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STATE OF MAINE
MAINE DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY
BOARD OF PESTICIDES CONTROL
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COMMISSIONER
HENRY S. JENNINGS
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BOARD OF PESTICIDES CONTROL

April 12, 2013

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

MINUTES

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

1. Introductions of Board and Staff

- The Board, Assistant Attorney General Randlett and staff introduced themselves.
- Staff present: Jennings, Hicks, Fish, Connors, Bills

2. Minutes of the March 1, 2013, Board Meeting

Minutes will be available at the next meeting.

3. Request from Maine Migrant Health Program and Eastern Maine Development Corporation to Help Support a Worker Safety Training Program for Summer 2013

Since 1995, the Board has supported a Migrant and Seasonal Farmworker Safety Education program. During 2012, 411 individuals received pesticide safety training in addition to the other health-related training provided under the grant. The Maine Migrant Health Program and Eastern Maine Development Corporation are planning to provide one health and safety outreach worker during the 2013 agricultural season. Funding to support this effort is being requested in almost the same amount as last year, and funds have been budgeted in the Board's FY'13 work plan.

Presentation By: Chris Huh, Program Manager, Farmworkers Jobs Program,
Eastern Maine Development Corporation

Barbara Ginley, Executive Director, Maine Migrant Health Program

Action Needed: Discussion and determination if the members wish to fund this request

- Chris Huh introduced himself and Liz Charles from the Maine Migrant Health program. He explained that this request was similar to those made in the past to support pesticide safety outreach activities during the summer. In the past this was matched by an AmeriCorps grant, but AmeriCorps is no longer supporting pesticide safety outreach. As a result, there will be one person this year instead of the two that have been hired in past years.

- Liz Charles explained that they have a network of growers that they have been working with and will continue to provide training for. She said the person hired would work out of Augusta for the first part of the summer, connecting with growers in the southern part of the state; move to Aroostook County in July to work with broccoli growers; and shift to blueberry country late in the summer. She said that they have been including heat stress training in addition to WPS and that growers have been receptive to that.
- In response to a question, Charles said that they would be happy to help collaborate on training to assist Spanish speakers pass commercial applicator exams.
 - **Eckert/Stevenson: moved and seconded to support the grant request**
 - **In Favor: Unanimous**

4. Gowan Company, Inc., Request for FIFRA Section 24(c) Registration for Malathion 8 Flowable on Low and High Bush Blueberries

Gowan Company, Inc. is requesting a Special Local Need [24(c)] Application to increase the maximum application rate of Malathion 8 Flowable agricultural insecticide to control spotted wing drosophila (SWD) on high- and low-bush blueberries. This request is supported by University of Maine Blueberry Extension Specialist, Frank Drummond. Research indicates that Gowan Malathion 8 Flowable is highly effective against the SWD at the higher application rates. In addition, Gowan Malathion 8 Flowable offers growers the advantage of very short pre-harvest and re-entry intervals. Available data indicate that residues are expected to be below the established tolerance.

Presentation By: Henry Jennings
Director

Action Needed: Approve or disapprove the request

- Jennings explained that this is for the same use pattern as what was approved last year; that last year it was an emergency exception under FIFRA Section 18, and this year, the EPA is asking that it be submitted as a Special Local Need under FIFRA Section 24(c). He noted that the review process is different; the 24(c) must indicate that tolerances and food safety are adequately addressed. The request would allow a use rate of 2.5 pints, two applications per year. He mentioned that the Cooperative Extension is interested in having a label available for cane berries as well, but that EPA and Gowan weren't ready for that when this application was being prepared; that should be available for review at the next meeting.
- Dave Yarborough explained that everyone is very concerned about the SWD because of its potential to increase populations very quickly, which could have devastating consequences. He said that there are many effective materials available, but that malathion is the least residual. He said the lower rate may not kill all the insects and it is essential to get them all. He said the plan is to try to harvest as much as possible before the pest comes in, but this is an insurance policy for late in the season.
- Jemison asked what pesticides are effective. Yarborough replied basically everything except the neonicotinoids. Most have been effective, but rotation is necessary to avoid resistance.
- Jemison said that with spinosads and pyrethroids the pre-harvest interval is several days, and asked if the benefit of malathion is that you can harvest 24 hours later? Dave Bell replied that malation is effective for five days so they are recommending not applying closer than five days to harvest.
- Jemison asked how it would work if a grower wanted to sell fresh fruit on a Saturday. Yarborough said the strategy is to not have the eggs in the fruit at all, especially for the fresh market; if the eggs are in there, the fruit goes bad fast.

- Dave Bell noted that the implications for organic farmers are huge; currently the only thing available to them is Entrust. He explained that for all growers shipping to other countries, this is going to be an issue; Maximum Residue Levels vary country to country. Frozen blueberries are 99% of the crop; producers are going to have to trace products, may have to segregate by materials used in order to go to different markets. Twenty-two million pounds of blueberries were exported last year, about one-quarter of the crop.
- Dave Bell explained that there is a lot of research going on, including with MOFGA, University of Maine Cooperative Extension, working with the Legislature to get additional funding for research. He said they are working aggressively on two fronts; treating to save this year's harvest and IPM for long-term solutions. He mentioned that, while other states are dealing with the same issues, Maine's climate is different and so additional research is needed.
 - **Stevenson/Flewelling: moved and seconded to approve request for five years**
 - **In favor: Jemison, Eckert, Stevenson, Morrill, Flewelling**
 - **Abstained: Granger**

5. Workshop Session to Review the Rulemaking Record on the Proposed Amendments to Chapters 20, 22, and 51

(Note: No additional public comments may be accepted at this time.)

On February 13, 2013, a Notice of Agency Rulemaking Proposal was published in Maine's daily newspapers, opening the comment period on the proposed amendments to Chapters 20, 22, and 51. A public hearing was held on March 1, 2013, at the AMHI Complex, Deering Building, in Augusta, and the written comment period closed at 5:00 PM on March 15, 2013. Four people spoke at the public hearing and 88 written comments were received by the close of the comment period. The Board will now review the rulemaking comments and determine how it wishes to proceed with the rulemaking proposals.

Presentation by: Henry Jennings
Director

Action Needed: Discussion and determination on how the Board wishes to proceed with the rulemaking proposals

- Jennings summarized the common themes in the comments received:

Comment Themes

- Protect organic farmers
- Don't make conventional crops unmarketable through residues
- Protect beekeepers
- Concern over non-target effects
- Some people believed there would be no notification (especially beekeepers) or that notification is being reduced (it's really authorization that's being changed)
- Many people opposed wide-area mosquito spraying
- Many people opposed aerial mosquito spraying
- Many people opposed the idea of spraying over their property without their permission
- People think mosquito spraying will increase cancer rates
- Many people advocated for other strategies for reducing the risk of mosquito-borne disease instead of wide-area spraying
- A few people advocated for more monitoring

- A couple people notified the Board that they want their properties excluded
- Do research on the residue degradation curve

Comment Responses

- Many commenters are uncomfortable with the prospect of wide-area, mosquito-control programs.
 - This is understandable and we should fully respect that sentiment and be mindful of it at every appropriate juncture.
 - But the Board of Pesticides Control has never made decisions around whether pests should be controlled or not. That's not the Board's job.
 - Instead, the Board promotes use of the best science and the best application practices.
 - The Board does have a duty to find ways to control targeted pests in a manner that minimizes reliance on pesticides, and the Board continues to devote considerable resources to that end.
 - And we should pour as much energy as possible into minimizing reliance on pesticides in the context of public-health, mosquito-control programs.
- Jennings suggested that, while many people voiced legitimate concerns, there are really two fundamental public policy issues before them:
 1. If the state and federal CDCs take the position that control of adult mosquito is in the best interest of the public, should the Board's rules allow for that?
 2. If the Board believes that aerial control of mosquitoes for public health purposes should not be done in Maine, then the most appropriate way to implement that policy decision would be to explicitly prohibit that practice. It is not appropriate to prohibit an activity through implementation of rules that make it impractical to do.
 - Jennings further noted that it had been pointed out that some of the requirements of Chapters 22 and 51 should be not exempted and he suggested that the staff go back and work through the rules to determine which parts should and should not be exempted. He asked Randlett if this would require beginning the rulemaking process over and Randlett said that if the changes were in response to specific comments in the rulemaking record and if it was not the intent of the Board to exempt those provisions then it would not be necessary to begin again.
 - Jemison said he was very appreciative of people who took the time to send us their comments but that there seemed to be some misunderstanding about what the Board is trying to do. He asked Katy Green (MOFGA) if it would be helpful if he came and talked to the MOFGA membership. Green replied that generally speaking, the public would love to hear what the intent was, but that the talking points to which Jemison referred did not come from MOFGA. Jemison felt that three-quarters of the messages concerned things over which the Board does not have control and he would like a chance to explain. Hicks said that this would be appropriate, but not during the rulemaking process; Randlett agreed. Green suggested that she work with Jemison on an article for the MOFGA newsletter.
 - Eckert stated that she supported this because of the risk to public health. Many of the comments were from people saying they don't want spraying, but that the Board doesn't want spraying either. We were saying we wanted to make authorization easier in the case of a public health emergency as determined by the Maine CDC. The fact that nobody wants spraying was not lost. She would like to be sure that the basis statement reflects that the Board is changing the rules to make spraying possible if it becomes necessary. She recognizes that there would be BMPs and things should be planned out ahead, but it still might become necessary to spray. She agreed that all of Chapter 22 shouldn't be exempted.

- Eckert asked if, when spraying was done in the late 90s, early 2000s, was any data collected on residues or health effects? Hicks replied that there was one study that looked at emergency room visits and found nothing.
- Flewelling asked if this would cover things other than mosquitoes if something came up. Jennings said that it was worded to include all vectors just in case. He pointed out that the CDC does not recommend wide-area control of ticks (for Lyme disease).
- Granger asked what would happen if we don't make these changes and a public health emergency was declared and they can't operate with the rules as written. Jennings replied that the Governor can declare an emergency and suspend all rules, but this type of emergency is designed around natural disasters, not public health emergencies. That's why the Board wants to make it workable if the CDC determines there is a public health emergency; if it were a crisis of large-scale proportions the Governor might declare an emergency, but it's more likely to be a localized emergency. Granger said that with the rules currently in effect, local areas can still spray. He suggested that we leave in rule what we think is right, which is not spraying other people's land without their permission, and let them overrule that if they want to instead of trying to anticipate what the needs will be. Dave Struble pointed out that for the Governor to get involved it would need to be very wide-scale, countywide or statewide. He doubted that the Governor would want to get involved if it was a town trying to do something.
- Jennings said the question is, if an area affected is too small to warrant a statewide emergency, are the Board's rules going to preclude a town from doing spraying?
- Flewelling said that a town is not going to spray first thing; it is difficult and expensive; it would be their last choice.
- Jemison opined that by being proactive the Board has the chance to frame the stages. If there's going to be ground spraying, anyone can opt out. He pointed out that the Board is trying to help control the chaos. Jennings said the idea is to do as much planning as possible so that we never get to a place where aerial spraying is necessary.
- Morrill pointed out that things got kind of hung up at the legislative level. Jennings said that the Legislature told the Department to write a plan; the more effort the state puts into trying to define the issues, the better. Hopefully it won't rise to the level of concern this year that it did last year, because if we get to a place where people start dying, nobody is going to know what to do.
- Morrill said that the Board spent a lot of time discussing this issue and has broadened the discussion from the original intent of rulemaking: we're just trying to make it possible for someone else to make a decision to spray. He agreed that we need to educate the public about what the Board is trying to do: we're talking about a severe public health threat; it is a local control issue; it's likely the problem will be in a small area; protecting crops is important. The Board should support more research on the products being used, which will help put the general public at ease. Hicks said she disagreed with this last statement; people are opposed to aerial spraying whether it is *Bt* or malathion; it makes no difference. Morrill said the product used is important to farmers; Jennings said it is also important for local health officials.
- Eckert pointed out that it takes a couple of weeks to diagnose EEE in humans so nothing will happen until there are multiple cases in the same area.
- Hicks said she could get residue data from registrants if the Board wanted to look at that; she doesn't see a need to generate basic data as it's already been done. For those that have food uses, the tolerances are available. The most likely product to be used, Anvil, is not labeled for food, so that will be more difficult, but she can contact the registrant. Jemison said that he would like to see whatever data is available.
- Fish said that the Board also needed to be aware that people are doing their own fogging, and the staff is getting questions about whether it's ok to go onto other people's properties. If people start

dying from EEE and there is no official response, then people are going to take matters into their own hands, which may be worse.

- Jennings pointed out that there is a lot of mosquito spraying going on already, and the business has picked up considerably. What the CDC may do will be minor in comparison to what's already happening.
- Hicks said that the application rates for five of the six products used in mosquito control are between two and 14 percent lower for air and ground spraying in a mosquito-control program than the similar products available to homeowners.
 - **Jennings noted that the Board would be doing two sets of rulemaking simultaneously: an emergency rule for this year and a major-substantive rule for long-term. He agreed to have the staff amend the rule to exempt only the appropriate parts of Chapters 22 and 51 and to prepare rulemaking documents for the Board to review at the next meeting.**
- Katy Green asked where things stood with DEP regarding larviciding, as that is a place where there seems to be common ground. Jennings said that Brian Kavanah at DEP was open to discussing ways to make it easier to larvicide, and that they will have a meeting to discuss it soon; they are short-staffed and grappling with many issues.
- Jennings said that the draft bill which will pave the way for a fix to the Clean Water Act conflict, An Act to Clarify the Permitted Use of Aquatic Pesticides, has been printed.

6. Consideration of a Consent Agreement with TRP Logging of East Machias

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 application of an herbicide by an unlicensed individual to the shrub and flower beds at the MacDonald's in Machias, Maine.

Presentation By: Raymond Connors
 Manager of Compliance

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

- Connors summarized the details of the case and explained that company did not realize a license was needed because he bought the material over the counter. It was a ready-to-use formulation with a built-in trigger nozzle. Flewelling asked whether he planned to get a license, but Connors said he didn't think so; he mainly does maintenance work. Flewelling asked why the person making the complaint had called; Connors said it was a small town, and probably someone saw him who knew that he wasn't licensed and called to ask that someone check and make sure that what he is doing is okay.
- Flewelling asked how many complaints come from licensed applicators. Connors said it happens; they figure they've committed time and paid the fees, and they shouldn't have to compete against people who haven't.
 - **Flewelling/Eckert: moved and seconded to accept consent agreement as written**
 - **In favor: unanimous**

7. Consideration of a Consent Agreement with Firehouse Property Maintenance of Falmouth

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 application of an herbicide by an unlicensed individual at the Bank of America in Gardiner.

Presentation By: Raymond Connors
Manager of Compliance

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

- Connors summarized the case and explained that the penalty was higher than the last case because it appeared the scope of work was on a different scale. This individual was using Roundup concentrate with a backpack sprayer; and they had travelled from Falmouth to Gardiner to do the job. When asked for the container, he retrieved it from the trash and it was an empty 32-ounce container; he couldn't have used that much on a single job. He is a subcontractor for a company that advertises weed control on its website. Connors said he has spoken to that company and they do have a stipulation in their contract that subcontractors have the necessary licenses but, from now on, they will require proof of licensure.
- Stevenson remarked that this would likely need some follow-up.
 - **Morrill/Stevenson: moved and seconded to approve consent agreement as written**
 - **In Favor: Unanimous**

8. Discussion About Providing Support to Municipalities Considering Pesticide Ordinances and/or Policies

At the January 18 and March 1, 2013, meetings, the Board discussed the appropriate staff role for participating in meetings in which municipal ordinances and/or policies are being discussed. The Department and the staff favor a policy in which the staff provides technical information at a variety of venues, but avoids meetings in which the merits of an ordinance or policy are being discussed. Following a discussion at the March 1 meeting, the staff agreed to prepare a memo describing its proposed educational/technical assistance approach.

Presentation By: Henry Jennings
Director

Action Needed: Provide guidance to the staff

- Jennings handed out a memo which he described as a proposed set of positions and strategies to assist municipalities and said he was looking for other ideas.
- Jemison and Morrill said that what is in the memo is excellent and that it will continue to evolve as different questions arise. Morrill also mentioned that the PowerPoint presentation by Gary Fish, which is available on-line, is excellent.
- Jennings said it was important to provide easy access to the best information and that the staff is happy to provide educational opportunities, they just don't want to be part of a town's debate about what its ordinance should be or whether they should have one.

9. Other Old or New Business

a. Legislative Update—H. Jennings

Jennings gave a brief update on current legislation:

- LD 292, An Act To Protect the Public Health from Mosquito-borne Diseases, had been voted out of committee as a Resolve directing the Department to do research and write a plan including what the triggers for action would be.
- LD 903, An Act To Enhance the Development and Implementation of Integrated Pest Management Programs has had a public hearing, but not the work session. Jennings said the Department is concerned about the BPC fund because it is already supporting BPC and Department staff. There is concern that some companies won't register products if the cost is too high, because of the low population in Maine; every time the fee is raised, we lose some registrations. The average state registration fee is \$193; the range is \$70 to \$750. Maine's fee is \$150 and we are 41st in population.
- LD 920, An Act To Prohibit Herbicide Spraying on Abandoned Railroad Lines, is being heard by the Transportation Committee; not sure where it stands.
- LD 961, An Act To Ensure Safe School Grounds, was voted out of committee ought-not-to-pass. Jennings said this may be because the Committee was also looking at the Board's Chapter 27 revisions. The Committee did attempt to amend the Resolve, so the Board may end up having to direct the Department of Education to do something; not sure how that's going to work. The LD was reconsidered and was voted out of committee, 7–6 opposed.
- LD 1391, Resolve, To Provide a Pesticide Spraying Notification Process, has not had a public hearing. It seems to be a voluntary system.
- Jennings reminded the Board they can take a position on any bill; they have not done so yet this session.

b. RWC Inc. Variance—H. Jennings

c. DeAngelo Brothers Variance—H. Jennings

d. Consideration of a Chapter 29 Variance Permit Request to Control Japanese Knotweed in Northeast Harbor above the High-Water Mark Adjacent to the Ocean—H. Jennings

- Jennings distributed copies of two emails that had been received from Nancy Oden.. There was some discussion about the two products listed in the request. Hicks said that both have issues with leaching. Jemison asked whether Capstone was the product that had the issues with manure and Hicks replied that it was. Fish pointed out the product is broken down by soil microbes; it is only an issue in compost. Jennings pointed out that Capstone is labeled for aquatic use because it controls aquatic weeds without damage to non-target organisms. He also said that Ron Lemin had recommended it. Jennings said that the applicator was not adverse to using different products. His plan is to plant annual rye prior to the application to get undergrowth established; he also plans to use silt fence and jute fabric as well as a wood-bark-mulch berm to control erosion. He may choose to use Garlon 3A instead of the Capstone, depending on how they choose to proceed; if there is grass growing, you don't want to follow up with glyphosate. Lemin's thinking is that this is going to get an aquatic label; if it's going to be allowed to be used in water, then whatever leaches into the water would have fewer non-target effects.
- Jennings suggested the Board could approve the request with a caveat that the applicator work with the staff and the vegetation management experts to determine what products are best to use; come up with a plan to minimize risk to aquatic organisms

- Jemison asked what the area looked like. Jennings said he thinks there is a rock wall and the area with the knotweed is just above that. They will have to come back and replant some kind of vegetation to reduce erosion.
 - Stevenson asked if it could be cut and the pesticide applied to the stumps. Morrill said they've tried that; it depends on how established it is; with bamboo, nothing works very well. He hasn't seen a noticeable difference using the cut-stump method over spraying and it is labor-intensive. Fish pointed out that using that method tends to result in applying more per acre than the label allows.
 - Eckert said that no matter what you do, you have the issue of being too close to the water.
 - Granger suggested using black plastic and fabric over the plants to block the light. Herbicides are going to knock it back, but they're going to have to keep going back.
 - Morrill said he's had the best success with leveling off the ground, planting a cover crop and mowing it.
 - Eckert asked if this issue was going to keep coming in front of the Board. Morrill said it comes up all the time; most people just aren't coming to the Board to get a variance; we should give this person credit for that and for having a plan to control erosion. Once they do this, and establish a new crop, it will make the environment much better.
 - Jemison said they would never get rid of it; they would be coming back to this forever.
 - Katy Green suggested that the Board ask for photos with the variance requests so the Board could have a better idea what it was looking at.
 - Jennings said that Morrill's point was a good one—at least if there is a variance request the Board has a chance to tell the applicator what the Board's priorities are. Fish pointed out that this person did a good job of addressing the most important aspects: it has an erosion control plan and a re-vegetation plan.
 - Randlett said that he would like to remind the Board of the standards they should be using in determining whether to grant a variance. The applicant must provide substantially equivalent protection of surface water as would occur without the variance.
 - Eckert said this could be a good educational opportunity.
 - Granger said if the method of application is directed away from the water, and if the Board is okay with the likely movement of the pesticide after application, then they should approve it.
 - Jennings reiterated that they could approve it with the caveat that the applicator work with the staff.
 - Stevenson said that it would be helpful in the future if we requested photos. He said this is not a high-risk situation; the applicator is responsible, is looking at the same things the Board is, and he explained what alternatives have been considered.
 - Jemison commented that while it may not be high-risk, it is purely aesthetic; there are benefits to Japanese knotweed. Fish noted that it is an extremely good pollinator food source.
 - Stevenson said that it looks like the Board is going to be dealing with this a lot; we should get the staff involved, to make sure best practices are used.
 - **Flewelling/Morrill: moved and seconded to approve variance request**
 - **In Favor: Stevenson, Morrill, Granger, Flewelling**
 - **Opposed: Jemison, Eckert**
- e. Consideration of a Consent Agreement with Bruce Hunter of Chebeague Island—R. Connors
- Connors summarized the case and explained that there was damage along the line where the properties abutted and also on the far side of the golf course opposite the Hunter property in line with Hunter's sight-line to the ocean. Samples taken were positive for glyphosate or the

breakdown product of glyphosate. Hunter hired legal representation and said he would pay the fine, but would not acknowledge culpability.

- Randlett said he assumes the language was requested to forestall a lawsuit.
 - **Eckert/Stevenson: moved and seconded to accept consent agreement as written**
- Flewelling remarked that the penalty seemed light. Connors said that inspector described the affected shrubs as brambles and native materials. Because Roundup has no residual action, they will come back.
 - **In Favor: Unanimous**

f. Other?

10. Schedule of Future Meetings

May 17, June 21, July 26, September 6, October 18 and December 6 are tentative Board meeting dates. The September 6 meeting is tentatively slated to include a planning session. The Board will decide whether to change and/or add dates.

Adjustments and/or Additional Dates?

- It was agreed the May 17 meeting be moved to May 24.
- It was agreed that the July 26 meeting (in Unity) would occur in the morning, followed by lunch provided by MOFGA, and then farm tours in the surrounding area.

11. Adjourn

- **Granger/Morrill: moved and seconded to adjourn at 11:59 AM**
- **In favor: Unanimous**