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Municipalities State Prescription
Spruce Budworm Spraying Exclusion State Control
22 M.R.S.A. 454

JOSEPH E. BRENNAN 12 M.R.S.A. 1010 et seq.
ATTORNEY GENERAL



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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

May 26, 1978

To: John Walker, Director, Bureau of Forestry
Lloyd Irland, State Forest Insect Manager, Bureau of Forestry

From: Joseph E. Brennan, Attorney General

Re: Legal Efficacy of Prohibition, by Certain Officers of
Towns of Greenbush and Princeton, of Bureau of Forestry's
Spray Program for Spruce Budworm Suppression

You have asked our opinion of the legal effect of pronouncements by certain officers of the Towns of Greenbush and Princeton, which pronouncements seek to prohibit within such towns the proposed spraying for spruce budworm suppression by the Bureau of Forestry, as authorized by the Maine Spruce Budworm Suppression Act, 12 M.R.S.A. §1010 et seq. (the "Act"). These pronouncements are set forth in the following correspondence: letter, dated May 11, 1978, to Lloyd Irland from the Public Health Officer of Greenbush, in which he states that, acting pursuant to 22 M.R.S.A. §454, he is "banning the aerial spraying for spruce budworm in the Town of Greenbush," in that he finds the same to constitute a "public health menace;" and letter, dated May 17, 1978, to Lloyd Irland from the Town Manager and Public Health Officer of the Town of Princeton, in which he states, without reference to statutory authority, that the Board of Selectmen of that Town has "voted . . . to prohibit the spraying of spruce budworms in Princeton this year" and that "I as the health officer am also taking whatever action I can to prevent the spraying." 1/

In addressing the questions posed here, it is instructive to briefly consider the recent historical context of the Bureau's spruce budworm suppression program. In 1976, finding that a severe outbreak of spruce budworm infestation was threatening the economic and natural resources of Maine's forests, 2/ the 107th Legislature

1/ Although, as will be discussed herein, we find no legal authority for this action by the Princeton Board of Selectmen, we will assume that Princeton's Public Health Officer, as with that of Greenbush, seeks to take this action under the auspices of 22 M.R.S.A. §454.
2/ See Emergency Preamble of the Act, P.L. 1976, c. 764.

enacted the Maine Spruce Budworm Suppression Act, providing for a comprehensive program, to be undertaken by the Bureau of Forestry, for the protection of the forest by means of aerial application of insecticides as well as other management devices. In connection with its partial funding of this program, the U. S. Department of Agriculture ("USDA") annually drafts, solicits comments on, and issues in final form an Environmental Impact Statement, the purpose of which is to set forth the effects of, and alternatives to, an insecticide spray program as envisioned by the Act and proposed by the Bureau of Forestry. 3/ In commenting upon the 1978 Environmental Impact Statement, the U. S. Environmental Protection Agency ("USEPA"), whose statutory duty it is to register all insecticides for use only after evaluating their possible effects on human health and the environment, 4/ commented "Generally, we have no objection to the use of the pesticides which are proposed." 5/ Moreover, we understand that each of the insecticides proposed for use in Princeton and Greenbush are in fact registered by EPA. Finally, you have advised us that the Bureau has designed its spray program for 1978 so as to create buffers of one half mile or more between aircraft spray operations and all known residences.

With this factual background, and within the limited time afforded us for researching and analyzing these issues, we would respond to the questions raised by you in connection with the actions taken by the officers of Greenbush and Princeton, as follows:

1. The Legal Effect of Actions of the Greenbush and Princeton Public Health Officers under 22 M.R.S.A. §454.

22 M.R.S.A. §454, the statute which the Greenbush Public Health Officer cites as authority for his action (and which we

3/ See Final Environmental Statement Cooperative Spruce Budworm Project - - Maine, Vermont and New Hampshire, 1978 prepared by the Forest Service of the U. S. Department of Agriculture.

4/ See Federal Insecticide, Fungicide and Rodenticide Act, ("FIFRA"), 7 USCA §136 et seq., §136a(c)(5).

5/ See Letter of Wallace E. Stickney, USEPA, to Kenneth H. Knauer, USDA, which is Comment No. 22 to the 1978 Environmental Impact Statement.

assume is also intended to furnish the basis for the action of the Princeton Public Health Officer), provides, in pertinent part, as follows:

"The local health officer shall receive and examine into the nature of complaints made by any of the inhabitants concerning nuisances dangerous to life and health within the limits of his jurisdiction. . . . Every such health officer shall order the suppression and removal of nuisances and conditions detrimental to life and health found to exist within the limits of his jurisdiction."

In this instance, the public health officers of Greenbush and Princeton seek to exercise the general powers afforded them under this section in order to rid their jurisdictions, not of some known source of disease or infestation plaguing the inhabitants, but of a state program created by the Legislature to eradicate an epidemic insect infestation which the Legislature has found to be "threatening the destruction of one of Maine's outstanding natural and economic resources, its spruce-fir forest." Therefore, it may simply be stated that the Legislature has determined the public nuisance in need of eradication to be the budworm rather than the means used by the State, acting under legislative mandate, to destroy the same, and that, accordingly, 22 M.R.S.A. §454 cannot be applied locally to prohibit this legislatively authorized program. However, a more meticulous approach to the question posed warrants close scrutiny of the entire statutory framework created by the Act, in order to discern whether the Legislature conceivably may have intended the program thereby established to be subject to actions by local governments under the earlier-enacted §454.

A review of the provisions of the Act reveals an elaborate scheme for the establishment, operation and funding of a comprehensive, emergency program for the suppression of the spruce budworm infestation, including by means of aerial spraying of insecticides by the Bureau of Forestry. Specifically, the statute provides the following:

- the articulation of a legislative policy favoring the eradication (including by means of aerial application of insecticides) of what the Legislature perceives as a spruce budworm epidemic (see Emergency Preamble and §1011);

- the creation of the Spruce Fir Forest Protection District (the "Protection District"), which includes the Towns of Greenbush and Princeton, in which the Legislature has determined there exists a forest cover substantially composed of spruce and fir which "is now, or may reasonably be expected to become, subject to infestation and destruction by spruce budworm insects." (see §1013);

- a mechanism for the funding of the program, including by means of appropriations from special excise tax funds, property tax funds and the general fund, as well as by means of federal financial participation (see §§1014 and 1015); 6/
- a program for the special excise taxation of all parcels of land, not otherwise exempted by the Act, within the Protection District, the proceeds of such tax to be dedicated to the program's activities including spray operations (see §§1014.3 and 1015);
- a procedure for the determination, following notice and hearing, by the State Entomologist of areas within the Protection District having significant budworm infestation and recommended by him for treatment with insecticides (see §1016);
- various elaborate mechanisms for withdrawal by landowners from the program, including a special withdrawal procedure specifically afforded to state and municipal agencies with respect to lands within their ownership or control (see §§1017, 1018, 1019, 1020, 1023, 1026.1); 7/
- the administration and operation of the program by the Bureau of Forestry (see §§1021 through 1025);
- a procedure for the recommendation by the Director of the Bureau to the Commissioner, Governor and Legislature for the termination of the program (see §1021.5);
- an appeal procedure for any person aggrieved by any final action of the Director (see §1028); 8/ and
- the intended exclusivity of the Legislature's authorization of the program, as demonstrated by the following provision:

"Exclusive authorization. It is the intent of this emergency legislation authorization

6/ It is noteworthy, in this regard, that §1014(1), which adopts a procedure for the Legislature to annually determine the program's budget, provides that "Such determination shall authorize the budworm suppression program provided for by this subchapter for such calendar year and shall supercede any requirements which may exist for the approval of this program by any other state agency."

7/ It is apparent that the Towns of Greenbush and Princeton were not seeking withdrawal of their lands by this statutory mechanism. They neither followed the statutory withdrawal procedure provided nor, it is believed, could they contend that the entirety of each Town is within the ownership or control of the same.

8/ No appeal has been taken by either Town or its officers under §1028.

that the budworm suppression program proceed as promptly as possible and that any requirements which may exist for the approval of this program by any other State agency are hereby superceded. . . ." P. L. 1976, c. 764, Sec. 7. 9/

Although it is recognized that the Act expressly provides that other laws administered by "state agencies" are superceded, 10/ the question remains whether locally administered laws, including actions taken by local health officers under 22 M.R.S.A. §454, are likewise preempted by clear implication of the Act. In this regard, legislative intent may be discerned from a reading of the entire Act in light of the legislative policy manifested by it, the goal sought by the Legislature, and the consequences of a particular interpretation. See Harbro, Inc. v. Johnson, 181 A. 2d 249 (Me. 1962); Acheson v. Johnson, 86 A. 2d 628 (Me. 1952); Inhabitants of the Town of Ashland v. Wright, 29 A. 2d 747 (Me. 1943); Finks v. Maine State Highway Comm., 328 A. 2d 791 (Me. 1974). In this case, the provisions of the Act themselves manifest a legislative purpose and intent that the integrated State program therein authorized, which is based upon a legislative finding of urgent need, not be subject to review, control and prohibition of the municipalities whose very jurisdictions are expressly made part of the Protection District and are, accordingly, made subject to the benefits and burdens of the program. Not only does the Act provide various means by which landowners within the Protection District may withdraw from the program. 11/, but it envisions an administrative appeal remedy whereby aggrieved persons may seek relief from the decisions of the director. Therefore, although the Act expressly provides that it supercedes the requirements of other "state agencies," it is reasonable to conclude that this Act,

9/ See also §1014(1)

10/ In this regard, it is arguable that public health officers may be considered closely associated with the State Department of Human Services. See 22 M.R.S.A. §§ 454 (1st para), 451, 452, 456. If considered in this light, actions taken by such health officers may be directly subject to the preemption of "state agencies" expressly provided by §1014.1 of the Act as well as by P. L. 1976, c. 764, Sec. 7.

11/ In this instance, it should be noted that, according to the Bureau of Forestry, the landowners in Princeton and Greenbush whose lands are proposed to be sprayed have indicated no desire to withdraw.

taken as a whole, manifests a legislative intent that it is exclusive of other non-federal laws except as otherwise expressly provided 12/, and that interfering local government actions, as in this case, taken pursuant to an earlier-enacted and more general statute, be preempted. See Larson v. New England Tel. & Tel. Co., 44 A. 2d 1 (Me. 1945); Van Buren Light & Power Co. v. Inhabitants of Van Buren, 109 A. 3 (Me. 1920); Lewiston Firefighters Assn v. City of Lewiston, 354 A. 2d 154 (Me. 1976).

In sum, and given what we believe to be the Legislature's intent, as manifested in the Act, to create exclusive state authorization for the program 13/, it is our opinion that the directives issued by the Town Health Officers of Princeton and Greenbush are of no legal effect.

2. The Legal Effect of Action by the Princeton Board of Selectmen.

As indicated above, the letter to Lloyd Irland from the Princeton Public Health Officer and Town Manager states that the Board of Selectmen of that Town have voted to prohibit spruce budworm spraying throughout the Town. There is no recitation in the letter of the legal authority under which this directive is made, nor are we aware of any such legal authority.

17 M.R.S.A. §2851 et seq. vests in the officers of a municipality the power, following notice and hearing, to order the abatement of a nuisance caused by the existence of a building or structure which constitutes a hazard to health or safety. Clearly, this statute on its face has no applicability here.

30 M.R.S.A. §1917 vests in municipalities the so-called "home rule power," permitting them to enact ordinances in the exercise of any constitutional power or function which is not denied them, "either expressly or by clear implication", by the Legislature. However, in this case, no ordinance has been adopted, the Board of Selectmen acting alone being powerless to do so. Moreover, even

12/ The program is expressly made subject to certain laws administered by the Pesticides Control Board (see P. L. 1976, c. 764, Sec. 7) and, of course, remains subject to all applicable federal laws.

13/ See exception noted in footnote 12.


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if an ordinance had been otherwise duly adopted by the Town, by which the State spruce budworm program were prohibited, such municipal action would have no legal effect upon the State in that, as discussed in the first section of this opinion, such an exercise of municipal power would be preempted by the clear implication of the Act. See 30 M.R.S.A. §1917.

Accordingly, it is our opinion that the action taken by the Princeton Board of Selectmen is of no legal effect.



JOSEPH E. BRENNAN
Attorney General

JEB/bls

cc: James B. Longley
Richard E. Barringer