STATE OF MAINE
DEPARTMENT OF AGRICULTURE, CONSERVATION & FORESTRY
BOARD OF PESTICIDES CONTROL
28 STATE HOUSE STATION
AUGUSTA, MAINE 04333

JANET T. MILLS
GOVERNOR

AMANDA E. BEAL
COMMISSIONER

Memorandum

To: Board of Pesticides Control
From: Alex Peacock, Manager of Compliance
Subject: Maine Board of Pesticides Control Enforcement Protocol Overview

February 23, 2024

Background:

At the Board of Pesticides Control (BPC)'s most recent meeting on February 9, 2024, the question was raised about the Board's ability to suspend and revoke licenses.

Pursuant to M.R.S. 22, ch. 258-A §1471-D (7) & (8), the Board has the ability to temporarily suspend licensure or certification through the provision of a public hearing. The Board also has the ability to seek revocation of licensure or certification through District Court with the cooperation of the Office of the Attorney General (OAG).

History:

In 1979, two major incidents occurred during aerial applications of pesticides that led to license revocation.

In June of 1979, a fixed-wing aircraft carrying 800 gallons of Sevin-4 Carbaryl Insecticide for spruce budworm control experienced a fire in the cockpit and the pilot downed the plane in Eagle Lake, a large water body in Aroostook County. Approximately 100 gallons of the insecticide was discharged into Eagle Lake. Unfortunately, information on the penalties for this case have not been located. License revocation is believed to have been part of the penalty. (see attached historical news articles)

Also in June of 1979, an aerial forestry herbicide application conducted by helicopter resulted in significant drift. The BPC and OAG sought applicator license revocation of the helicopter pilot

and financial penalties against Northeast Helicopter Services, Inc. and St. Regis Paper Company. These penalties were challenged in District Court and a stay was granted by the Court pending the outcome of civil litigation brought against Northeast Helicopter Services, Inc. and St. Regis Paper Company by several landowners affected by the spray drift. The State of Maine appealed this decision to Superior Court which upheld the District Court decision. The Superior Court decision was then appealed to the Maine Supreme Court. Maine Supreme Court found that the District Court should not have granted a stay and vacated the decision by the Superior, reinstating the original penalties. The penalties were ultimately upheld after extensive court proceedings that were finally ratified by Maine Superior Court in 1982. (see attached news article and court decisions)

In October of 1995, The Board voted to suspend the general use pesticide dealers license for seven Marden's retail stores for repeated violations of torn pesticide bags and defaced pesticide labels. Following the adjudicatory hearing process in April of 1996, the Board directed staff to craft a consent agreement to resolve the violations.

3b

ADOPTED 9/19/84
AMENDED 9/7/90
AMENDED 6/3/98
AMENDED 12/13/13

Maine Board of Pesticides Control Enforcement Protocol

The Board adopts the following enforcement protocol to be utilized in routine enforcement matters arising under the Board's statutes and regulations.[1]

1. Persons wishing to report potential violations should refer such matters, as soon and in as much detail as possible, to the Board's staff. Where such reports are submitted by telephone, the Board requests that confirmation be made in writing. As a general rule, where requested by the individual making the report, the Board shall keep the identity of that person confidential, except as the Attorney General may advise in a particular case that such information is subject to public disclosure under the Maine Freedom of Access Law.

2. As soon as practicable after receipt of a report of a potential violation, the Board's staff shall investigate. The precise method and extent of investigation shall be at the discretion of the staff, considering the potential severity of the violation and its consequences, the potential the violation may have for damage to the environment or human health, and other matters which may place demands upon staff resources at the time.

3. Following staff investigation, if the staff determines that a violation has occurred of sufficient consequence to warrant further action, the Board's staff may proceed as follows:

   a. In matters not involving substantial threats to the environment or public health , the Board's staff may discuss terms of resolution with the Attorney General's office and then with the violator without first reporting the matter to the Board. This procedure may only be used in cases in which there is no dispute of material facts or law, and the violator freely admits the violation(s) of law and acknowledges a willingness to pay a fine and resolve the matter. The terms of any negotiated proposed resolution shall be subject to the Board's subsequent review and approval, as provided in section 6b.

   b. In matters involving substantial threats to the environment or the public health or other extraordinary circumstances, or in which there is dispute over the material facts or law, the Board's staff shall bring the matter to the attention of the Board. The staff shall prepare a written report summarizing the details of the matter. Copies of the report shall be mailed to the alleged violator and any complainants so they may make comments. The report and any comments will then be distributed to the Board prior to their next available meeting. The staff will also notify the alleged violator and other involved parties about the date and location of the meeting at which the alleged violation will be considered by the Board.

4. At the Board meeting, the Board shall hear from its staff and, if requested, from the alleged violator(s) and/or their attorneys, as well as from other interested members of the public, to the extent reasonable under the circumstances and in a manner which the Board's chairman shall direct. Ordinarily, such a meeting will not be conducted as a formal adjudicatory hearing. Before making a decision regarding any action(s) which it may wish to take in response to an alleged violation, the Board may choose to go into executive session to discuss with its counsel the various enforcement options available to it and other related matters which are not subject to public disclosure under the Freedom of Access Law. However, all Board decisions shall be made on the public record and not in executive session.

[1] In emergency or other unusual situations, the Board and/or its staff may depart from this protocol, in a manner consistent with State law, when necessary to the handling of particular enforcement actions.

5. Following receipt of the staff report and other information presented to it and completion of whatever further inquiry or deliberations the Board may wish to undertake, the Board shall make a decision regarding which course(s) of action, as described in Section 6, it deems appropriate in response to the alleged violation. Any such decision will ordinarily be based upon the Board's judgment as to whether a violation of its statutes or regulations appears to have occurred which is of sufficient consequence to warrant an enforcement action, but shall not require that the Board be satisfied to a legal certainty that the alleged violator is guilty of a particularly defined violation. In disputed matters, the ultimate decision as to whether a violation is factually and legally proven rests with the courts.

6. If the Board makes the determination that a violation appears to have occurred which warrants an enforcement action, the Board may choose among one or more of the following courses of action:

   a. In matters involving substantial violations of law and/or matters resulting in substantial environmental degradation, the Board may refer the matter directly to the Attorney General for the initiation of enforcement proceedings deemed appropriate by the Attorney General. Also, with regard to more routine violations with respect to which the Board finds sufficient legal and/or factual dispute so that it is unlikely that an amicable administrative resolution can be reached, the Board may choose to refer the matter directly to the Attorney General.

   b. On matters warranting enforcement action of a relatively routine nature, the Board may authorize and direct its staff to enter into negotiations with the alleged violator(s) with a view to arriving at an administrative consent agreement containing terms (including admissions, fines and/or other remedial actions) which are satisfactory to the Board, to the Attorney General and to the alleged violator(s). The Board will not ordinarily determine in the first instance the precise terms which should be required for settlement but may indicate to the staff its perception of the relative severity of the violation. In formulating a settlement proposal, the staff shall take into consideration all of the surrounding circumstances, including the relative severity of the violation, the violations record and other relevant history of the alleged violator(s), corrective actions volunteered by the alleged violator(s) and the potential impact upon the environment of the violation. The staff shall consult with the Attorney General's office before proposing terms of settlement to the alleged violator(s). Following successful negotiation of an administrative consent agreement with the alleged violator(s), the staff shall report back to the Board the terms of such agreement for the Board's review and, if it concurs, ratification. All administrative consent agreements shall become final only with the Board's and the Attorney General's approval.

   c. In the event that an administrative consent agreement cannot be arrived at as provided in paragraph b., the staff shall report the matter back to the Board for further action by it. Such action may include referral to the Attorney General for appropriate action.

   d. In addition, in appropriate cases, the Board may act to suspend the license of a certified applicator as provided in its statute, may act to refuse to renew the license of a certified applicator and/or may request that the Attorney General initiate proceedings in the Administrative Court to revoke or suspend the license of any such applicator. Where provided for by its statute, the Board shall give the licensee involved the opportunity for a hearing before the Board in connection with decisions by it to refuse to renew a license or to suspend such license.

7. Whereas the Board is establishing this protocol in order to clarify and facilitate its proceedings for the handling by it and its staff of enforcement matters, the Board recognizes that the Attorney General, as chief law enforcement officer of the State, may independently initiate or pursue enforcement matters as he deems in the best interests of the State and appropriate under the circumstances.

M.R.S. 22, ch. 258-A §1471-D. Certification and licenses

7. Suspension.

A. If the board determines that there may be grounds for revocation of a license or certificate, it may temporarily suspend said license or certificate pending inquiry and opportunity for hearing, provided that such suspension shall not extend for a period longer than 45 days. [PL 1975, c. 397, §2 (NEW).]

B. The board shall notify the licensee or certificate holder of the temporary suspension, indicating the basis therefor and informing the licensee or certificate holder of the right to request a public hearing. [PL 1983, c. 819, Pt. A, §47 (AMD).]

C. If the licensee or certificate holder fails to request a hearing within 20 days of the date of suspension, such right shall be deemed waived. If the licensee or certificate holder requests such a hearing, notice shall be given at least 20 days prior to the hearing to the licensee or certificate holder and to appropriate federal and state agencies. In addition, public notice shall be given by publication in a newspaper of general circulation in the State and such other publications as the board deems appropriate. [PL 1983, c. 819, Pt. A, §48 (AMD).]

D. This subsection is not governed by the provisions of Title 4, chapter 5 or Title 5, chapter 375. [PL 1999, c. 547, Pt. B, §39 (AMD); PL 1999, c. 547, Pt. B, §80 (AFF).]

8. Revocation. The District Court may suspend or revoke the certification or license of a licensee or certificate holder upon a finding that the applicant:

A. Is no longer qualified; [PL 1975, c. 397, §2 (NEW).]

B. Has engaged in fraudulent business practices in the application or distribution of pesticides; [PL 1975, c. 397, §2 (NEW).]

C. Used or supervised the use of pesticides applied in a careless, negligent or faulty manner or in a manner which is potentially harmful to the public health, safety or welfare or the environment; [PL 1975, c. 397, §2 (NEW).]

D. Has stored, transported or otherwise distributed pesticides in a careless, faulty or negligent manner or in a manner which is potentially harmful to the environment or to the public health, safety or welfare; [PL 1975, c. 397, §2 (NEW).]

E. Has violated the provisions of this chapter or the rules and regulations issued hereunder; [PL 1975, c. 397, §2 (NEW).]

F. Has made a pesticide recommendation, use or application, or has supervised such use or application, inconsistent with the labelling or other restrictions imposed by the board; [PL 1975, c. 397, §2 (NEW).]

G. Has made false or fraudulent records or reports required by the board under this chapter or under regulations pursuant thereto; [PL 1981, c. 470, Pt. A, §67 (AMD).]

H. Has been subject to a criminal conviction under section 14 (b) of the amended FIFRA or a final order imposing a civil penalty under section 14 (a) of the amended FIFRA; or [PL 1981, c. 470, Pt. A, §67 (AMD).]

I. Has had the license or certificate, which supplied the basis for the Maine license or certification pursuant to subsection 10, revoked or suspended by the appropriate federal or other state government authority. [PL 1977, c. 694, §341 (NEW).]

M.R.S. 7 §606. Prohibited acts

1. Unlawful distribution. A person may not distribute in the State any of the following:

A. A pesticide that has not been registered pursuant to the provisions of this subchapter; [PL 2005, c. 620, §5 (AMD).]

B. A pesticide if any of the claims made for it or any of the directions for its use or other labeling differs from the representations made in connection with its registration, or if the composition of a pesticide differs from its composition as represented in connection with its registration; a change in the labeling or formulation of a pesticide may be made within a registration period without requiring reregistration of the product if the registration is amended to reflect that change and if that change will not violate any provision of FIFRA or this subchapter; [PL 2005, c. 620, §5 (AMD).]

C. A pesticide unless it is in the registrant's or the manufacturer's unbroken immediate container and there is affixed to the container, and to the outside container or wrapper of the retail package, if there is one, through which the required information on the immediate container cannot be clearly read, a label bearing the information required in this subchapter and rules adopted under this subchapter; [PL 2005, c. 620, §5 (AMD).]

D. A pesticide that has not been colored or discolored pursuant to section 610, subsection 1, paragraph D; [PL 2005, c. 620, §5 (AMD).]

E. A pesticide that is adulterated or misbranded or any device that is misbranded; [PL 2021, c. 105, §1 (AMD).]

F. A pesticide in containers that are unsafe due to damage; [PL 2021, c. 673, §4 (AMD).]

G. Beginning January 1, 2022, a pesticide containing chlorpyrifos as an active ingredient; [PL 2021, c. 673, §4 (AMD).]

H. A pesticide that has been contaminated by perfluoroalkyl and polyfluoroalkyl substances; or [PL 2021, c. 673, §4 (NEW).]

I. Beginning January 1, 2030, a pesticide that contains intentionally added PFAS that may not be sold or distributed pursuant to Title 38, section 1614, subsection 5, paragraph D. [PL 2021, c. 673, §4 (NEW).]

2. Unlawful alteration, misuse, divulging of formulas, transportation, disposal and noncompliance. A person may not:

A. Detach, alter, deface or destroy, wholly or in part, any label or labeling provided for in this subchapter or rules adopted under this subchapter; [PL 2005, c. 620, §5 (AMD).]

A-1. Add any substance to or take any substance from a pesticide in a manner that may defeat the purpose of this subchapter or rules adopted under this subchapter; [PL 2005, c. 620, §5 (NEW).]

B. Use or cause to be used any pesticide in a manner inconsistent with its labeling or with rules of the board, if those rules further restrict the uses provided on the labeling; [PL 2005, c. 620, §5 (AMD).]

C. Use for that person's own advantage or reveal, other than to the board or proper officials or employees of the state or federal executive agencies, to the courts of this State or of the United States in response to a subpoena, to physicians, or in emergencies to pharmacists and other qualified persons for use in the preparation of antidotes, any information relative to formulas of products acquired by authority of section 607 or any information judged by the board to contain or relate to trade secrets or commercial or financial information obtained by authority of this subchapter and marked as privileged or confidential by the registrant; [PL 2005, c. 620, §5 (AMD).]

D. Handle, transport, store, display or distribute pesticides in such a manner as to endanger human beings or their environment or to endanger food, feed or any other products that may be transported, stored, displayed or distributed with such pesticides; [PL 2005, c. 620, §5 (AMD).]

E. Dispose of, discard or store any pesticides or pesticide containers in such a manner as may cause injury to humans, vegetation, crops, livestock, wildlife or beneficial insects or pollute any water supply or waterway; [PL 2005, c. 620, §5 (AMD).]

F. Refuse or otherwise fail to comply with the provisions of this subchapter, the rules adopted under this subchapter or any lawful order of the board; [PL 2021, c. 673, §5 (AMD).]

G. Apply pesticides in a manner inconsistent with rules for pesticide application adopted by the board; or [PL 2021, c. 673, §5 (AMD).]

H. Use or cause to be used any pesticide container inconsistent with rules for pesticide containers adopted by the board. [PL 2021, c. 673, §5 (NEW).]

3. Unlawful use. A person may not apply glyphosate or dicamba within 75 feet of school grounds. This subsection does not apply to residential property or land used for commercial farming.

For purposes of this subsection, unless the context otherwise indicates, the following terms have the following meanings:

A. "Commercial farming" has the same meaning as in section 52, subsection 3; [PL 2021, c. 197, §1 (NEW).]

B. "Residential property" means real property located in this State that is used for residential dwelling purposes; [PL 2021, c. 197, §1 (NEW).]

C. "School" means any public, private or tribally funded elementary school as defined in Title 20-A, section 1, subsection 10, secondary school as defined in Title 20-A, section 1, subsection 32 or a nursery school that is part of an elementary or secondary school; and [PL 2021, c. 197, §1 (NEW).]

D. "School grounds" means:

(1) Land associated with a school building including playgrounds and athletic fields used by students or staff of a school. "School grounds" does not include land used for a school farm; and

(2) Any other outdoor area used by students or staff including property owned by a municipality or a private entity that is regularly used for school activities by students and staff but not including land used primarily for nonschool activities, such as golf courses, farms and museums. [PL 2021, c. 197, §1 (NEW).]

Title 7 §616-A. Penalties

1. Informal hearing. When the staff of the board proposes that the board take action on a possible violation, the board shall notify the alleged violator before discussing the alleged violation. The alleged violator may choose to address the board and may also choose to be represented by legal counsel. This requirement does not constitute and is not subject to the same procedures as an adjudicatory hearing under the Maine Administrative Procedure Act.

[PL 2005, c. 620, §16 (AMD).]

2. Civil violations. The following violations are civil violations.

A. A person may not violate this subchapter or a rule adopted pursuant to this subchapter or Title 22, chapter 258-A or a rule adopted pursuant to Title 22, chapter 258-A. Except as provided in paragraph B, the following penalties apply to violations of this paragraph.

(1) A person who violates this paragraph commits a civil violation for which a fine of not more than $1,500 may be adjudged.

(2) A person who violates this paragraph after having previously violated this paragraph within the previous 4-year period commits a civil violation for which a fine of not more than $4,000 may be adjudged. [PL 2003, c. 452, Pt. B, §6 (RPR); PL 2003, c. 452, Pt. X, §2 (AFF).]

B. A private applicator, as defined in Title 22, section 1471-C, may not violate a rule regarding records maintained pursuant to section 606, subsection 2, paragraph G. The following penalties apply to violations of this paragraph.

(1) A person who violates this paragraph commits a civil violation for which a fine of not more than $500 may be adjudged.

(2) A person who violates this paragraph after having previously violated this paragraph within the previous 4-year period commits a civil violation for which a fine of not more than $1,000 may be adjudged. [PL 2011, c. 510, §1 (AMD).]

[PL 2011, c. 510, §1 (AMD).]

2-A. Criminal violation. A person may not intentionally or knowingly violate this subchapter or Title 22, chapter 258-A, a rule adopted under this subchapter or Title 22, chapter 258-A or a restriction of a registration issued pursuant to this subchapter. A person who violates this subsection commits a Class E crime. Notwithstanding Title 17-A, section 1604, subsection 1 and sections 1704 and 1705, the court may impose a sentencing alternative of a fine of not more than $7,500 or a term of imprisonment of not more than 30 days, or both, for each violation. Prosecution under this subsection is by summons and not by warrant. A prosecution under this subsection is separate from an action brought pursuant to subsection 2.

[PL 2019, c. 113, Pt. C, §1 (AMD).]

3. Continuation. Each day that the violation continues is considered a separate offense.

[PL 1989, c. 841, §3 (NEW).]

4. Exceptions.

[PL 2003, c. 452, Pt. B, §8 (RP); PL 2003, c. 452, Pt. X, §2 (AFF).]

5. Criminal violations.

[PL 2003, c. 452, Pt. B, §8 (RP); PL 2003, c. 452, Pt. X, §2 (AFF).]

6. Other relief. Notwithstanding Title 22, section 1471-D, subsections 6 to 8 and in addition to other sanctions provided under this section, the court may order that a violator obtain recertification credits through board-approved meetings or courses as a condition of retaining, maintaining or renewing a certification or license required under Title 22, chapter 258-A.

[PL 1989, c. 841, §3 (NEW).]

7. Considerations. In setting a penalty under this section, the court shall consider, without limitation:

A. Prior violations by the same party; [PL 1989, c. 841, §3 (NEW).]

B. The degree of harm to the public and the environment; [PL 1989, c. 841, §3 (NEW).]

C. The degree of environmental damage that has not been abated or corrected; [PL 1989, c. 841, §3 (NEW).]

D. The extent to which the violation continued following the board's notice to the violator; [PL 1989, c. 841, §3 (NEW).]

E. The importance of deterring the same person or others from future violations; and [PL 1989, c. 841, §3 (NEW).]

F. The cause and circumstances of the violation, including:

(1) The foreseeability of the violation;

(2) The standard of care exercised by the violator; and

(3) Whether or not the violator reported the incident to the board. [PL 1989, c. 841, §3 (NEW).]

[PL 1989, c. 841, §3 (NEW).]

8. Injunction. The board may bring an action to enjoin the violation or threatened violation of any provision of this subchapter or any rule made pursuant to this subchapter in a court of competent jurisdiction of the district in which the violation occurs or is about to occur.

[PL 1989, c. 841, §3 (NEW).]

9. No damages from administrative action if probable cause exists. A court may not allow the recovery of damages from administrative action taken, or for a stop sale, use or removal order, if the court finds that there was probable cause for the administrative action.

[PL 1989, c. 841, §3 (NEW).]

10. Sunset.

[PL 1991, c. 829, §1 (RP).]

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Maine Memory Network

https://www.mainememory.net/record/5629

Pesticide clean up in Eagle Lake, 1979

Contributed by Maine Historical Society

Item 5629

Description

In June of 1979 this aircraft crashed into Eagle Lake. Members of Maine's Department of Conservation and Environmental Protection are hooking up a hose to off-load some 700 gallons of Sevin-4 into 55 gallon drums onshore.

Though the pilots of the plane were uninjured, close to 100 gallons of the pesticide was released into Eagle Lake in the accident. The plane was involved in Spruce budworm spraying.

The United Press International caption attached to the photo identified the plane as a C-47. However, it probably is a DC-4/C-54.

About This Item

Title: Pesticide clean up in Eagle Lake, 1979
Creator: United Press International
Creation Date: 1979
Subject Date: 1979
Location: Eagle Lake, Piscataquis County, ME
Media: Photographic print
Dimensions: 20 cm x 26 cm
Local Code: Coll. 1880, Box 1/4
Collection: United Press International collection
Object Type: Image

Cross Reference Searches

Standardized Subject Headings

Aircraft accidents--Maine--Eagle Lake--Photographs
Airplanes
Conservation of natural resources--accidents--Maine--Eagle Lake
Flight
Maine Dept. of Conservation and Environmental Protection--Photographs
Pest control--Maine
Spruce budworm--Maine

Other Keywords

Planes
Transportation

For more information about this item, contact:

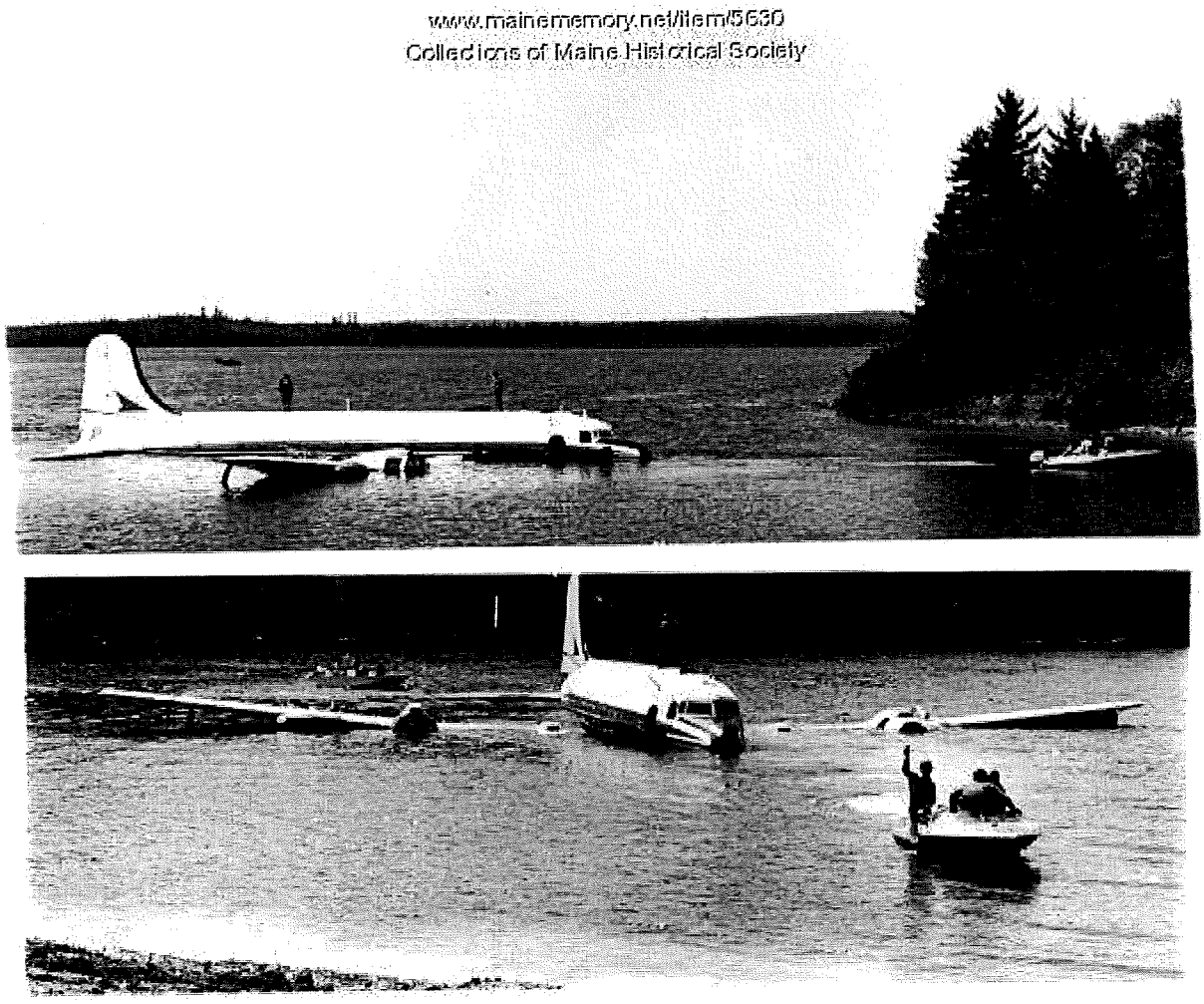
Maine Historical Society
485 Congress Street, Portland, ME 04101
(207) 774-1822 x230
Website (http://www.mainehistory.org)

Maine Memory Network

https://www.mainememory.net/record/5630

Plane rescue, Eagle Lake, 1979

Contributed by Maine Historical Society



Item 5630

Description

This aircraft made an emergency landing into Eagle Lake in northern Maine in June 1979. A cockpit fire forced the plane down. It was carrying 800 gallons of pesticide. The crew members were uninjured.

In 1979 Maine's forests were beset by an outbreak of spruce budworm which infected the spruce trees and made them unusable to the timber industry. This plane was spraying the forests with the pesticide Sevin-4. Close to 100 gallons of pesticide drained into the lake, but the remaining liquid was siphoned off.

The United Press International caption attached to the photo identified the plane as a C-47. However, it probably is a DC-4/C-54.

About This Item

Title: Plane rescue, Eagle Lake, 1979
Creation Date: 1979
Subject Date: 1979
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Media: Photographic print
Dimensions: 20 cm x 26 cm
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Flight
Pesticides--Maine
Spruce budworm--Maine

Other Keywords

Nature, geography & animals
Planes
Transportation

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The New York Times https://www.nytimes.com/1979/09/16/archives/paper-concern-to-pay-damages-to-gardeners-because-of-herbicides.html

Paper Concern to Pay Damages to Gardeners Because of Herbicides

Sept. 16, 1979

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AUGUSTA, Me., Sept. 15 (AP) — The St. Regis Paper Company will pay damages to 164 eastern Maine residents whose vegetable gardens may have been contaminated by drifting herbicides this summer. a comnanv official says.

The St. Regis executive, John Gould, refused to divulge the total payment, saying it was "a personal matter." But claims adjuster named by Gov. Joseph E. Brennan and the paper company indicated that the sum involved was about $90,000.

The corporation is not admitting liabil- ity for the gardens, Mr. Gould told reporters at a Statehouse news conference this week. "We are being sensitive to the facts," he said. "It may well turn out that there was no reason for concern."

The herbicide *was* sprayed to defoliate broad-leafed plants that compete with the conifers used in paper, Maine's Pesticides Control Board, in a crackdown on allegedly sloppy spraying, has lifted the pesticides license belonging to the helicopter pilot who sprayed for St. Regis that day. The board is also seeking fines against St. Regis and the helicopter company that did the spraying.

St. Regis based its awards on a survey last month by the claims adjuster, Franklin Eggert, a University of Maine plant specialist. Since Aug. 10, Dr. Eggert has been assessing damages to 164 gardens in Washington County, where defoliants were sprayed by St. Regis.

Soon after the forest was sprayed, residents in Dennysville complained that their garden products were turning brown and wilting. The state warned residents not to' eat their home-grown vegetables.

Dr. Eggert said that he had personally examined the 164 gardens. He valued about half at less than $500, saying the most frequent individual assessment was from $250 to $300. One commercial garden was valued at considerably more than that, but Dr. Eggert declined to disclose the amount.

Dr. Eggert said he could not determine whether the herbicides that poisoned the gardens had actually drifted from the St. Regis forest. But he said that the "effects on the gardens were that of a growth regulator," of the type sprayed by St. Regis.

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 2644
Law Docket No. Was-80-11

STATE OF MAINE

v.

ST. REGIS PAPER COMPANY

and

NORTHEAST HELICOPTER SERVICES, INC.

Argued March 16, 1981
Decided July 15, 1981

Before GODFREY, NICHOLS, GLASSMAN,* and CARTER, JJ., and DUFRESNE, A.R.J.

CARTER, J.

The State appeals from two Superior Court Orders (consolidated by order of the Law Court) dismissing appeals from two District Court Orders which granted the defendants' Motions For Stays of Further Proceedings. The merits of the District Court's decision to order those stays are not before us. The only issue here presented is whether the State's appeals to the Superior Court were premature and therefore properly dismissed pursuant to the final judgment rule. See Breau v. Breau, Me., 418 A.2d 193, 195 (1980); Casco Bank & Trust Co. v. Emery, Me., 416 A.2d 261, 262-63 (1980).

In June 1979, the defendants, St. Regis Paper Company ("St. Regis") and Northeast Helicopter Services, Inc. ("Northeast"), conducted an aerial herbicide spraying operation in the Edmonds area. In September of the same year, ten private landowners filed a civil suit in the Superior Court (Washington County)

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* Glassman, J., sat at oral argument and participated in the initial conference but died before the opinion was adopted.

seeking a recovery from St. Regis and Northeast of one hundred million dollars in actual and punitive damages claimed to have arisen from the spraying operation. That case, Pottle v. St. Regis Paper Company and Northeast Helicopter Services, Inc., remains pending in the Superior Court.

In January of 1980, the State of Maine, acting by and through the Attorney General, commenced civil actions against St. Regis and Northeast in the District Court at Machias for violations of the pesticide laws in connection with the same spraying operation. In those proceedings, the State seeks civil penalties of $7,000 against St. Regis for violations of 22 M.R.S.A. §§ 1471-D(8), 1471-J and 7 M.R.S.A. §§ 606, 616, plus civil penalties of $2,500 against Northeast for violations of 7 M.R.S.A. §§ 606, 616.

In April of 1980, both defendants moved in the District Court to stay the District Court proceedings pending ultimate resolution of the Pottle suit in the Superior Court. The motions were supported by affidavits from each defendant's attorney stating that simultaneous defense of both suits would require extensive duplication of discovery and other pretrial effort. In May 1980, the District Court, reciting that good cause had been shown, ordered in each action "that all proceedings ... be stayed pending final resolution" of the Pottle case.

The State appealed to the Superior Court pursuant to M.D.C.Civ.R 73. The Superior Court justice granted the defendants' motions to dismiss the appeals stating:

> This case does not come within the exception to the final Judgment rule which allows appeals from collateral order [sic] interlocutory in nature. ... This Court finds that no great or irreparable loss may result to the plaintiff if determination of the issues raised by the pleadings is postponed by Order to Stay.

The State appealed from these Orders to this Court. The parties agree that the Stay Orders entered in the District Court were Interlocutory Orders which are only appealable if within an exception to the Final Judgment Rule. We hold that the Stay Orders are within the exception to the Final Judgment Rule recognized in Bar Harbor Banking and Trust Co. v. Alexander, Me., 411 A.2d 74 (1980), which is based upon the "separation of powers" doctrine. We therefore vacate the judgments and remand to the Superior Court for further proceedings.

We have recently reaffirmed our long-standing rule that the Superior Court should not entertain an appeal from the District Court unless there is a final judgment. See Breau v. Breau, Me., 418 A.2d 193, 195 (1980); Casco Bank & Trust Co. v. Emery, Me., 416 A.2d 261, 262-63 (1980). We have, however, recognized certain exceptions to the "final judgment" rule. See generally, 2 R. Field, V. McKusick, and L. Wroth, Maine Civil Practice, §§ 73.2-73.5 (2d ed. 1970). One exception, first articulated in Bar Harbor Banking and Trust Company v. Alexander, is based upon our recognition of the constraints placed upon judicial action in certain circumstances by the constitutional doctrine of "Separation of Powers". That doctrine is fundamental to the American concept of government. As the United States Supreme Court has said:

> The Constitution, in distributing the powers of government, creates three distinct and separate departments.... This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, [citations omitted], namely, to preclude a commingling of those essentially different powers of government in the same hands.

O'Donoghue v. United States, 289 U.S. 516, 530, 77 L.Ed. 1356, 1360 (1933). Separation of the powers of government among the legislative, executive, and judicial branches both prevents the concentration of excessive power in the hands of any single governmental entity and provides a framework of three distinct power centers, thus permitting the implementing of the "checks and balances" theory. For checks and balances to operate effectively in the scheme of state government, care must be taken to maintain the separation of powers and functions:

> It is very essential that the sharp separation of powers of government be carefully preserved by the courts to the end that one branch of government shall not be permitted to unconstitutionally encroach upon the functions properly belonging to another branch, for only in this manner can we preserve the system of checks and balances which is the genius of our government.

Giss v. Jordan, 82 Ariz. 152, ____, 309 P.2d 779, 787 (1957). It is likewise necessary that the lines of separation between the power groupings authorized by the Constitution be defined and respected:

> It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.

Kilbourn v. Thompson, 103 U.S. 168, 191, 26 L.Ed. 377, ____ (1880). (emphasis added).

By way of amplification of this concept, it is said:

> The powers of these departments are not merely equal; they are exclusive in respect to the duties assigned to each, and they are absolutely independent of each other. The encroachment of one of these departments upon the other is watched with jealous care, and is generally promptly resisted, for the observance of this division is essential to the maintenance of a republican form of government.

Langenberg v. Decker, 131 Ind. 471, 478, 31 N.E. 190, 193 (1892) (emphasis added).

The Maine Constitution mandates "[i]n clear and unmistakable language" the separation and allocation of powers among the separate and independent branches of government. Bar Harbor Banking and Trust Co. v. Alexander, 411 A.2d at 76; Board of Overseers of Bar v. Lee, Me., 422 A.2d 998, 1002 (1980); see Ex parte Davis, 41 Me. 38, 53 (1856).

These political science concepts, embodied in the Constitutional mandate, underlie the exception to the final judgment rule articulated in Bar Harbor Banking. There, a member of the Executive Branch, pursuing her legitimate governmental function of enforcing the laws, found her activities stayed by a temporary restraining order that enjoined her from holding a scheduled hearing to determine whether a bank had violated certain statutory regulations. Thus was created a conflict between the Executive Department's enforcement function and the Judicial Department's adjudicatory function: the judicial action would at least temporarily stop the Executive Branch from enforcing the laws. This raised the question of the legitimacy of the issuance of the temporary restraining order. The judicial action severely hampered the ability of the Executive Branch to carry out its enforcement

function. Yet, because the judicial act creating the hinderance was not a "final judgment," it appeared that appellate review would be barred for the indefinite future.

The effect of that bar was to prevent an official of the Executive Branch from performing a statutorily mandated duty. Recognizing that an issue of such profound importance to the proper functioning of government should not be permitted to go unresolved, even temporarily, we found it to be improper to apply the final judgment rule so as to preclude prompt judicial resolution of destructive inter-branch clashes of authority. We said:

> The constitutionally mandated separation of powers forbids precipitous injunctive interference with the legitimate, ongoing executive function. [citations omitted]. Moreover, judicial interference with apparently legitimate executive department activity not only disrupts the administrative process but also encourages the circumvention of statutorily authorized investigation and enforcement mechanisms. To avoid this result and to safeguard the separation of powers, we will review this temporary restraining order issued to restrain a state administrative agency from holding a hearing pursuant to a statute which on its face grants the agency authority to conduct such a hearing.

Bar Harbor Banking, 411 A.2d at 77 (emphasis added).

That exception applies here. The statutes which the defendant allegedly violated are intended to protect the public by regulating the labeling, distribution, storage, transportation, use, disposal, sale and application of chemical pesticides.[1] Violations of these

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1. 7 M.R.S.A. § 603 provides as follows:

§ 603. Declaration of Purpose

The purpose of this subchapter is to regulate in the public interest, the labeling, distribution, storage, transportation, use and disposal of pesti-

laws are "civil violations,"[2] and therefore enforceable by the Attorney General. 17-A M.R.S.A. § 4(3).[3] Judicial interference

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cides as hereinafter defined. The Legislature hereby finds that pesticides are valuable to our State's agricultural production and to the protection of man and the environment from insects, rodents, weeds and other forms of life which may be pests; but it is essential to the public health and welfare that they be regulated to prevent adverse effects on human life and the environment. New pesticides are continually being discovered or synthesized which are valuable to the control of pests and for use as defoliants, desiccants, plant regulators and related purposes. The dissemination of accurate scientific information as to the proper use of any pesticide is vital to the public health and welfare and the environment, both immediate and future. Therefore, it is deemed necessary to provide for regulation of such pesticides.

22 M.R.S.A. § 1471-A provides as follows:

§ 1471-A. Purpose and policy

For the purpose of assuring to the public the benefits to be derived from the safe, scientific and proper use of chemical pesticides while safeguarding the public health, safety and welfare, and for the further purpose of protecting natural resources of the State, it is declared to be the policy of the State of Maine to regulate the sale and application of chemical insecticides, fungicides, herbicides and other chemical pesticides.

2. 7 M.R.S.A. § 616 expressly states that any person violating any provision of 7 M.R.S.A. §§ 601-624 commits a civil violation. 22 M.R.S.A. § 1471-J provides that penalties for violating any provision of 22 M.R.S.A. §§ 1471-A - 1471-N consist solely of fines. According to 17-A M.R.S.A. § 4-A(4):

If a criminal statute or criminal ordinance outside this code prohibits defined conduct but does not provide an imprisonment penalty, it is hereby declared to be a civil violation ....

3. 17-A M.R.S.A. §4(3) provides in part:

All civil violations are expressly declared not to be criminal offenses. They are enforceable by the Attorney General, his representative or any other appropriate public official in a civil action to recover what may be designated a fine, penalty or other sanction, or to secure the forfeiture that may be decreed by the statute.

with the Attorney General's enforcement function here also encourages "the circumvention of statutorily authorized ... enforcement mechanisms." Bar Harbor Banking, 411 A.2d at 77.

If the State is denied the opportunity to appeal from the District Court's decision to stay these proceedings, then review of that decision, which limits the prosecutor's ability to enforce the Acts in question, may remain in abeyance until there is a final determination of the proceedings. That determination cannot take place, of course, as long as the District Court's stays remain in place. By the time the stays are lifted and proceedings recommence, the passage of time and change of circumstance may well have made it impossible for the prosecutor to achieve his enforcement goals and to adequately protect the public interest. Thus, if indeed the granting of the stays here in question amounts to "precipitous injunctive interference with the legitimate, ongoing executive function" (a question not before us and on which we express no opinion), application of the final judgment rule to delay appeal may well frustrate the executive purpose, jeopardizing the public interest while leaving the executive without an effective remedy.

The goals of judicial economy and effective appellate review intended to be furthered by the final judgment rule are not so weighty as to justify undue delay in resolving this serious inter-branch dispute. No general harm will be done to those goals by permitting review of the District Court orders as an

exception to the final judgment rule.[4] It was the need for prompt resolution of such interbranch confrontations that provided the basis for the "separation of powers exception" to the final judgment rule articulated in Bar Harbor Banking and Trust Co. v. Alexander. The stays here achieve precisely the same effect as the injunctive relief at issue in that case. As we there stated, "The constitutionally mandated separation of powers forbids precipitous injunctive interference with the legitimate, ongoing executive function." Id. at 77. That principle applies here. The Superior Court should have reviewed the District Court decision to enter the stays under that exception to the final judgment rule.[5]

The entry is:

Judgments of the Superior Court vacated.

Remanded to the Superior Court for further proceedings consistent with the opinion herein.

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4. Indeed, appellate review now will be more effective and meaningful than review in the distant future when the issue of whether the stays were properly granted may be, for purposes of this case, moot.

5. Again, we note that because the Superior Court did not reach the question of whether the District Court properly granted the stays, our judgment is not a ruling on that issue. We express no opinion as to the merits of that dispute.

STATE OF MAINE
WASHINGTON, ss.

SUPERIOR COURT
Civil Action
Docket No. Cv 80-69
Cv 80-70

STATE OF MAINE
Plaintiff-Appellant

vs.

ST. REGIS PAPER COMPANY
Defendant-Appellee

* *

STATE OF MAINE
Plaintiff-Appellant

vs.

NORTHEAST HELICOPTER SERVICES, INC.
Defendant-Appellee

* *

DECISION

This appeal is brought by Plaintiff-Appellant State of Maine ("State") from orders issued by the District Court staying civil penalty actions filed by the State against St. Regis Paper Company ("St. Regis") and Northeast Helicopter Services, Inc. ("Northeast"), which actions allege violations of certain state pesticide laws. In June, 1979, Defendants St. Regis and Northeast conducted aerial herbicide spraying operations in the Edmunds area of Washington County. The following September ten private landowners filed a civil action in Washington County Superior Court seeking actual and punitive damages in the sum of ten millon dollars as a result of the spraying operation by St. Regis and Northeast. That case, Pottle v. St. Regis Paper Company and Northeast Helicopter Services, Inc., Cv 79-133, is still pending in Superior Court.

In January, 1980, the State of Maine, acting by and through the Attorney General, commenced civil actions against St. Regis and Northeast in the District Court at Machias seeking civil penalties of $7,000.00 against St. Regis for violations of 22 M.R.S.A. §§1471-D(8), 1471-J and 7 M.R.S.A. §§606,616, plus civil penalties of $2,500.00 against Northeast for violations of 7 M.R.S.A. §§606,

616, The actions by the State arise out of the same spraying operation, are similar in nature and raise the same or similar issues of fact and law as the Pottle case.

In April, 1980, St. Regis and Northeast filed motions in the District Court to stay the actions by the State pending the outcome of the Pottle case. The motions were accompanied by affidavits of Defendants' attorneys setting forth the history of the Pottle case, its complexity and the duplication of discovery in both actions unless a stay of the State's actions was ordered.

On May 23, 1980 the District Court issued an order staying the proceedings by the State pending final resolution of the Pottle case. The State appealed the order to Superior Court and the Superior Court dismissed the appeal on the ground that the case did not come within the exception to the Final Judgment Rule which allows appeals from callateral orders, interlocutory in nature. The Superior Court further found that no great or irreparable loss might result to the State if determination of the issues raised by the pleadings were postponed by the District Court's Order to Stay. The State appealed the ruling of the Superior Court to the Law Court. State of Maine v. St. Regis Paper Company and Northeast Helicopter Services, Inc., Me., 432 A2d 383 (1981). The Law Court sustained the appeal, finding that the appeal did come within the exception to the Final Judgment Rule recognized in Bar Harbor Banking and Trust Company v. Alexander, Me., 411 A2d 74 (1980). This matter is now back before the Superior Court for determination of the State's appeal of the District Court's Order of Stay of May 23, 1980.

Rule 73(a) of the District Court Civil Rules provides, in part:

> The appeal shall be on questions of law only and shall be determined by the Superior Court without jury on the record on appeal specified in Rule 75. Any findings of fact of the District Court shall not be set aside unless clearly erroneaus.

The entire factual record consists of the affidavits of the attorneys for

the Defendants. The affidavits are undisputed by the State. Therefore, this appeal is limited to the question of whether the District Court erred as a matter of law in issuing the stays.

The power to stay proceedings is incidental to the power inherent in every Court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants. Landis v. North American Co., 299 U.S. 24E, 57 S.Ct. 153, 81 L Ed. 153 (1936). How this can be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance. Id. A stay of proceedings is not a matter of right but a matter of grace, the grant or denial of which rests in the sound discretion of the Court and is only to be granted when the Court is satisfied that justice will thereby be promoted. Cutler Associates, Inc. v. The Merrill Trust Company, Me., 395 A2d 453 (1978), Fitch v. Whaples, Me., 220 A2d 170 (1966). Recognizing that the District Court has the inherent power to stay proceedings in order to control its own docket, this appeal focuses on whether the District Court, in weighing the competing interests of the litigants and attempting to maintain an even balance, erred as a matter of law. In weighing the competing interests of the litigants, it is accepted by this Court that, on the one hand, the Defendants St. Regis and Northeast have been virtually deluged with lawsuits arising out of the spraying operation. In addition to the Pottle case, in the summer of 1981 six additional private civil actions similar to the Pottle case, raising the same or similar issues of fact and law, were commenced in this Court against St. Regis, Northeast and Dow Chemical Company, all of which are still pending. It is accepted by this Court that enormous amounts of discovery has been and will continue to be filed in all of those actions. It is anticipated that Pottle and the other pending actions will take years before they are finally resolved, either by way of settlement or trial. On the other hand, if the Order of Stay remains in effect until the outcome of Pottle, the Attorney General has, in effect, been enjoined from enforcing the pesticide control

laws which he has a statutory obligation to enforce. The sole basis for the Order of Stay is the economy to be realized by the litigants and counsel which might otherwise not be realized if the State pursued its actions in the District Court due to the fact that there would be duplicative discovery and simultaneous actions in two different courts with similar issues of fact and law. The Court distinquishes the instant case from Fitch v. Whaples, supra. In Fitch, there were two separate actions between the same parties pending at the same time, one in the courts of Massachusetts and one in Lincoln County Superior Court in Maine. Furthermore, Cutler Associates, Inc. v. Merrill Trust Co., supra, is distinquishable in that it involved an action to confirm an arbitration award while a motion was pending for clarification and modification of the arbitrator's award - both actions between the same parties. If the instant case were one in which a private citizen had commenced an ordinary civil action against the Defendants after commencement of Pottle, involving similar questions of fact and law, this Court would not attempt to "second-guess" the District Court. However, the plaintiff in the instant case is the State of Maine, acting by and through the Attorney General seeking to enforce its pesticide control laws. This Court is concerned that the issuance of the Order to Stay by the District Court transgresses the doctrine of separation of powers as enunciated in Bar Harbor Banking and Trust Company v. Alexander, supra, and State v. St. Regis Paper Company and Northeast Helicopter Service, Inc., supra. Bar Harbor Banking, deals with the doctrine of separation of powers under the theory of primary jurisdiction. That is, the doctrine [of primary jurisdiction] is designed to resolve the question of who should act first. Where the administration of a particular statutory scheme has been entrusted to an agency, the Court will postpone consideration of an action until the agency has made a designated determation if such postponement will protect the integrity of the statutory

scheme. However, Bar Harbor Banking, as noted by State v. St. Regis further held:

> The constitutionally mandated separation of powers forbids precipitous injunctive interference with the legitimate, ongoing executive function. Moreover, judicial interference with apparently legitimate executive department activity not only disrupts the administrative process but also encourages the circumvention of statutorily authorized investigation and enforcement mechanisms. To avoid this result and to safeguard the separation of powers, we will review this temporary restraining order issued to restrain a state administrative agency from holding a hearing pursuant to the statute which on its face grants the agency authority to conduct such a hearing. [emphasis added in State v. St. Regis.]

The statutes allegedly violated by Defendants are intended to protect the public by regulating the labeling, distribution, storage, transportation, use, disposal, sale and application of chemical pesticides. Violations of these laws are "civil violations" and are enforceable by the Attorney General. The state's ability to enforce the laws in question remain in obeyance pending final determination of the Pottle cases as long as the District Court's Orders of Stay remain in place. By the time the stays are lifted and proceedings recommence the passage of time and change of circumstance may make it impossible for the State to achieve its enforcement goals and to adequately protect the public interest. The granting of the Orders of Stay amount to "presciptious injunctive interference with the legitimate, ongoing executive function" and encourages "the circumvention of statutarily authorized enforcement mechanisims". Bar Harbor Banking, 411 A2d at 77. The District Court's Orders of Stay violate the doctrine of separation of powers in that they amount to precipitious injunctive interference with the legitimate ongoing executive function prohibited under Bar Harbor Banking. The District Court erred as a matter of law. Therefore, it is hereby ORDERED:

The appeal of the State is hereby sustained. This case

is hereby Remanded to District Court for further proceedings consistant with this decision.

Dated: JANUARY 28, 1982

Carl O. Bradford

CARL O. BRADFORD
Justice, Superior Court

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

In the Matter of:	)	
Marden's of Brewer	)	ADMINISTRATIVE CONSENT AGREEMENT
564 Wilson Street	)	AND FINDINGS OF FACT
Brewer, ME 04412	)	

This Agreement by and between Marden's of Brewer (hereinafter called the "Dealer") and the State of Maine Board of Pesticides Control (hereinafter called the "Board") is entered into pursuant to 22 M.R.S.A. § 1471-M(2)(D) and in accordance with the Enforcement Protocol adopted by the Board on September 19, 1984 and amended September 7, 1990.

The parties to this Agreement agree as follows:

1. That the dealer distributed general use pesticides and as such held a General Use Pesticide Dealers License issued pursuant 22 M.R.S.A. § 1471-W.

2. That on August 28, 1995 Inspector Robert Tomlins of the Board's staff conducted a routine inspection of the Dealer's retail outlet in Brewer.

3. That at the time of the inspection, Mr. Tomlins observed and photographed approximately 60 torn and otherwise damaged paper bags of granular pesticides present in the self service area of the store.

4. That at the time of the inspection, label directions were partially obliterated on several of the damaged bags.

5. That at the time of the inspection, granular pesticides had spilled from several bags and were present on the floor, in the aisle, and on top of the bags. Products present in damaged bags included Greenview Preen EPA Reg. # 961-280, Greenview Lawn Fungicide EPA Reg. # 961-277, Lebanon Turf Fungicide EPA Reg. 961-353 and Agway Lawn Insect Control EPA Reg. # 8590-659.

6. That at the time of the inspection, three one quart containers of Lesco Malathion 50% EC were present in the self service display area with no label or labeling attached.

7. That at the time of the inspection, several pesticides not registered for sale in Maine were present in the self service display area including Lesco Sevin EPA Reg. # 264-334-10407, Ortho Atrazine Plus EPA Reg. # 239-268 and Lesco Malathion 50% EC EPA Reg. # 4-99-10404.

8. That actions described in paragraphs 3 ,4 & 6 constitute violation of 7 M.R.S.A. § 606 (1)(C).

9. That the actions described in paragraph 5 constitute violations of 7 M.R.S.A. § 606 (1)(F) and (2)(D).

10. That the actions described in paragraph 7 constitute violations of 7 M.R.S.A. § 606 (1) (A).

11. That the Board has regulatory authority over the activities described herein.

12. That the Dealer expressly waives:

    a. Notice of or opportunity for hearing:

    b. Any and all further procedural steps before the Board; and

    c. The making of any further findings of act before the Board.

13. That this Agreement shall not become effective unless and until the Board accepts it.

14. That in consideration for the release by the Board of the causes of action which the Board has against the Dealer resulting from the violations referred to in paragraphs 8, 9 & 10, the Dealer agrees to:

    a) pay to the State of Maine the sum of $1000.00 prior to May 7, 1996 (Please make check payable to Treasurer, State of Maine); and

    b) take remedial steps designed to establish safe pesticide handling practices and to prevent violations from occurring in the future. Said practices will be further specified in a separate Administrative Consent Order.

IN WITNESS WHEREOF, the parties have executed this Agreement of two pages.

MARDEN'S

BY: John R Marden Date 5-7-96

BOARD OF PESTICIDES CONTROL

BY: Robert I. Batteese Jr Date 5/30/96
Robert I. Batteese, Jr., Director

APPROVED

BY: Thomas A Harnett Date 6/3/96
Assistant Attorney General

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

In the Matter of:	)	
Marden's of Lewiston	)	ADMINISTRATIVE CONSENT AGREEMENT
750 Main Street	)	AND FINDINGS OF FACT
Lewiston, ME 04240	)	

This Agreement by and between Marden's of Lewiston (hereinafter called the "Dealer") and the State of Maine Board of Pesticides Control (hereinafter called the "Board") is entered into pursuant to 22 M.R.S.A. § 1471-M(2)(D) and in accordance with the Enforcement Protocol adopted by the Board on September 19, 1984 and amended September 7, 1990.

The parties to this Agreement agree as follows:

1. That the dealer distributed general use pesticides and as such held a General Use Pesticide Dealers License issued pursuant 22 M.R.S.A. § 1471-W.

2. That on August 29, 1995 Inspector Robert Tomlins of the Board's staff conducted a routine inspection of the Dealer's retail outlet in Lewiston.

3. That at the time of the inspection, Mr. Tomlins observed and photographed approximately 30 torn and otherwise damaged paper bags of granular pesticides present in the self service area of the store.

4. That at the time of the inspection, label directions were partially obliterated on several of the damaged bags.

5. That at the time of the inspection, granular pesticides had spilled from several bags and were present on the floor, in the aisle, and on top of the bags. Products present in damaged bags included Glorion Lawn Builder Plus Weed Control EPA Reg. # 2217-658-12176 and Lofts Weed & Feed EPA Reg. # 9198-16-614.

6. That at the time of the inspection, several pesticides not registered for sale in Maine were present in the self service display area including Lesco Broadleaf Weed Control EPA Reg. # 4-173-10404, Black Leaf Garden & Evergreen Spray EPA Reg. # 5887-90AA, Black Leaf Tomato & Vegetable Spray EPA Reg. # 5887-108AA, ACME Liquid Sevin Duraspray EPA Reg. # 33955-533AA and Rigo's Best Crabgrass Killer EPA Reg. # 2935-448-70.

7. That actions described in paragraphs 3 & 4 constitute violation of 7 M.R.S.A. § 606 (1)(C).

8. That the actions described in paragraph 5 constitute violations of 7 M.R.S.A. § 606 (1)(F) and (2)(D).

9. That the actions described in paragraph 6 constitute violations of 7 M.R.S.A. § 606 (1) (A).

10. That the Board has regulatory authority over the activities described herein.

11. That the Dealer expressly waives:

    a. Notice of or opportunity for hearing:

    b. Any and all further procedural steps before the Board; and

    c. The making of any further findings of fact before the Board.

12. That this Agreement shall not become effective unless and until the Board accepts it.

13. That in consideration for the release by the Board of the causes of action which the Board has against the Dealer resulting from the violations referred to in paragraphs 7, 8 & 9, the Dealer agrees to:

    a) pay to the State of Maine the sum of $1000.00 prior to May 7, 1996 (Please make check payable to Treasurer, State of Maine); and

    b) take remedial steps designed to establish safe pesticide handling practices and to prevent violations from occurring in the future. Said practices will be further specified in a separate Administrative Consent Order.

IN WITNESS WHEREOF, the parties have executed this Agreement of two pages.

MARDEN'S

BY: John E. Marden Date 5-07-96

BOARD OF PESTICIDES CONTROL

BY: Robert I. Batteese Jr. Date 5/30/96
Robert I. Batteese, Jr., Director

APPROVED

BY: Thomas A. Knott Date 6/3/96
Assistant Attorney General

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

In the Matter of the Application for Renewal of General Use Pesticide Dealer Licenses Submitted by Marden's Inc.	))))	CONSENT ORDER

This Agreement by and between Marden's Inc. and the State of Maine Board of Pesticides Control (hereinafter called the "Board") is entered into pursuant to 22 M.R.S.A. § 1471-M(2)(D).

Procedural Background

At its regular meeting on October 27, 1995, the Board reviewed two enforcement matters concerning Marden's stores in Brewer and Lewiston. The Board staff presented information regarding alleged unlawful pesticide distribution practices at both stores, including distribution of pesticides in broken containers, distribution of pesticides without full labeling intact (7 M.R.S.A. § 606 (1)(C)), distribution of unregistered pesticides (7 M.R.S.A. § 606 (1)(A)) and distribution of pesticides in "a manner as to endanger man and his environment or to endanger food, feed or any other products that may be transported, stored, displayed or distributed with such pesticides" (7 M.R.S.A. § 606 (2)(D)). The Board subsequently voted to seek an emergency suspension of the General Use Pesticide Dealer licenses for all Marden's stores in accordance with 22 M.R.S.A. § 1471-D(7)(A).

On November 1, 1995, the Board staff delivered notice of the license suspensions to all seven licensed Marden's retail stores. The licenses were suspended through December 16, 1995. Marden's notified the Board on November 16, 1995 that it would not challenge the emergency suspensions.

On February 1, 1996, the Board staff received applications for license renewal for six Marden's retail stores. On February 16, 1996, Director of the Board, Robert Batteese, notified Marden's Inc. that its six licenses would not be renewed pursuant to 22 M.R.S.A. § 1471-D (6) and advised Marden's Inc. of its right to request an adjudicatory hearing in conformity with 5 M.R.S.A. § 9051 et seq.

On February 22, 1996, the Board received a request for an adjudicatory hearing from Rhett Weiland, Esq., representing Marden's Inc. On March 11, 1996, the Board's Director sent Marden's Inc. a Notice of Hearing and explained Marden's hearing rights in accordance with 5 M.R.S.A. § 9051 et. seq.

An adjudicatory hearing was held on April 12, 1996 in Waterville. Testimony was presented by Board staff and by witnesses for Marden's. Upon completion of the testimonial portion of the hearing, the Board directed the staff to attempt to negotiate a consensual administrative resolution for the violations alleged by the Board at their October 27, 1995 meeting and to

attempt to craft a Consent Order that would specify practices that Marden's Inc. would put into place to prevent a recurrence of these violations in the future.

Consequently, the parties to this Agreement agree to the following conditions.

1. That prior to May 7, 1996, Marden's Inc will develop and submit to the Board for approval with this Consent Order, a comprehensive written plan designed to ensure that: 1) no unregistered pesticides will be offered for sale at any Maine Marden's Inc. retail establishment; 2) no pesticides will be offered for sale unless they are in the manufacturers unbroken container and the full pesticide labeling is affixed; 3) all pesticide spills will be handled in a safe and responsible manner; and 4) any pesticide wastes resulting from spills or broken containers will be handled in a safe and proper manner.

2. That Marden's Inc will provide annual training to its employees on the contents of the plan described in paragraph 1 above, general requirements for pesticide distributors under Maine pesticide law and general training on safe pesticide handling. Marden's Inc. will maintain records showing the date, time and attendance at said training. Those records shall be maintained for three years.

3. That the previously submitted applications for General Use Pesticide Dealer License, for six Marden's Inc retail stores, are approved.

4. That this Agreement shall not become effective unless and until the Board accepts it and until the Board formally approves the comprehensive management plan described in paragraph 1. In addition, the terms of the comprehensive management plan are incorporated as conditions into this Consent Order.

IN WITNESS WHEREOF, the parties have executed this Agreement of two pages.

MARDEN'S

BY: John R Marden Date 5-23-96

BOARD OF PESTICIDES CONTROL

BY: Robert I. Batteese Jr. Date 5/30/96

Robert I. Batteese, Jr., Director

APPROVED

BY: Thomas L. Harnett Date 6/3/96

Assistant Attorney General

COMPREHENSIVE PLAN

Please accept the following conditions jointly developed by Marden's, Inc. and the State of Maine Board of Pesticides Control (hereinafter referred to as the "Board") and the staff of said Board (hereinafter referred to as the "Staff"):

LIST:

1. Marden's, Inc. will keep a listing of the pesticide products registered for sale in the State of Maine as offered by the Staff. Marden's will request an updated copy of said list prior to April 1 of each year.

INSPECTION AND SALE:

2. Upon receiving any stocks containing pesticides, Marden's will segregate all pesticides for special processing prior to placing said products for sale to the general public in any of Marden's stores.

3. Said processing shall consist of:

A. Visual inspection of all containers for integrity of manufacturer's original packaging and pesticide labeling information. Any product not meeting these standards shall be disposed of in a safe and proper manner in accordance with the recommendations of the staff, i.e. delivery to a licensed commercial applicator or application of product on property of Marden's in accordance with the pesticide labeling information. When disposed in this manner, at least one copy of a pesticide package label with complete text must be provided to the applicator receiving the pesticide product.

B. All products shall be verified as legal for sale in the State of Maine per the rules and regulations promulgated by the Board as follows:

I. The product's EPA reg. number will be checked against the current list of registered products as supplied by the staff.

II. If the product's EPA reg. number does not appear on the current list of registered products, Marden's shall contact the staff to determine whether the product is registered for sale in the State of Maine. Any product not currently registered for sale in the State of Maine will be disposed of in a safe and proper manner.

RIPPED, TORN, OR DAMAGED CONTAINERS:

4. Marden's Inc. will not sell pesticides contained within ripped, torn, or damaged containers until and unless the

staff specifically approves sale of such, or sale subject to conditions.

SPILLS:

5. All pesticide spills will be handled in a safe and responsible manner. All retail sales areas where pesticides are offered for sale shall have a spill control kit readily available in accordance with the rules and regulations of the Board. All spills shall be cleaned up as soon as possible in order to eliminate any potential hazard to Marden's employees and to the general public. Cleanup will only be performed by trained employees of Marden's or by professional persons brought in for the job.

TRAINING:

6. Marden's shall provide training for all its employees whose job responsibilities require them to work with pesticides. Said training shall include, but not be limited to the following areas:

A. The general requirements for pesticide distributors/dealers under current State of Maine laws.

B. Safe pesticide handling procedures.

C. Location and proper use of appropriate types of personal protective gear.

D. Location and proper use of pesticides spill control kits.

E. Location and proper use of Material Safety Data Sheets.

F. Who to contact or report in the event of a question or problem.

G. Regular inspection of the pesticide display area to immediately deal with any spills or damaged containers.

H. Corrective actions when needed to reduce or eliminate the potential for further damage to pesticide containers.

Said training shall be done on at least an annual basis with recurrent training each year. Marden's shall maintain records of employee training showing the employee's name, and the date and time of such training. These records shall be kept on file by Marden's for at least three years and made available upon request to Board's representatives.

01 DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY

026 BOARD OF PESTICIDES CONTROL

Chapter 70: ADJUDICATORY PROCEEDINGS

SUMMARY: These regulations describe procedures the Board must follow in conducting hearings concerned with pesticide certification, licenses and permits.

Section 1. Purpose

These rules are in conformance with the Administrative Procedure Act as promulgated pursuant to 5 M.R.S.A. §8051 and the *Pesticides Control Board Law,* 22 M.R.S.A. §1471-A *et seq.*

Section 2. Applicability

A. These rules apply to proceedings when the Board considers the following:

1. The application of pesticides in a critical area described pursuant to 22 M.R.S.A. §1471-M(2)(A), when a rule establishing the critical area so provides;

2. The application of pesticides to a water body pursuant to 22 M.R.S.A. §1471-E;

3. The renewal of a previously issued certification, license or permit provided for in 22 M.R.S.A. §§ 1471-D, 1471-N, unless the certification, license or permit is renewed by other action of the Board;

4. The amendment or modification of a certification, license or permit provided for in 22 M.R.S.A. §§ 1471-D, 1471-N;

5. The continuation of a temporary suspension of a license, certification or permit pursuant to 22 M.R.S.A. §1471-D(7)(C).

Section 3. Application to Apply Pesticides to a Critical Area or Water Body

A. A written application for permission to apply a pesticide under 22 M.R.S.A. §§ 1471-M(2)(A) or 1471-E shall be addressed to the Director, Pesticides Control Board, Department of Agriculture, Augusta, Maine, 04333.

B. Such application shall contain such information as is requested by the Board.

Section 4. Notice of Right to Hearing

A. Upon receipt of an application or otherwise when the Board's action is covered by these rules, the Board shall give notice to:

1. The person or persons whose legal rights, duties or privileges are at issue, by regular mail, sufficiently in advance of the anticipated time of the decision to afford an adequate opportunity to prepare and submit evidence and argument, and to request a hearing if so desired; and

2. The general public, in any proceeding deemed by the Board to involve the determination of issues of substantial public interest, such notice to be given sufficiently in advance of the anticipated time of the decision to afford interested persons an adequate opportunity to prepare and submit evidence and argument, and to request a hearing if so desired.

B. This section is complied with if notice is given as provided in 6 of these regulations.

Section 5. Hearings

A. **Upon request.** A hearing shall be held upon receipt of a request by a person whose legal rights, duties or privileges are at issue under these rules. Failure by such person to request a hearing within 15 days of receipt of notice as provided in 4 shall be deemed a waiver of the right to a hearing.

B. **Board's discretion.** A hearing may be held, at the Board's discretion, in any proceedings deemed by the Board to involve issues of substantial public interest.

Section 6. Notice of Public Hearing

A. When a hearing is to be held, notice shall be given as follows:

1. To the person or persons whose legal rights, duties or privileges are at issue, be regular mail, sufficiently in advance of the hearing date to afford an adequate opportunity to prepare and submit evidence and argument; and

2. In any proceeding deemed by the agency to involve the determination of issues of substantial public interest, to the public sufficiently in advance of the hearing date to afford interested persons an adequate opportunity to prepare and submit evidence and argument and to petition to intervene.

Section 7. Notice to the Public of a Hearing

A. **Notice to the public.** Notice to the public shall be given:

1. By publication, at least twice in a newspaper of general circulation in the area of the state affected;

2. By publication in any other trade, industry, professional or interest group publication which the agency deems effective in reaching persons who would be entitled to intervene as of right under section 12 of these regulations.

3. In any other manner deemed appropriate by the Board.

Section 8. Notice

Notice shall consist of:

1. A statement of the legal authority and jurisdiction under which the proceeding is being conducted;

2. A reference to the particular substantive statutory and rule provisions involved;

3. A short and plain statement of the nature and purpose of the proceeding and of the matters asserted;

4. A statement of the time and place of the hearing, or the time within which a hearing may be requested;

5. A statement of the manner and time within which evidence and argument may be submitted to the Board for consideration, whether or not a hearing has been set; and

6. When a hearing has been set, a statement of the manner and time within which applications for intervention may be filed.

Section 9. Presiding Officer

A. **Presiding officer.** The Board may authorize any agency member, employee or agent to act as presiding officer in any hearing.

B. **Substitute officer.** Whenever a presiding officer is disqualified or it becomes impracticable for him to continue the hearing, another presiding officer may be assigned to continue with the hearing; provided that, if it is shown that substantial prejudice to any party will thereby result, the substitute officer shall commence the hearing anew.

C. **Presiding officer; duties.** Presiding officers may:

1. Administer oaths and affirmations;

2. Rule on the admissibility of evidence;

3. Regulate the course of the hearing, set the time and place for continued hearings, and fix the time for filing of evidence, briefs and other written submissions; and

4. Take other action authorized by statute or agency rule consistent with 5 M.R.S.A., Chapter 375, subchapter IV.

D. **Report.** In the event that the presiding officer prepares any report or proposed findings for the Board, the report or findings shall be in writing. A copy of the report or findings shall be provided to each party and an opportunity shall be provided for response or exceptions to be filed by each party.

Section 10. Bias of Presiding Officer or Board Member

A. **Hearings; impartial.** Hearings shall be conducted in an impartial manner. Upon the filing in good faith by a party of a timely charge of bias or of personal or financial interest, direct or indirect, of a presiding officer or Board member in the proceeding requesting that that person disqualify himself, that person shall determine the matter as a part of the record.

B. **Counsel.** Notwithstanding 1, the person involved may consult with private counsel concerning the charge.

Section 11. Disposition without Full Hearing

A. **Stipulation, settlement, consent order.** The Board may make informal disposition of any adjudicatory proceeding by stipulation, agreed settlement or consent order.

B. **Default.** The Board may make informal disposition of any adjudicatory proceeding by default, provided that notice has been given that failure to take required action may result in default, and further provided that any such default may be set aside by the Board for good cause shown.

C. **Issues limited.** The Board may limit the issues to be heard or vary any procedure prescribed by these rules or 5 M.R.S.A. Chapter 375, subchapter IV if the parties and the Board agree to such limitation or variation, or if no prejudice to any party will result.

Section 12. Intervention As of Right

A. Any person showing that he is or may be a member of a class which is or may be substantially and directly affected by the proceedings, or any other agency of federal, state or local government which is or may be substantially and directly affected, shall be allowed to intervene as a party to the proceedings.

B. **Intervention; interested person.** The Board may, by order, allow any other interested person to intervene and participate as a full or limited party to the proceeding. This subsection shall not be construed to limit public participation in the proceeding in any other capacity.

C. **Application.** Application for intervention shall be received by the Director no later than five days before the commencement of the hearing, except for good cause shown. The application shall state the interest of the person or class and the reason it wishes to intervene. A copy of the application shall be sent by regular mail to the person or persons whose legal rights, duties or privileges are at issue.

D. **Decision.** The Board shall either grant or deny the application at the time of the hearing, unless all parties agree to an earlier decision.

E. **Participation limited or denied.** When participation of any person is limited or denied, the Board shall include in the record an entry to that effect and the reasons therefor.

F. **Consolidation of presentations.** Where appropriate, the Board may require consolidation of presentations of evidence and argument by members of a class entitled to intervene under subsection (A) of these regulations, or by persons allowed to intervene under subsection (B).

G. **Participation.** The Board shall allow any of its staff to appear and participate in any adjudicatory proceeding.

Section 13. Ex Parte Communications; Separation of Functions

A. **Communication prohibited.** In any adjudicatory proceeding, no Board members authorized to take final action or presiding officers designated by the Board to make findings of fact and conclusions of law shall communicate, directly or indirectly, in connection with any issue of fact, law or procedure, with any person, except upon notice and opportunity for all parties to participate.

B. **Communication permitted.** This section shall not prohibit any Board member or other presiding officer described in subsection (A) from:

1. Communicating in any respect with other members of the Board or other presiding officers; or

2. Having the aid or advice of those members of his own Board staff, counsel or consultants retained by the Board who have not participated and will not participate in the Board proceeding in an advocate capacity.

Section 14. Opportunity to be Heard

A. **Opportunity for hearing.** The opportunity for hearing in an adjudicatory proceeding shall be afforded without undue delay.

B. **Rights.** Unless limited by stipulation under 11(C) or by Board order pursuant to 12(B) or 12(F) or unless otherwise limited by the Board to prevent repetition or unreasonable delay in proceedings, every party shall have the right to present evidence and arguments on all issues, and at any hearing to call and examine witnesses and to make oral cross-examination of any person present and testifying.

Section 15. Evidence

A. **Rules of privilege.** The Board need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law.

B. **Evidence.** Evidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs. The Board may exclude irrelevant or unduly repetitious evidence.

C. **Witnesses.** All witnesses shall be sworn.

D. **Prefiling testimony.** Subject to these requirements, the Board may, for the purposes of expediting adjudicatory proceedings, require procedures for the prefiling of all or part of the testimony of any witness in written form. Every such witness shall be subject to oral cross-examination.

E. **Written evidence; exception.** No sworn written evidence shall be admitted unless the author is available for cross-examination or subject to subpoena, except for good cause shown.

Section 16. Official Notice

A. **Official notice.** The Board may take official notice of any facts of which judicial notice could be taken, and in addition may take official notice of general, technical or scientific matters within their specialized knowledge and of statutes, regulations and non-confidential agency records. Parties shall be notified of the material so noticed, and they shall be afforded an opportunity to contest the substance or materiality of the facts noticed.

B. **Facts.** Facts officially noticed shall be included and indicated as such in the record.

C. **Evaluation of evidence.** Notwithstanding the foregoing, the Board may utilize their experience, technical competence and specialized knowledge in the evaluation of the evidence presented to them.

Section 17. Record

A. **Record.** In an adjudicatory proceeding, the Board shall make a record consisting of:

1. All applications, pleadings, motions, preliminary and interlocutory rulings and orders;

2. Evidence received or considered;

3. A statement of facts officially noticed;

4. Offers of proof, objections and rulings thereon;

5. Proposed findings and exceptions, if any;

6. The recommended decision, opinion or report, if any, by the presiding officer;

7. The decision of the Board; and

8. All staff memoranda submitted to the members of the Board or other presiding officers by Board staff in connection with their consideration of the case, except memoranda of counsel to the Board.

B. **Hearings recorded.** The Board shall record all hearings in a form susceptible to transcription. Portions of the record as required and specified in subsection A may be included in the recording. The Board shall transcribe the recording when necessary for the prosecution of an appeal.

C. **Record; copies.** The Board shall make a copy of the record, including recordings made pursuant to subsection B available at its principal place of operation, for inspection by any person during normal business hours; and shall make copies of the record, copies of recordings or transcriptions of recordings available to any person at actual cost. Notwithstanding the provisions of this subsection, the Board shall withhold, obliterate or otherwise prevent the dissemination of any portions of the record which are made confidential by state or federal statute, but shall do so in the least restrictive manner feasible.

D. **Decision on the record.** All material, including records, reports and documents in the possession of the Board, of which it desires to avail itself as evidence in making a decision, shall be offered and made a part of the record and no other factual information or evidence shall be considered in rendering a decision.

E. **Documentary evidence.** Documentary evidence may be incorporated in the record by reference when the materials so incorporated are made available for examination by the parties before being received in evidence.

Section 18. Subpoena and discovery

A. Any party may request the issuance of a subpoena by the Board, and the Board may issue the same if it first obtains the approval of the Attorney General or of any deputy attorney

general. Such approval shall be given when the testimony or evidence sought is relevant to any issue of fact in the proceeding.

B. When properly authorized, subpoenas may be issued by the Board or by any person designated by the Board for that purpose, in accordance with the following provisions:

1. The form shall be similar to that used in civil cases before the courts. Witnesses shall be subpoenaed only within the territorial limits and in the same manner as witnesses in civil cases before the courts, unless another territory or manner is provided by law. Witnesses subpoenaed shall be paid the same fees for attendance and travel as in civil cases before the courts. Such fees shall be paid by the party requesting the subpoena.

2. Any subpoena issued shall show on its face the name and address of the party at whose request it was issued.

3. Any witness subpoenaed may petition the Board to vacate or modify a subpoena issued in its name. The Board shall give prompt notice to the party who requested issuance of the subpoena. After such investigation as the Board considers appropriate, it may grant the petition in whole or in part upon a finding that the testimony or the evidence whose production is required does not relate with reasonable directness to any matter in question, or that a subpoena for the attendance of a witness or the production of evidence is unreasonable or oppressive or has not been issued a reasonable period in advance of the time when evidence is requested.

4. Failure to comply with a subpoena lawfully issued in the name of the Board and not revoked or modified by the Board as provided in this section shall be punishable by a fine of not less than $500 and not more than $5,000, or by imprisonment not to exceed 30 days, or both.

19. Decisions: Appeal

A. Every Board decision made at the conclusion of an adjudicatory proceeding shall be in writing or stated in the record, and shall include findings of fact sufficient to apprise the parties and any interested member of the public of the basis for the decision. The Board shall maintain a record of the vote of each member of the Board with respect to the Board's decision. A copy of the decision shall be delivered or promptly mailed to each party to the proceeding or his representative of record.

B. The Board shall inform the parties at the time the decision is delivered or mailed that they have the right to have the Superior Court review the decision and that a petition for review of the decision must be filed in the Superior Court within 30 days after receipt of notice of the decision pursuant to 5 M.R.S.A. §11002.

STATUTORY AUTHORITY: 22 M.R.S.A., Chapter 258-A

EFFECTIVE DATE:

July 6, 1979 - filing 79-338

EFFECTIVE DATE (ELECTRONIC CONVERSION):
March 1, 1997

CONVERTED TO MS WORD:
March 11, 2003

CORRECTIONS:
February, 2014 – agency names, formatting

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**

through the system and getting a master applicator. Fish noted that some are able to use pesticides without licensing by closing the area to the public for seven days.

- **Consensus was reached for the staff to bring a draft policy to the next meeting.**

5. Review of Ideas for Increasing the Availability of Online Continuing Education Options

At the September 6, 2013, Planning Session, the Board discussed increasing online continuing education options, which had been identified as its third highest priority topic. Current options and ideas for additional options were discussed. The staff has reviewed some of the ideas from the Planning Session and is prepared to discuss them further with the Board.

Presentation By: Gary Fish
Manager of Pesticide Programs

Action Needed: Provide Guidance to the Staff about Potential Changes

- Fish explained that the Board has approved many online courses for continuing education credits. He checks the offerings and chooses those that apply to Maine. Does the Board want the staff to reach out to specialists and ask them to make presentations similar to Steve Johnson's, specific to Maine crops? People are always looking for credits at the last minute. Eventually we will have to decide whether applicators should be able to get all their credits online or whether there should be a requirement that some training be in person.
- Jemison asked whether there was testing included in Johnson's videos. He pointed out that people can attend a training in person and get nothing out of it. It would be helpful to know what areas are already covered, then the Board could contact experts in other areas; he offered to help with that.
- Jennings said there is nothing specific to Maine crops beyond Johnson's potato videos.
- Jemison said that his boss at Cooperative Extension has been encouraging them to do more online. The best are three to four minutes long; if you want a broader education component, testing at the end would require people to pay attention.
- Morrill noted that he would like to see more training for commercial applicators online; things they could do in the evening, rather than missing a whole day of work. Fish said there is a lot available for commercial applicators; Morrill said that most were not free. Fish said most online courses have a fee, even those for private applicators. Johnson's cost is $10 per credit; the average is $30 per credit; Cornell's are cheaper and they offer 25–30 courses. The challenge is that they have to be an hour in order to approve (or combine to make an hour).
- Jemison suggested 5–6 minutes videos, followed by a test, and combined to make an hour.
- Fish suggested the Board look at the School IPM initial training. Most people said it was easy enough to get through, but it is not fancy.

6. Review of the Board's Enforcement Protocol

At its September 6, 2013, meeting, concerns arose about the proposed fine imposed by a pending consent agreement. During the course of the discussion, there were questions about (1) whether the matter may have been more appropriately presented to the Board prior to negotiating a draft agreement, (2) the process by which the Board might alter an agreement, and (3) how the staff arrives at proposed penalties. Some of the questions relate to the Board's existing Enforcement Protocol. Consequently, the staff determined a review of the existing protocol may be a useful starting point.

Presentation By: Henry Jennings
Director

Action Needed: None—Informational Only

- Jennings said that at the last meeting a consent agreement was discussed and the question arose about whether the issue should have been brought before the Board instead of being negotiated by staff. It's always a bit of a judgment call whether an issue falls under section 3A or 3B of the enforcement protocol. He explained that all violations used to come before the Board. This didn't work for a variety of reasons:
    - One, there was a lack of consistency;
    - Two, there wasn't a good understanding on the part of the Board of the required level of proof—these are all civil matters and the burden of proof is a preponderance of evidence; the Board was clearly trying to apply the "beyond a shadow of a doubt" standard. Also, applicators had a lot more at stake than the others involved, so they showed up at meetings to plead their case, while complainants did not, so there was a clear trend of erring on the side of the applicator. After one case involving a significant violation, the Attorney General wrote a letter to the Board saying that if you're not going to enforce your laws, then the Attorney General will.
    - Three, the Board spent a lot of time, sometimes hours, discussing each case.
- The current protocol is essentially a policy, and the Board can change it. Jennings said the staff would try to be more mindful of those cases that should come in front of the Board prior to negotiating a consent agreement.
- Jemison said that in 10 years he can only think of a couple of cases that he would have liked to have seen earlier, the marijuana case being one of them.
- Jennings said that another issue is how to determine a fine. Some states use a mathematical formula; Maine had a hard time with that because it ignores some of the less tangible things, such as: were they trying to do it right, or were they completely ignoring the law. There is a statutory list of considerations. The staff tries to look at consistency and fairness… If the Board wants to provide guidance in advance, they can try to do that.
- Eckert said she'd like to see the "very different" issues. Jennings said that's a difficult yardstick to apply.
- Granger said that his discomfort is that the fine has already been negotiated and the person has agreed to pay the fine, and the Board can only reject the entire agreement. What kind of option does the Board have to go back and say this fine should be higher or lower? Having to rubberstamp what the staff has done without hearing everything involved puts Board members in a difficult position. He's generally comfortable with the process, but once in a while, like when an $18,000 fine comes up, it's a concern. Maybe the Board should see everything over $10,000 before it gets agreed upon? If it's that egregious, the Board should have a chance to look at it before it's agreed on.
- Morrill agreed with Granger, that he didn't like seeing the issue for the first time after a fine has already been agreed upon.
- Jennings pointed out that if they don't approve any part of a consent agreement, it gets thrown out and they start from scratch.
- There was some discussion about whether the staff could give the Board some warning about big or unusual cases coming up. Jennings said that if it was to be discussed at all, notice would have to be given to the parties involved, so they could attend the meeting.
- There was some discussion about executive session and what could happen there. The statute appears to closely limit what can be discussed in executive session.

    - **Consensus was reached to revisit when the Assistant Attorney General was present.**

7. Consideration of a Consent Agreement with Lucas Tree Experts of Portland

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 on matters not involving substantial

7. Review of the Board's Enforcement Protocol

At the September 6, 2013, Board meeting, concerns arose about the proposed fine imposed by a pending consent agreement. At the October 18, 2013, meeting, the Board reviewed the enforcement protocol, and discussed when enforcement cases should be presented to the Board prior to negotiating an agreement, as well as the Board's options regarding executive sessions. However, because the Assistant Attorney General was not present, it was agreed that discussion of this topic should be continued at the next meeting.

Presentation By: Henry Jennings
Director

Action Needed: Determine Whether Changes Should be Made to the Board's Enforcement Protocol and Provide Guidance to the Staff

- Jennings noted that when the medical marijuana case came up there was some difficulty in understanding how the numbers were arrived at and what are the Board's options if they are concerned with a penalty.
- Enforcement protocol: why hadn't the issue been brought to the Board in advance? Section 3 outlines two paths the staff can take to resolve a violation; first, if it's a routine matter and there is no disagreement between violator and staff around facts or law, Section 3A directs the staff attempt to negotiate an agreement before presenting the matter to the Board. The orchard situation is an example of when the staff cannot reach an agreement, so it came to the Board under Section 3B. The other way it comes before the Board first under Section 3B is if there is a substantial threat to the environment or public health. It's a judgment call. At the last meeting, the Board seemed to be narrowing in on a dollar threshold as an additional criterion to trigger the 3B option. Most fines are $1500 or less. The Board wanted to have this discussion when Randlett was present. The staff has already taken note that it needs to be mindful and pay attention to whether or not we should bring cases to the Board first. At the last meeting, Jennings described the pitfalls around bringing all to the Board-it takes a lot of time at Board meetings, etc.
- Randlett stated that it is the Board's determination on how it wants to address enforcement matters initially. It can be based on a dollar amount; the Board could include a criterion about "substantial public interest" instead or in addition to the criteria about the environment and health. It's up to the Board, it can set up any way it wants. Randlett noted that with any violation, no matter how serious, the maximum penalty for a first offence is $1500; larger amounts are allowed with multiple violations, either of the same rule, or spanning multiple rules, or over a period of time. The seriousness varies. To some extent it will most likely be based on the staff's initial determination; if you base the penalty on possible violations, the Board would see them all.
- Morrill said that the protocol is well written and captures the Board's sentiments. He is not comfortable assigning a dollar figure threshold; one guy goes out one day and treats 15 lawns, that's 15 potential violations. The staff gets the idea. In five years there were two that the Board would have liked to see. Paragraph 3B says it, the Board wants to see the unusual ones.
- Jennings commented that Randlett said that the Board can provide some direction to the staff on a dollar figure without changing the policy.
- Bohlen asked whether the Board could be alerted without bringing a consent agreement before the Board formally. The Board couldn't act at that point, but the frustration earlier was that by the time it came to the Board it was a done deal. The question is how do we do it without getting into the negotiation process, because once we get into the process, it's the Board's.
- Randlett stated that once it is brought to the Board's attention, it's public information. If an agreement hasn't been reached and it gets reported, that could interfere with the process. In the marijuana case the staff and Randlett were able to sit down with the attorney and responsible parties

from the facility and have an open and frank discussion about violations and what we were looking for; he's not sure that would have been possible if it had been brought in front of the Board and it became known that the fines could potentially reach $24,000.

- Eckert asked if the Board could have been told that it was a case involving marijuana and multiple violations. Randlett said they probably would not have been able to give the Board as much information as it would like. Jennings noted that if the violator is identified they would have to be invited to the meeting, so it would have to be very general terms.
- Granger said that he wasn't uncomfortable with the dollar amount in the marijuana case, but with the violations. Usually the rules are pretty clear; in this instance there was a pest problem and no licensed tools to deal with it. When something doesn't fit, there are extenuating circumstances, and there is no good clear legal path to deal with the problem, that should be taken into consideration.
- Jennings questioned what would happen if the Board just refused to ratify a consent agreement; it puts the staff in a difficult spot but it sends a clear message to the violator. Randlett stated that this would put the state in the position of having to return any monies collected and would seriously impact the ability of the staff to negotiate a settlement.
- Eckert and Morrill asked if the Board could review the consent agreement before the penalty was collected. Randlett said that accepting payment does lock the violator in. Legally there is no reason the consent agreement couldn't be negotiated initially and payments not collected until after the Board approves. At least if the Board rejects it, the state wouldn't have to return the money. It does present some difficulty; to what extent are conversations regarding penalty amount made public, and which can be made in executive session. Ultimately it's the AG's determination of what to do.
- Eckert noted that in the marijuana case there was some disagreement of whether this was a threat to public health and suggested the words "novel situation." Randlett suggested "or other extraordinary situations", would still be at the discretion of the Board.
- Granger said that he liked the idea of not collecting money first; when the violator has written a check it makes it more difficult for the Board to disagree with the consent agreement. He noted that he doesn't want the Board determining what the penalty should be, just that there should be a discussion with the Board. Randlett noted that any discussion with the Board prior to an agreement would have to be in the context of a public meeting, which might impact some negotiations.
- Jennings noted that if payment is not collected at time of signing, the staff is going to have to chase people down to collect.
- Morrill reiterated that the current protocol is fine; if it's covered under 3B it should come before the Board first.

    - **Morrill/Eckert: Moved and seconded to add the words "or other extraordinary circumstances" to section 3B of the enforcement protocol.**
    - **In favor: unanimous**

- Randlett broached the subject of executive sessions, noting that this discussion refers only to enforcement matters. Meetings are open to the public; there are limited reasons why the Board may go into executive session, which are spelled out in Subsection 6. paragraph E (M.R.S.A. 1 Section 405, included in Board packet) is the one that applies to the Board, with conversations with AG concerning legal rights and duties of Board regarding pending enforcement actions. The end is the relevant part: "when premature public knowledge would clearly place the State… at a substantial disadvantage" The AG would need to make a couple of determinations, does it involve legal questions and would it clearly place the Board at a substantial disadvantage? It's tough to make those determinations. Having discussions involving the merits of the case, quality of the evidence, the type of penalty ranges that might be considered-those might place the Board at a disadvantage, difficult to say whether it "clearly" places the Board at a "substantial" disadvantage. There's also an impact on the individual; premature knowledge of the severity if disclosed might have an impact.