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MAINE DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY
BOARD OF PESTICIDES CONTROL
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BOARD OF PESTICIDES CONTROL

September 6, 2013

AMHI Complex, 90 Blossom Lane, Deering Building, Room 319, Augusta, Maine

MINUTES

Present: Bohlen, Eckert, Granger, Jemison, Morrill, Stevenson

1. Introductions of Board and Staff

- The Board and staff introduced themselves.
- Staff present: Jennings, Connors, Hicks, Fish, Tomlinson, Bills

2. Minutes of the July 26, 2013, Board Meeting

Presentation By: Henry Jennings
Director

Action Needed: Amend and/or approve

- **Granger/Eckert: Moved and seconded to accept minutes as written**
- **In Favor: Unanimous**

3. Request for Renewal of DuPont Special Local Need [24(c)] Registration for Express[®] Herbicide with TotalSol for Control of Bunchberry in Lowbush Blueberries

In September of 2008, the Board approved a Special Local Need (SLN) registration for DuPont Express[®] Herbicide with TotalSol (EPA Reg. No. 352-632). The SLN expired in 2010 and subsequently was renewed through July of 2013. Consequently, the University of Maine Cooperative Extension and DuPont are now requesting to renew the SLN registration to make this product available to growers again to allow for selective postemergence control/suppression of certain broadleaf weeds, primarily bunchberry in lowbush blueberries. 2011 water quality testing did not reveal any tribenuron in 55 samples collected.

Presentation By: Mary Tomlinson
Pesticides Registrar

Action Needed: Approve/disapprove 24(c) registration request

- Tomlinson explained that the Board had approved the use of the product on blueberries in September 2008. Due to concerns about water quality, it was good for one year; in 2010 it was renewed for two years, and it expired this past July. Dave Yarborough requested that it be continued. 2011 blueberry groundwater monitoring samples were returned as non-detects. Yarborough works closely with blueberry growers and does lots of education. Express is used primarily for spot treatments. Much of the training advocates for a lot of precautions for the protection of groundwater.
- Jemison noted that it would be applied in October after the harvest, so there would be a growth year and then a harvest year, almost two years between application and harvest. Initially it looked like it could be mobile, but nothing has shown up, it seems like a solid use. Tomlinson said that there has to be 365 days between application and harvest.
- Eckert remarked that this is a soluble granular, so it is dissolved and spot-sprayed; she asked if the only human issues are with rash and irritation for the applicators. Hicks said yes.
- Bohlen said that the potential risk for transport into water systems is critically dependent on how it's applied. While it is currently used as spot treatments, it is not explicit on label; should there be concern about that? Is there any reason someone will use it any other way? Hicks replied that it is labeled for one ounce of active ingredient per acre. Jemison noted that it is used for bunchberry, which tends to be bunched. Dave Bell commented that in the interest of IPM and cost, it wouldn't be used over a large area. Jennings said that there is no reason it can't be used over a large area, but it's unlikely due to costs and weed habitat. The low application rate will still reduce the probability of detectable residues in ground water.
 - **Granger/Morrill: Moved and seconded to approve the registration**
 - **In favor: Unanimous**
- Bohlen commented that it makes sense to end the registration in December and not in the middle of the growing season.

4. Review of Draft Policy on Exclusion Areas for Potential Aerial, Public-Health-Related, Mosquito-Control Programs

At the May 24, 2013, meeting, the Board provisionally adopted amendments to Chapters 20, 22, and 51. The amendments were intended to allow for potential public-health-related, mosquito-control programs conducted by governmental entities. During the development of the Chapter 20 amendments, the Board determined it was preferable to define "exclusion areas," in the context of potential aerial applications, via policy, instead of codifying them in rule. Such a strategy allows the Board greater flexibility should new concerns arise. The Board reviewed the first draft of the exclusion area policy at its July 26, 2013, meeting and offered a few suggestions for improving the language. The staff has revised the draft policy which the Board will now consider.

Presentation by: Henry Jennings
Director

Action Needed: Revise/amend draft policy and adopt, if appropriate

- Jennings explained the changes that had been made based on the last discussion: when maps need to be submitted; changed endangered species to match what EPA does around endangered species. Staff was directed to come up with a minimum size for farms. At the hearings people were talking about some very small farms, e.g., a quarter-acre garlic farm. Should it be a monetary minimum or an acreage minimum? The purpose of the application is to save human lives; if a government entity conducts a spray program for mosquito control, there will be no reason to spray agricultural areas. Jennings wasn't sure it's the Board's role to decide if it's more important to ensure there are no residues that could affect the marketing of farm produce or human lives. He is uncomfortable

valuing the interests of a small agricultural enterprise over public health in an area where controlling mosquito vectors is very important. Jennings was also uncomfortable overriding the public health scientists on this issue. So it was written to exclude any mapped farm area unless a government entity decides it's more important to spray.

- Bohlen said he thinks it needs to be more explicit; the way it's written, the government entity can do whatever it wants. The current language doesn't provide sufficient protection for the groups the Board is worried about. The determination of whether to exclude farmland should be based on defensible criteria.
- Hicks noted that the label has wording about keeping out of water unless that's where the mosquitoes are growing and need to be controlled. She suggested using similar language.
- Bohlen said that it seems strange to be writing about reserving rights for government entities; it seems like odd wording. There is nothing about efficacy of program or environmental risks. The Board can delegate authority to government entities, but it needs to be based on something, some written rationale, some balancing, so a responsible official is being asked to make the call.
- Jennings pointed out that the federal CDC has spent a lot of time and effort studying this, and when disease pressure is high, they feel comfortable with the risk-benefit analysis.
- Bohlen asked what type of government entity would likely be doing the spraying. Jennings said that whoever does it will talk to the Maine CDC. In Vermont they sprayed a rural area, not to protect the few people who live in that area, but they were trying to break the amplification cycle in the bird and mosquito populations; if it can be nipped in the bud in a small area, there won't be a need to spray a much larger area.
- Stevenson noted that this is difficult because we don't know what the threshold is. Pest managers usually look at the economic threshold; in this case, because it involves human life, we don't know what the threshold is.
- Eckert asked if we are essentially saying that the CDC or Department of Agriculture will give advice and the town or county would make the decision. Jennings said that we would give advice on what and where to spray, once CDC makes the decision that spraying should occur. Eckert suggested that if the advice is joint, perhaps it should reference something like the CDC Arboviral (Mosquito-borne) Illness Surveillance, Prevention and Response Plan .
- Bohlen said that he is concerned that a town would be acting out of fear, not doing a balanced reasoning. Anxiety may prevail over science. He suggested changing the wording so they can ignore the exclusion zones if there's a serious risk, but not just to make spraying easier. Also change the wording "reserves right." Put in a standard that goes back to the Arboviral Plan.
- Dave Colson, MOFGA, suggested adding some wording about participation of landowners in control efforts. The State could work with farmers on what they can do to reduce mosquito populations voluntarily, and if they can prove they've done that, their property can be safely excluded.
- Hicks said that she is concerned about homeowners making decisions to use control products, because they use different products, higher rates, lower efficacy.
- Dave Colson noted that he was talking about farmers, not homeowners. His concern is about taking away exclusion areas.
- Hicks said that this was being considered only in the case of people dying. She is not arguing against all exclusion areas. If the State has maps handy, and if it's not going to affect efficacy, then excluding farmland should not be an issue.
- Colson said that if farmers can show they're doing everything they can to control mosquitoes, it will give the CDC confidence to exclude them.
- Bohlen said he liked communicating with landowners if it will help. He doesn't like using aerial spraying to break the disease cycle, but studies show that it reduces disease pressure. He asked how far the adult mosquitoes can fly. Fish replied that the Arboviral Plan is based on the species of mosquito and their ability to move and how far they move; that's all part of the planning. Bohlen suggested adding something about the government entity consulting with the CDC and the DACF to do the calculations to determine if the exclusions will reduce efficacy to an unacceptable level in a

particular hotspot. Is it mosquito habitat or is it a place that this particular species of mosquito is going to be at night during spraying?

- Jennings pointed out that every point that is excluded results in a 23-acre area not covered by aerial spraying, so it's not really just about farmland. Exclusions in high-risk areas have the potential to dramatically reduce efficacy.
- Hicks commented that the Vector-borne Work Group was formed in 1986; the plan has been developed and adjusted over the years. In a perfect world there would be adequate monitoring, but we do not have adequate monitoring.
- Morrill noted that if there are a lot of small plots of land excluded, other landowners are getting excluded, and not getting the benefits of the application. The result would be increased risk for many people because one person chose to exclude their property.
- Jennings said that this is unlikely to be a big issue; agricultural areas are not important areas to spray. But there is a potential for the Board to write a policy that prevents effective control.
- Jemison asked how much personal protection has been promoted. Jennings said that the CDC aggressively promotes it, and has since 1999. They recommend clothing that covers skin, use of repellents, and trying to get people to not be out at dusk.
- Kathy Murray said that the CDC might suggest ground spraying in certain circumstances of limited scope. It's easy to exclude properties via ground spraying, but the efficacy is lower.
- Dave Colson remarked that he appreciates the proactive approach. If the Board or CDC could work with farmers it could be a really good public relations campaign; farmers could talk in their communities about what they are doing. Eckert noted that most people that want to opt out are organic farmers and blueberry growers; she asked if there are things that organic farmers can be encouraged to do. For high-value crops, could they be grown in a greenhouse or under wraps? Colson said that he is seeing more and more farms, around the Portland area, doing small acreage; not what we think of as conventional farms, they are small plots. The Board should keep this in mind when talking about exclusion areas.
- Hicks noted that using IPM will make the probability of having to act on this plan less likely. This is for an emergency, not for routine circumstances. If all the practical IPM steps are implemented in an entire town, and you still have someone die, then it may be important to spray. Spraying is part of a continuum. Towns may do all they can, but if you get to a crisis, things change.
- Bohlen replied that he is not entirely comfortable with that logic, because of the repeated spraying in Massachusetts; it's a crisis, but when it's a crisis year after year, then there needs to be a change in planning. IPM on farms, dumping flower pots, won't help with EEE because it's amplified by forest mosquitoes.
- Dave Bell noted that the lack of adequate monitoring had been mentioned several times; is the report to the Legislature the place to advocate for enough resources for monitoring? Jennings replied that if the Board develops consensus that monitoring is necessary, a letter could be sent to the ACF Committee. It would also be included in the plan and report.
- Jennings reworked the wording on the policy to include suggested changes and distributed it to the Board.
 - **Eckert/Stevenson: Moved and seconded to adopt policy as amended**
 - **In favor: Unanimous**

5. Review of the 2012 Complaints/Inquiries Summary

In 2007, the Stakeholders Committee on Drift recommended that the Board produce and review an annual summary of complaints received by the Board's office. Summaries from 2008 and 2009 led to Board recommendations for improving the report. The Board will now review the 2012 summary.

Presentation By: Raymond Connors
 Manager of Compliance

Action Needed: None—informational only

- Connors explained that this is a summary of the types and natures of complaints; it doesn't reflect all the queries received by the staff, only those coming through the complaints office. It is a fairly accurate reflection of complaints; lawn and turf holding steady over five years; agricultural complaints down significantly, average 21 per year over five years, last year was a total of five. There were a couple of mold cases, which seems to be a category that is up and coming. Landlord/tenant cases were significant because it reflects the bedbugs issue; there is an economic incentive for landowners to do applications themselves or have employees do them.
- Morrill asked why there are three cases from 2012 still pending. Connors said that low gravity allegations fall to the bottom. Eckert asked if they were pending because the consent agreement hadn't been agreed to or they hadn't been sent yet; Connors said they haven't been sent yet.
- Bohlen commented that a lot of them are essentially licensing issues; a lot of violations because most people don't know the rules. He asked how a general complaint is classified. Connors said he tries to classify based on what the caller's primary concern was.
- Eckert noted that the licensing issue has always been with us. She asked if there are ways to get the word out, especially to landlords, so they understand the rules. There seem to be more complaints about notification/registry; despite a small registry, there are more complaints, so maybe more people are aware.
- Hicks noted that if people call for technical information, it's not included in this table.

6. Consideration of a Consent Agreement with Northeast Patients Group of Augusta

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 use of pesticides on medical marijuana inconsistent with the label.

Presentation By: Raymond Connors
Manager of Compliance

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

Present: Dan Walker, Preti Flaherty, and Patricia Rossi, Northeast Patients Group

- Connors gave an overview of the consent agreement. He explained that the company grows medical marijuana, and at the time of the inspection had four dispensaries and two cultivation sites. The BPC received a call and did a joint inspection with the Maine Department of Health and Human Services (DHHS) on March 14, 2013, at the Auburn cultivation site. The DHHS licenses medical marijuana production. At that inspection, it was confirmed that pesticides were being used; seven pesticides were found in inventory and five were confirmed as having been used. An inspection was done at the Thomaston site, where a similar set of pesticides were being used, as well as two additional pesticides. There are no federally registered pesticides that list marijuana as an allowable site, so the use was inconsistent with the label. Additionally, two of the products are not registered in Maine. The company submitted a plan of corrective actions taken; a copy was included in the Board meeting packet. They are no longer using pesticides. The consent agreement is for \$18,000, payable in three installments; two payments have been received.
- Jemison asked whether the employee hired to do the applications should have had a commercial license. Connors replied that a license would not be required in this setting unless they were using restricted products.

- Eckert asked if the products used were 25(b) products; Hicks said that they were, but that the DHHS law says that no pesticides may be used, period.
- Granger asked how the figure of \$18,000 was reached, and commented that it seemed excessive for somebody using a pesticide when nothing is registered and available for them to use. Wouldn't starting with a warning rather than a high fine be appropriate? Connors said things taken into consideration included the fact that the DHHS allows no pesticide use; some of the products were unregistered and none of the products are labeled for use on marijuana. The primary issue was the potential harm, as the product is used for medical purposes, and the patients may already be vulnerable to adverse effects. Granger said it seems that if the DHHS policy is violated, they should assess a fine, not BPC. Connors said the citation was based on Board regulations about the potential health effects, but the DHHS regulations were part of the discussions.
- Jennings noted that the statute lists a series of things to look at in arriving at a fine. In this case it involved a medicine for people who are sick. Also, the penalty needs to be high enough to deter future violations. He felt it was important to send a message because it is a fairly large industry with lots of customers across the state. Inhaling combustion byproducts from pesticides is different than eating something with pesticides on it. We don't know what combustion does to these compounds, but incomplete combustion often yields polycyclic compounds.
- Connors remarked that they also took into account the frequency and duration of use; it wasn't a one-time event. Granger said that there wasn't a protocol for people to follow to control pests on marijuana. Connors replied that one thing that came out of this was an effort to try to find products that could be used to control pests on marijuana.
- Eckert asked if the DHHS has a separate complaint. Jennings replied that they did have a consent agreement, but they have no statutory authority to apply a penalty.
- Hicks noted that there are a number of products labeled for use on tobacco which is smoked; she said there are discussions going on at the national level. Morrill asked if the products being used were labeled for use on tobacco; Hicks said most of them were, but noted that there are no tolerances like there are on food. Morrill asked whether the company knew what they were doing was not legal. Jennings replied that is clear in the DHHS law; it might have been unclear to them that these 25(b) products are pesticides.
- Morrill said that the wording of the enforcement policy indicates that a case like this may have more appropriately been presented to the Board first. He suggested that some outreach be done to other companies
- Eckert asked what the status of the related legislation is. Dan Walker, Preti Flaherty, replied that it had passed. He said his firm worked closely with Tom Saviello and Henry Jennings and the ACF Committee, were able to get an almost unanimous vote, and it was signed by the Governor. The law goes into effect the beginning of October 2013 and allows for certain 25(b) products to be legally used. Tomlinson said a flowchart was created for dispensaries to use to determine if a product would not be prohibited. Fish pointed out that they will also be required to have a licensed applicator and to train employees in the Worker Protection Standard.
- Jemison asked if there was an effort to develop IPM strategies. Patricia Rossi answered that they have instituted a lot of improvements; bio-controls, sanitation; all employees wearing scrubs, protective gear. They have been working with MOFGA and Backyard Farms. They are currently not using any pesticides.

○ **Eckert/Morrill: Moved and seconded to accept consent agreement as written**

- Stevenson said that he is confident in the logic used in coming up with a fine, but that it seems a bit high in this case. There were no resources available, it wasn't intentional unlike a lawn care company deliberately defrauding people. A lesser fine in this case would have been a catalyst for the same changes. Granger said he would like to lower the amount of the fine. Stevenson said he would be comfortable with reducing the fine. Eckert said that she would argue to leave the fine as is; a

reduction from \$18,000 to \$12,000 is probably not a big deal for this company; the publicity they already received was worse for them than the fine. Morrill said that he would agree with the proposed penalty; the consent agreement on the table is fair, given the violations that occurred and the threat to public health. With these egregious violations, the Board should hear them before they get to this point. Given the wording of the enforcement protocol, the Board should have heard it before. Bohlen noted that the staff effectively had no guidance because we've never seen anything like this before; it was a tough spot for everybody.

- **In favor: Eckert, Jemison, Bohlen, Morrill**
- **Opposed: Granger, Stevenson**

7. Annual Planning Session

Periodically, the Board holds informal planning sessions with the entire staff to discuss concerns, trends, issues and priorities. The Board has developed a list of topics it wishes to discuss and it will review them as time allows.

- Planning Session notes available separately

8. Other Old or New Business

- a. Variances for RLC Services, LLC—H. Jennings
- b. Variance for MDOT for Wetland Mitigation—H. Jennings
- c. Variance for Aroostook Arboriculture, Inc.—H. Jennings
- d. Letter from Susan Moyer and Karen D'Antonio—H. Jennings
 - Eckert asked if Plum Creek was spraying their own land, so the only issue would be if there was drift; Jennings said they were doing a conifer release on their own land, and there is little likelihood for drift given the large droplet size used, but anytime there is aerial spraying, people get concerned.
- f. Other?

9. Schedule of Future Meetings

October 18 and December 13, 2013; January 15 or 17, February 21, and March 28, 2014, are tentative Board meeting dates. The Board will decide whether to change and/or add dates.

Adjustments and/or Additional Dates?

- The Board discussed the timing of the Agricultural Trades Show, but did not add or change any meeting dates.

10. Adjourn

- **Eckert/Stevenson: Moved and seconded to adjourn at 10:35 AM**
- **In favor: Unanimous**