

MAINE STATE LEGISLATURE

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STATE OF MAINE

Inter-Departmental Memorandum Date June 6, 1975 ✓

To Donald F. Mairs.

Dept. Pesticides Control Board

From Sarah Redfield, Staff Attorney S.R.

Dept. Attorney General

Subject Blackfly larvacide Permit Application of Old Town and Orono

This is in response to your memorandum of May 27, 1975 raising various questions concerning the request of the towns of Orono and Old Town for an aquatic permit to conduct a blackfly larviciding program.

Title 22 M.R.S.A. §1454-A provides that the Pesticides Control Board may grant a permit for the aquatic application of pesticides upon finding that

the proposed application of pesticides will conform to applicable laws and regulations and is unlikely to adversely affect any plant or animal life.

Although there is no precise statement as to which laws and regulations are contemplated by the statute, some parameters can be drawn. On the one hand, it does not appear that the statute contemplates that the Pesticides Control Board concern itself with legal issues which are essentially private in nature and generally determined by a court of law. As a practical matter, the Board is without the necessary expertise to determine the legal merits of the wide variety of private causes of action (such as trespass, contractual liability, corporate authority) which may be raised in the context of a pesticide application program.

On the other hand, the Board is obviously capable of determining conformity with its own laws and regulations and such conformity is clearly required prior to granting a permit. This also includes determining, for licensing purposes, conformity with such other laws and regulations as may be relevant to the subject-matter of the Pesticides Control Board's jurisdiction and concern, that is, laws pertaining to pesticides and water use and quality. Such laws would include the relevant requirements of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the Maine Department of Agriculture and the Maine Department of Environmental Protection.*

Because of your familiarity with the statutory requirements of FIFRA and of the Maine Department of Agriculture, these provisions are not addressed herein. In regard to the statutes administered by

*This list is not meant to be complete. As projects arise in the future they may well relate to additional statutory requisites.

the Department of Environmental Protection, the provision applicable to the proposed aquatic application of methoxychlor is section 413 of Title 38 which requires a license from the Board for the direct or indirect discharge of any "pollutant". The term "discharge" is defined as "any spilling, leaking, pumping, pouring, emptying, dumping, disposing, or other addition of any pollutant to water of the State," 38 M.R.S.A. §361-A.1; and the definition of pollutant includes "chemicals", 38 MR.S.A. §361-A.4-A. The addition of methoxychlor to the Penobscot River would require a permit even though it would not be a "waste" discharge as indicated by the heading of §413. Words of a heading do not control the more specific words of the act and in the present case the proposed application is within the scope of the specific statutory definitions, see 2A Sutherland Statutes and Statutory Construction §47.14.

In considering the DEP licensing provisions and other statutory requirement, the Pesticides Control Board is not itself able to determine, in the first instance, a project's conformity with applicable laws. In the case of DEP, the Board of Environmental Protection must issue the requisite permit. However, as a practical matter, the Pesticides Board may ensure conformity with the law by making its permit conditional upon the applicant's obtaining of all other requisite permits or authorizations. Section 1454-A itself provides that any permit "may contain such reasonable terms and conditions as in the Board's determination may be necessary to assure compliance with applicable laws and regulations. . . ."

In view of the preceeding analysis of the scope of the Board's obligations with respect to applicable laws and regulations, it is unnecessary to address the questions raised as to property rights of individual riparian landowners and of the Penobscot Indians.