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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
DIRECTOR

BOARD OF PESTICIDES CONTROL

June 5, 2015

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

MINUTES

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

1. Introductions of Board and Staff

- The Board, Staff, and Assistant Attorney General Randlett introduced themselves.
- Staff Present: Connors, Couture, Jennings, Patterson, Tomlinson

2. Minutes of the April 24, 2015 Board Meeting

Presentation By: Henry Jennings
Director

Action Needed: Amend and/or Approve

April 24, 2015, Minutes:

- **Jemison/Flewelling: Moved and seconded to adopt minutes**
- **In Favor: Unanimous**

3. Review of Draft “Guidance for the Application of Pesticides In Forest Settings In Order to Minimize the Risk of Discharges to Surface Waters”

On June 27, 2012, the Board approved *Interim Guidelines for Forest Pesticide Applications* which were intended to assist foresters in minimizing the risk of discharges to surface waters. In April, 2015, the Maine Department of Environmental Protection finalized a general permit for aerial application of pesticides to forestry sites and referenced BPC Best Management Practices. Additionally, at the Joint Standing Committee on Agriculture, Conservation and Forestry work session for LD 817, An Act Regarding Aerial Pesticide Spray Projects, there was discussion about adding references to technological advances for aerial spraying. The Board reviewed the interim guidelines at the April 24, 2015 meeting and provided some input which the staff has attempted to capture in a new draft.

Presentation By: Mary Tomlinson
Pesticides Registrar and Water Quality Specialist

Action Needed: Provide Guidance to the Staff

- Jennings said that the guidance document does not describe any recommendations as BMPs. Operators need the ability to choose which practices to implement because all of the practices will not be feasible in all circumstances. These are not requirements.
- Tomlinson sent the draft document to foresters and a few other people, seeking feedback, and heard nothing back.
- Jennings wanted to make sure no one can construe these as legal parameters. There was concern about this from the Board.
- Eckert asked what the difference between neutral and stable atmospheric conditions is. Jennings replied that stable atmosphere occurs first thing in the morning if you have clear sky when there is very little air movement. Under neutral conditions there is some horizontal movement but the vertical movement caused by thermals has not begun yet. Under unstable conditions, the thermals have formed and there is both horizontal and vertical air movement. Applicators do not want to apply small droplets in stable air because high off-target residues can result.
- Bohlen asked who the target audience is for this, applicators only or a broader audience? Jennings replied that it will most likely be someone well versed on the subject. Bohlen responded there was terminology used that was very technical. Jennings suggested the staff go back and look at places where terminology could use further explanation. When Tomlinson drew those up and sent them out she used multiple forestry manuals and input from foresters.
- Morrill questioned item 4 on page 20. The document mentions buffer areas in several spots and then provides an actual footage buffer in that location. Jennings stated this came from foresters. Since they are required to buffer surface waters with their harvesting practices, they use this as a way to buffer streams by both vegetation and distance. Morrill suggested taking the whole bullet out because buffers are explained under item 16, etc. Jennings agreed to delete item 20.
- Bullet point 34 is missing closing parentheses. Tomlinson stated that this has been fixed.
 - **Morrill/Jemison: Moved and seconded to accept the draft as amended**
 - **In Favor: Unanimous**

4. Interpretation of CMRCMR 01-026, Chapter 10, Section 2(P)(2), Definition of Property Open to Use by the Public as Regards Outdoor Applications

At the December 5, 2014, meeting the Board had a discussion about the definition of “property open to use by the public,” which state statutes defines as commercial applications requiring a licensed applicator. Section 2(P)(2) of Chapter 10 provides the exemption, “where the public has not been permitted upon the property at any time within seven days of when the property received a pesticide application.” During that discussion it was noted that this exemption has been used most commonly by land trusts to treat for invasive plants where they post and indicate the area (but not the entire “property”) is temporarily closed to the public. The Board discussed this topic at the March 13 and April 24, 2015 meetings, but tabled the matter pending further input from Maine land trusts. The Board will review those findings and provide guidance on whether this is the appropriate interpretation of the rule.

Presentation By: Henry Jennings
Director

Action Needed: Provide Guidance on Interpretation of the Chapter 10 Definition

- Jennings stated there was interest in reaching out to land trusts to see what sort of impact it might have if the seven day exemption applied to the entire property. The land trust network sent out an online survey. Attachment 9G summarizes this survey.

- The survey provides information on how many land trusts are doing their own invasive species control and which are hiring commercial applicators. Many are doing invasive plant control, but few are hiring commercial applicators.
- Bohlen stated the tenor of the responses revolves around two ideas: pesticide application safety and entirely blocking land trusts from doing invasive plant control.
- Bohlen stated the take home message was that many of the land trusts have extremely limited capacity to do any of this. There are only a few, two or three, that have licensed their own master applicators. For many of the land trusts this is not a top priority and if we make it a \$500 fee, they just will not do invasive plant control. Invasive plant control is a low priority activity anyway. Bohlen felt the overall feeling from the land trusts was that changing the current interpretation of exemption was a bad thing. He is leaning towards not making it apply to the entire property and going with option two.
- Of the land trusts that responded to survey 47% said they sprayed and 53% did not.
- Eckert asked of the people not using the licensed applicators, what are they doing and how are they doing it? Is it staff, someone fairly knowledgeable, or volunteers? Bohlen said his feeling was the ones not using licensed applicators are using off the shelf products. Many land trusts do hand removal of invasive plants as well.
- Jennings stated most of the off the shelf herbicides are typically not restricted. Stevenson stated that internet purchases could be a concern.
- Granger asked if we are only talking about herbicides, or all pesticides. Morrill stated he believes they are talking about all pesticides, but the Board is mainly concerned about the spraying of trails.
- Granger suggested a third option; areas on property open to the public which are treated with pesticides must be closed to the public for a period of seven days after treatment. Granger stated this keeps people off the area that has been sprayed, but doesn't close down the entire property. Jennings stated the third paragraph is similar to Granger's option. What Granger is suggesting sounds a lot like what the interpretation is now.
- The real question is what is the definition of "property"? Randlett suggests replacing the word "property" with "treated area".
- The other question is, to keep it open are you required to use a commercial applicator?
- Recreational areas, trails, and parks are the areas affected by this rule.
- Flewelling suggested the Board go with option two and then revise it as necessary.
- Bohlen suggested thinking about this not in terms of a public health risk, but of overuse of material, excessive runoff, and not paying attention to buffers.
- Jennings stated educating the land trusts on proper pesticide use is an alternative to changing the interpretation of the exemption.
- Ann Gibbs stated that Fish is providing this kind of training and the DACF has a new hire that is doing this.
- Stevenson did not think closing down 100 acres to apply to one acre makes much sense. He also stated they have not seen any problems/issues with how things are being done. Are we trying to solve a problem that is not there?
 - **Randlett suggested that the staff come back with a rewritten policy and the Board agreed.**

5. Board Discussion About How to Handle Situations in Which a Property Owner Removes Signs Prior to the Required 48 Hours

In April of 2015, the Board's office received an inquiry about whether it was lawful for a property owner to remove signs posted pursuant to Chapter 28, Section 3, prior to the expiration of the 48 hour posting period. One homeowner allegedly removes the signs as soon as the lawn care company leaves

the property. Chapter 28 states that signs “shall remain in place at least two days following the completion of the application.” The staff is seeking Board input on the interpretation of that standard and whether the staff should enforce the standard with homeowners.

Presentation By: Henry Jennings
Director

Action Needed: Provide Guidance to the Staff

- How should staff respond when homeowners are pulling up pesticide application signs as soon as the applicator leaves?
- Jennings stated he had reservations about aggressively enforcing the posting standards with homeowners for a variety of reasons.
- Morrill stated if an application is done by a commercial applicator, it needs to be posted, however a homeowner can buy the same products and apply them and would not need to post signs.
- Randlett stated he was not interested in enforcement against homeowners, but if it is a landlord-tenant situation or the public is invited onto the property, then the signs take on more public significance. When this is at a rental property and the landlord pulls up signs, tenants may have no idea that an application was made.
- Jemison suggested that one solution could be the lawn care companies put in their contract that it is the homeowner’s obligation to keep the sign up for two days. Morrill said that the necessary information is on the sign. Stevenson remarked that space is a premium on the homeowner agreement forms. Jemison noted that the signs say should, but not must. Bohlen felt uncomfortable with the idea of specifying what a business needs to put in a contract. Jemison said he was seeing this as a way to protect the businesses. Morrill stated that there is already a lot of information in the contracts.
- Connors agreed with Randlett that it is not so much about enforcement, but clarifying who is responsible for making sure the sign is up for two days. Connors suggested having the sign state, “Homeowner Do Not Remove”. In this particular case, it was about the abutter. Another issue is the public walking by a property and going off a sidewalk and unknowingly onto a location that has recently been sprayed with pesticides. Connors also noted that homeowners may not own all the way to the sidewalk.
- Flewelling asked if this was a single incident. Connors replied that there have been multiple incidents of a similar nature, but this is one is at the forefront.
- Bohlen said he is trying to envision how this is going to be enforced. He asked Connors if the Board would even hear about these signs being removed.
- Eckert remarked that after the sign has been posted, the responsibility shifts to the homeowner; the company did its job by posting the sign.
- Connors said that in other New England states the commercial applicators inform the homeowner not to remove the sign for a specified amount of time and in some instances that is in writing.
- Morrill said the Board cannot currently pursue any action on this. Randlett stated in a certain circumstance this could come into play and the Board should be careful about making a pronouncement that they do not want to pursue any action against a property owner. Bohlen provided an example of a circumstance in which the commercial property owner might have an incentive to remove the sign prematurely: a bed & breakfast may want to pull signs early because it would detract from what they are trying to promote.
- Connors suggested that in order to determine when enforcement is appropriate you first need to determine applicability. Granger suggested the sign be put up and removed by the applicator. Connors said that in his view the placing of the sign is specific to the applicator and the responsibility of removing of the sign is implied to be the responsibility of the property owner.

Connors asked what is the Board's position? The real question is whose duty is it to remove the sign?

- Jennings offered that the Assistant Attorney General has provided an interpretation. He believed the important question is the level of priority enforcement of this standard deserves.
- Bohlen said the level of priority for him has to do with the level of the risk to the public.
- Eckert remarked that she sees a difference in priority between a situation involving homeowner and abutter versus a business and a larger public group.
- Connors said that it is still unclear who the sign language applies to. It is natural for the homeowner or tenant to remove the sign. Jennings responded that it applies to anybody who removes the sign.
- Bohlen stated that the test for this should be asking what is the risk to others, not what is the risk to property owners.

6. Board Discussion About Commercial Certification and Licensing Periods

The Board's staff has been working with the State Office of Information Technology and Pegasystems to develop a new technology solution to manage the Board's licensing system and other process oriented activities. That effort includes an analysis of the Board's processes and discussion about whether any of those processes can be streamlined or simplified. The commercial applicator licensing requirement is one that adds complexity, but not necessarily benefit—licenses last for two years and the certification period lasts for six years—which makes that process more difficult to automate. Private licenses have the same three-year license and certification period. Because the staff is in the midst of analyzing its business processes, it seemed appropriate to bring process questions to the Board for review and discussion.

Presentation By: Henry Jennings
Director

Action Needed: Provide Guidance to the Staff

- Jennings explained that the staff is in the midst of a fairly large scale “business process management” technology solution development project. This is a good opportunity to go through each requirement and ask ourselves why we came up with each specific rule and does it still make sense.
- For example, there is a fair amount of confusion on the part of commercial applicators about the six-year certification period and the two-year license period. Jennings asked the Board about exploring simplifying specific license processes.
- Morrill remarked that it was easier to track credits over a three-year period.
- Stevenson suggested five years and five years.
- Morrill said that if the Board can make it easier for the applicators and the staff they should do it. He suggested three years and three years. Jennings said that from a management standpoint it is easier to track credits for a three-year period rather than a five- or six-year period. There is added cost with a longer licensing period. What if the licensing period is five years and a person quits prior to working five years?
- Morrill stated that is easier to keep track of credits over a three-year period.
- Bohlen suggested all licenses should be on the same period and they can have different credits; that is fine, but all license periods should be the same.
- Eckert asked why it was set up like it is to begin with? Jennings responded that it used to be a one year license period and a five year certification period.
- Morrill said this is the time to simplify this.

- Jennings noted that this would require rulemaking, but not major-substantive if the fee is not changed. The staff will initiate rulemaking on this.
- Jennings discussed the merits of the requirement for passing a core and category exam within a one-year period.
- Eckert suggested staggering the licenses so that staff does not have to review all licenses in one year.
- Jennings stated if anyone else has ideas on processes that seem unnecessarily complex, now is the time to bring them up.
- Jemison suggested changing the license and certification periods for all licenses to three years.
- Bohlen agreed the licensing process looks absurdly complicated.

7. Board Discussion About Enforcement of the Ag Basic License Requirement

On April 1, 2015, the new Maine statute requiring licensing of “private applicators of general use pesticides for food production” (the so-called Ag Basic license) went into effect. The compliance staff has raised the question about how the Board recommends enforcing this new standard. Historically, the Board has endorsed a phased approach to enforcement of new standards. The staff is seeking guidance on the appropriate enforcement approach.

Presentation By: Raymond Connors
 Manager of Compliance

Action Needed: Provide Guidance to the Staff

- Connors asked for the Board’s view on how to approach enforcement of the new licensing requirement.
- Morrill stated there was already a three-year phase in on this.
- Eckert suggested giving them a warning on the first inspection and then enforcement action on the second inspection. Morrill and Flewelling worried this will put out the word that people do not need to worry about getting a license until they are inspected.
- Katie Green stated she felt MOFGA tried very hard to get the word out, but there are still many people who are not licensed. Tim Hobbes remarked that all the potato growers are licensed.
- Connors said that for an Ag Basic grower using pesticides, the criteria is \$1,000 of gross produce sales. The produce season is just beginning. When does the trigger start since the law went into effect April 1? How do you prove when \$1,000 of edible products have been sold?
- Dave Struble asked how many Ag Basic licenses have been issued? Connors replied that there are approximately 400 Ag Basic licenses currently, but Gary would be in a better position to answer the question. Dave Struble asked what percent of the population that 400 is?
- Jennings said that a large percentage of those licenses are from medical marijuana people, which was not anticipated. Some growers chose to get private licenses, rather than Ag Basic. Also, growers do not need a license if they are only using FIFRA Section 25b exempt products.
- Jemison remarked that the statute stating selling “\$1,000 annually” is bad wording.
- Stevenson asked how inspectors figure out how much growers sell?
- Ann Gibbs noted for nursery licenses they have a defined area that they require licenses for.
- Connors said that in the past, in the lawn care industry, the inspectors discussed the licensing requirements, left a brochure, and then the applicator signed off on that. He suggested using a similar process in this situation.
- Morrill said that continuing to provide educational support is the best approach.
- Some farms have three or four people with Ag Basic licenses

8. Consideration of a Consent Agreement with Tractor Supply Company of Brentwood, TN

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 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 to resolve the matter. This case involves a retailer that was selling pesticides positioned closer than ten feet from animal feed.

Presentation By: Raymond Connors
Manager of Compliance

Action Needed: Approve/Disapprove the Consent Agreement Negotiated by Staff

- Tractor Supply sells pesticides that require a General Use Pesticide Distributors license. Connors said that some of the requirements of the pesticide self service area (such as signs, 10' rule, spill kit), were ignored in 14 of the Tractor Supply stores. Many of these stores were in violation more than one year.
- Connors sent the corporate office a warning letter.
- The stores have corporate planograms dictating which products go where, so store managers were reluctant to move products.
- In 2014, there were eight Tractor Supply Stores that were inspected and had violations.
- Connors sent them a Consent Agreement that they acknowledged and paid.
- Bohlen stated eight stores and \$1,000 does not seem like nearly a high enough fine for this large of a corporation.
- Morrill noted that there are six years of failed inspections. Why didn't we send a warning letter in 2008 and then a fine in 2009? Morrill asked why we waited so long to fine them?
- Randlett replied that he also questioned the fine amount because he thought it was low, but then understood it better after talking to Connors. Connors had been working with a new Tractor Supply Company employee who was working to bring the stores into compliance. Morrill stated he felt there was uneven treatment concerning farmers and this company. Connors stated there was a distinction with this situation where there were individual stores that had violations, but not in all the sequential years the consent agreement covered.
- Bohlen asked if the Tractor Supply stores are going to be inspected this year? The Board needs evidence they're making changes; if this does not work, then the fine needs to be ratcheted up.
- Eckert added that there needs to be equal treatment between farmers and large corporations.
 - **Flewelling/Eckert: Motion to approve consent agreement negotiated by staff**
 - **In Favor: Unanimous**

9. Other Old or New Business

- a. Variance Permit for Maine Department of Transportation, Bureau of Maintenance & Operations
 - Morrill asked what the first three variances were for. He would like that stated in the letter. Item 9.d. the variance permit for Dubois Contracting lists the purpose of the variance, items 9.a., 9.b., and 9.c. do not provide this level of detail.
- b. Variance Permit for RWC, Inc
- c. Variance Permit for Asplundh Tree Expert Co.—Railroad Division

- d. Variance Permit for Dubois Contracting
- e. EMERA Maine Letter
 - Letter to inform BPC that they plan to hydraulically spray 53 substations in SOR and 43 in NOR
- f. Nancy Oden Letter and Article
 - EPA proposing temporary pesticide-free zones for honeybees.
- g. Land Trusts Memo and Survey
 - 51 of 80 land trusts responded to survey
- h. Other?
 - The staff hasn't secured a room to meet in yet at University of Machias for next Board meeting. There are some places that can be rented, but they are expensive and/or inconvenient.

10. Schedule of Future Meetings

July 10 and August 28, 2015 are the next tentative Board meeting dates. The Board will decide whether to change and/or add dates.

- Tentative plan for field trip/Board meeting August 27-28 (Thanks to Nancy McBrady for her hard work on this)
 - Leave Augusta Thursday morning, August 27, arrive in Jonesboro around noon. Have lunch and tour the Blueberry Hill Farm Experimental Station.
 - Proceed to Wyman's of Maine, Deblois for a tour of the processing facility and fields.
 - Proceed to Machias for dinner/overnight. Listening session in the evening?
 - Board Meeting Friday, August 28 at University of Maine Machias. Listening session before meeting?
 - Eat lunch.
 - Return to Augusta.
- Adjustments and/or Additional Dates? - Those who want to ride in the van, meet at the Deering Building at 8am on August 27th
- Board will plan to hold October meeting on the 9th at the Deering Building
- Board will plan to hold November meeting on the 13th
- Board will plan to hold December meeting on the 18th

11. Adjourn

- **Eckert/Flewelling: Moved and seconded to adjourn at 10:20am**
- **In Favor: Unanimous**