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BOARD OF PESTICIDES CONTROL
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BOARD OF PESTICIDES CONTROL

October 18, 2013

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

MINUTES

8:30 AM

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

1. Introductions of Board and Staff

- The Board and staff introduced themselves.
- Staff present: Jennings, Connors, Hicks, Fish, Tomlinson, Bills

2. Minutes of the September 6, 2013, Board Meeting

Presentation By: Henry Jennings
Director

Action Needed: Amend and/or approve

- On page 3, take out the extra "it" in the last sentence of the bullet.
 - **Eckert/Granger: Moved and seconded to accept minutes as amended**
 - **In Favor: Unanimous**

3. Review of Ideas about Streamlining the Applicator Licensing Process

At the September 6, 2013, Planning Session, the Board discussed streamlining of the commercial applicator licensing process, identified as the highest priority topic, and debated several ideas to improve the system. Companies are trying to get new and seasonal employees licensed quickly in the spring and summer. 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 Pesticides Programs

Action Needed: Provide Guidance to the Staff about Potential Changes

- Fish explained that the Department is currently working with a state vendor to consolidate databases, and provide an e-commerce application for online and electronic issuance of licenses. Many of the issues discussed by the Board would be included in that effort, but that is a long-term solution, so

really important issues need to be addressed in another way. The only option for doing online transactions would be going through InforMe, a state-approved contractor, and would be very expensive because there aren't enough transactions to adequately fund the application.

- Discussion turned toward a combined exam/license fee where companies could pay ahead with the understanding that they would forfeit the money if the applicant failed to pass the exams. This has been requested by some companies because they have a short period of time to get people licensed, so some are sending a person to Augusta to pay the fee to facilitate the process. Fish explained that a license can't be issued until payment is received. He also explained that the state's accounting system will not allow carrying a credit, and refunds are very resource intensive.
- The current fee is \$10 per exam and \$70 for a two-year license.
- It was suggested that there be a single fee; Fish pointed out that this would require a change in rule.
- Fish reiterated that online licensing isn't currently feasible; InforMe is too expensive, the Administrative Licensing Management System software use by the Department of Professional and Financial Regulation is too rigid, BPC rules are somewhat complex and replete with exceptions.
- Morrill said the current system is convoluted: fill out an application and pay an exam fee; take exam; wait two days for results; fill out another application; send in money. Jennings suggested trying to combine applications.
- A discussion ensued about the merits of a combined application form. Commercial applicator companies favored having a combined form which included both the exam and license fees as an option. Fish agreed to investigate that option.

- Online testing was discussed next. Bohlen asked whether there was enough overlap in content so that we could work with other states. Fish replied that he is currently serving on a national committee addressing this issue: manuals, exams, finding ways to consolidate. Maine is significantly different from other states, especially in categories. Maine requires a commodity exam for private applicators, which most states do not. Eckert noted that 10 or so years ago some categories were eliminated and asked whether there would be any value to looking at simplifying categories and eliminating some exams and manuals. Fish said that the EPA has a framework for categories, but that Maine has gone way beyond that. Eckert noted that some people, especially in agriculture, don't want to know about potatoes if they're working with blueberries. Jennings said this is true in commercial also: if you're spraying stumps you don't want to know about bedbugs.
- Hicks pointed out that the oral exam for master applicants doesn't always align: if someone is working on mold remediation or biociding, they take the indoor version of the oral exam, but it has nothing to do with what they are doing for work.
- Fish noted that Maine is unusual in that it has two levels of commercial license: regular and master; most states do not.

- Video training was discussed. Fish noted that they have tried taping his presentation, but that people didn't get much out of it. Watching a talking head video isn't as good as a live class, and those are bad enough.
- Jemison noted that Steve Johnson has done some videos; not the most exciting, but informative enough. Fish said he did not know how much those cost to produce.
- Jemison asked if there was a plan with all the new licensees coming up. Fish said either more training or a professional DVD. Bohlen suggested talking to people at universities who are already doing a lot of online courses. That style of teaching is becoming more prevalent.
- Eckert suggested that slides are preferable to talking head.
- Eckert asked whether other states had material that we could use. Fish said there are many opportunities for continuing education; these are listed on our website. Also some for initial training; California has a good site, it isn't exactly the same as Maine's but it's a good opportunity to learn.
- Jennings pointed out that this is mostly a resource issue. There are definitely things that are possible, but being down one position, the staff is barely keeping its head above water. The university will

need to take a big role in this; hopefully the new position funded through registration fees can work more consistently on these issues.

4. Review of Ideas for Improving How the Board Addresses Variance Requests

At the September 6, 2013, Planning Session, the Board discussed improving how it addresses variance requests, which had been identified as its second highest priority topic. Concerns have been voiced about turnaround time, consistency, whether applicators are applying the most up-to-date best management practices, sustainability and whether variances are the most efficient regulatory approach. The staff has reviewed some of the ideas from the Planning Session and is prepared to discuss them further with the Board.

Presentation by: Henry Jennings
Director

Action Needed: Provide Guidance to the Staff about Potential Changes

- Jennings noted that there are different issues with variances. Variance requests for Chapter 22, the drift rule, are always for the same thing: eliminating the requirement to identify and map sensitive areas, because when applicators are working on a road or power line it is difficult to see 500 yards into the woods. The Board always approves with two requirements: (1) use of drift-reduction strategies, and (2) a public notice in the affected areas. If the Board is always issuing the same permit, it makes more sense to revise the rule to require what the permits require. This will require rulemaking, but is relatively minor.
- The Chapter 29 variances involve the 25-foot setback from certain water bodies. This requirement applies to everyone, including homeowners, who probably don't even know the standard exists. Therefore we are holding commercial applicators to a higher standard. The Board has already approved a policy to allow staff to issue variances for plants with a dermal toxicity issue. Recently there have been several requests for treatment of invasive plants: *Phragmites*, bittersweet, Japanese knotweed, buckthorn, and honeysuckle. Jennings said there seems to be a strong consensus to get people to use BMPs. Bohlen said there is a lot of information available, but it's not well organized. It would be nice to point people toward the best information. There is a huge split in literature between chemical and non-chemical strategies, but it is not based on IPM, it is based on what they believe in.
- Jennings said that if the Board wants to push people to BMPs there will need to be some time invested to reach consensus on them. Jemison asked whether it would make sense to see who could serve on a committee to draft BMPs. Eckert asked whether they would need to be species-specific; Bohlen replied that there are some broad generalities, but also some specifics. For instance, with purple loosestrife, small pieces can resprout so they have to be carefully bagged. There are basic principles and then some strategies that apply to certain species. When you get in the field, practitioners really need details, such as what tools you need.
- Flewelling asked how much responsibility the Board should take on determining BMPs for an individual; should the board manage someone's business or ensure that they do it legally? On his farm he wants advice, but he doesn't want Augusta telling him how to do it.
- Jemison noted that in this case the responsibility ends at 25 feet; the rule was drafted that way because that zone is such a critical area for water quality.
- Morrill said that the basic question is: do we continue to require variances if we're just going to rubberstamp them every year? Or should we change the process to eliminate paperwork, if their current practices are acceptable. Eckert suggested that it could be put in rule: if you follow certain BMPs you don't need a variance; for others, staff can approve.
- Bohlen remarked that there might be value in the Board seeing these variance requests even if they're rubberstamping them, so they can be aware of what's happening. Doesn't have to be every year, could be every three years. He appreciates Flewelling's point that we shouldn't be telling

people how to do things, but we don't want to be issuing a variance to spray year after year (for instance, a person spraying for poison ivy in front of their house) if they're not doing it right. There is a proper balance, but we need to find it.

- Morrill pointed out that the person he used as an example isn't getting a variance anyway, because homeowners generally don't.
- Hicks noted that all terrestrial pesticides have on the label to not get it into the water. Use of pesticides in the water would require a permit from DEP. We are the Board of Pesticides Control, we are not the BMPs manager for specific sites. If someone else put together a BMP manual for how to control invasive plants on these sites, we would be a part of it, but this is getting away from our charge. Jemison noted that we have done BMPs before.
- Hicks said if we are talking about control without chemicals, is it our place to tell them how to do it? Bohlen said that if you're thinking IPM, then both chemical and non-chemical means need to be discussed.
- Eckert noted that BMPs would be developed by a group, not just the Board. The value would be that we could say: if you follow these, the staff can issue variances.
- Bohlen suggested keeping it simple and straightforward: if you have a multiyear plan for following BMPs, we will issue a variance. We don't need a lot of details.
- Heather Spalding (MOFGA) pointed out that not using any chemicals to control pests helps support the Board's mandate of minimizing reliance on pesticides; therefore it is appropriate for the Board to be promoting this approach. She asked whether there are any places where invasives have been controlled without using chemicals. Fish said that the US Forest Service has eliminated purple loosestrife in places using manual and chemical means, but that it requires replacing the ground cover with competing vegetation.
- Discussion returned to Chapter 22 variances. Board members suggested use of multiple-year variances for linear ROWs. Hicks noted that it would be important for staff to review the variance if different chemicals were to be used.
 - **Bohlen/Flewelling: moved and seconded to allow staff to approve variances for linear projects for up to three years, with the condition that the Board be notified of any significant changes, including chemicals used.**
 - **In favor: unanimous**
 - **Consensus to discuss revising Chapter 22 next time rulemaking is considered**
- Bohlen suggested a policy to allow staff to issue variances for Chapter 29 provided the application includes a multiyear control strategy, a plan for revegetation of the site, and some evidence of knowledge of efficacy and appropriate practices, and long-term monitoring. For all the variances the Board has looked at, if those things were included, it was approved. Jennings questioned whether there should be a reference to BMPs. Bohlen replied that he was trying to avoid that; the Board should make information on BMPs available, but not sure it should be tied into policy.
- Fish noted that the current policy for dermal toxicity does not reference BMPs. In the background to the policy it says "... emphasis on BMPs..."
- Eckert suggested crafting a similar policy for invasive plants. When asked whether it should be a single policy she said no, because dermal toxicity is a health issue. Jemison noted that strategies would be very different.
- There was some discussion about whether policy should include a list of invasive plants. Eckert noted that any plant could be considered invasive by someone; Fish suggested consulting with Ann Gibbs, who serves on the National Invasive Board.
- Jemison asked whether homeowners would look at the Board site for information. How do we reach that population? Bohlen said that he is working with groups now who are dealing with invasives and will need variances occasionally: non-profits, municipalities, land trusts. Most of them are working

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

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 an application of lawn care pesticides within 250 feet of a property listed on the Maine Pesticide Notification Registry. The registry participant did not receive advance notice.

Presentation By: Raymond Connors
Manager of Compliance

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

- Morrill recused himself from the discussion. Connors provided an overview of the case. Within the past four-year cycle, Lucas Tree had similar violations in 2010 and 2011. In addition to the assessed penalty, the company was asked to submit a policy to show what they have in place to prevent a recurrence. The mosquito/tick division had provided notification; the lawn care division had not. The policy submitted indicated that all three divisions need to comply and will be operating under the same standards.
- Eckert asked whether this was a clerical error and Connors replied in the affirmative.
 - **Flewelling/Eckert: moved and seconded to accept the consent agreement as written.**
 - **In favor: unanimous**
- Staff was directed to include copies of the executive session statute in next meeting packet.

8. Other Old or New Business

- Kathy Murray presented a memo from the Maine IPM Council. She explained that they only meet twice a year and, over the past several years, have discussed promoting IPM through the pesticide licensing process. At the last meeting it seemed the Board would be open to tracking IPM credits as long as it was a voluntary program.
- Regarding the Board listening session proposed for the Agricultural Trades Show, Murray hasn't heard anyone saying that pesticide licensing is burdensome, but it is one more license on top of all the others. The session could be an opportunity to hear whether there are chances to streamline the processes. The Board agreed to participate in a listening session and suggested a Board Meeting from 3:00–5:00 followed by a one-hour listening session.

9. Schedule of Future Meetings

December 13, 2013, January 7, 8 or 9, 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?

- May 9, 2014 and June 27, 2014 were added as meeting dates; the June meeting will be held in the Madison/Skowhegan area. Mary Tomlinson will contact Backyard Farms in Madison to arrange a tour. Staff will look at meeting venues.

10. Adjourn

- **Flewelling/Granger: moved and seconded to adjourn at 12:03 PM**
- **In favor: unanimous**