that does not bear pesticidal claims on the label and the applicator makes no written or verbal claims for the product as a pesticide. Pursuant to the regulations at 152.15 (b), if the product has no significant commercially valuable use as distributed or sold other than as a pesticide, the product would be considered a pesticide. In addition, use as part of the pest control service would also imply that the product was intended for use as a pesticide. Unless the product comes within the terms of a registration exemption, the use of this product as part of the pest control service would represent the "distribution or sale" of an unregistered pesticide. As indicated in Scenario 2, any mixing, dilution, or repackaging of the product by the applicator may form the basis for alleging production of a pesticide in an unregistered establishment.

Scenario 4

Scenario 4, the last scenario, is similar to the first. As long as the school maintenance person does not "distribute or sell" the pesticide and the pesticide remains on the school campus, there would be no "distribution or sale" of an unregistered pesticide. The maintenance person or school district is considered to be the distributor of an unregistered pesticide, if the school district or their agent, the maintenance person:

- transports the product from the point of purchase to the school property with the knowledge that the product will be used for pesticidal purposes; and/or
- moves the product to another property location such as another school campus within the school district for further use as a pesticide.



Donald J. Lott, Associate Director
Waste and Chemical Enforcement Division