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STATE OF MAINE
MAINE DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY
BOARD OF PESTICIDES CONTROL
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BOARD OF PESTICIDES CONTROL

September 12, 2014

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

MINUTES

8:30 AM

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: Chamberlain, Connors, Fish, Hicks, Jennings, Patterson, Tomlinson

2. Minutes of the August 8, 2014 Board Meeting

Presentation By: Henry Jennings
Director

Action Needed: Amend and/or Approve

- **Flewelling/Jemison: Moved and seconded to approve the August minutes as written.**
- **In favor: Unanimous**

3. Workshop Session to Review the Rulemaking Record on the Proposed Amendments to Chapters 20, 22, 28, 31, 32, 33 and 41

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

On July 16, 2014, 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, 28, 31, 32, 33 and 41. A public hearing was held on August 8, 2014, at the AMHI Complex, Deering Building, in Augusta, and the written comment period closed at 5:00 PM on August 22, 2014. Three people spoke at the public hearing and nine 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 discussed the comments, referencing the Summary of Comments. Moving to Chapter 22, Eckert asked if the drift management plan was something the Board needed to discuss. Jennings explained that since 1988 the Board has been issuing the same variance to MDOT and the railroads as long as they include a plan for public notice and that they institute strategies to minimize pesticide drift (for powered equipment). Previous Board discussions concluded that if the Board is requiring the same standards every year by way of variance, wouldn't be easier for all parties to just place those standards in rule. This is the reason that proposal includes a drift management plan. The Board could change it from "plan" to "strategies" or remove drift management plans from the rule altogether. Chapter 22 has strategies to minimize drift in any case. Variances emphasized drift reduction because they were part of the drift rule. Strategies include use of adjuvants, coarse droplets, etc. The Board never intended to require more in a revised rule than what was required for a variance.
- Jennings pointed out that there were several comments on Chapter 28. The proposed language created the unintended requirement for notification for applications using non-powered equipment, Chapter 22 applies only to powered equipment, and Chapter 28 applies to all outdoor applications, so although the Board intended to trade the requirement for identification of sensitive areas in Chapter 22 for a notification requirement in Chapter 28 it inadvertently created a new burden for those applications that had been exempt in Chapter 22. Power lines are generally done with non-powered backpacks; we don't get a lot of questions on private rights-of-way. They target only woody brush with the potential to grow tall enough to interfere with the conductors and leave the short species. They have also done a good job of dealing with public concerns. CMP, for instance, offers no-spray agreements. And, anyone can be notified by making a request under Chapter 28. The public rights-of-way, particularly trails, are where the public has some interest in knowing about spraying. It might be a good idea to have notice for those situations. However, newspapers are expensive and there's evidence that fewer people read them. It might make sense to look at alternatives. For example, some trails have clear points of ingress and egress where it may make sense to post; other trails are more challenging to post. The staff thinking is that notice should be limited to public rights-of-way and the rule should leave the precise notification methods to Board policy, where we can have a series of options, and it will be easy to update.
- Eckert said that she thinks in terms of what situations in these two categories present a significant risk of public exposure or a significant risk of worker exposure.
- Jennings said that when MDOT did some work on Japanese knotweed along a trail, they put signs where the knotweed was; they weren't required to do that, but, in that case, there were distinct patches and posting was practical and effective. Sidewalks are impossible to post. It would make more sense to give applicators and/or administrators a menu of notification options so they can choose what makes sense for the situation.
- Granger remarked that the primary difference between powered versus non-powered equipment is the drift potential. When we're talking about restricted entry intervals, the concern is about exposure.
- Hicks replied that one of the major differences between agricultural label instructions and non-agricultural labels is that non-agricultural instructions often stay "stay off until dry," whereas agricultural labels give a specific reentry time frame; that is because of the total exposure risk; farm workers have greater exposure risk than some other situations.
- Jennings noted that there was one comment on the amendment around antibacterial hardware, but that the person thought it might be referring to UV disinfection systems, which the Board clearly was not intending.
- Jennings said that there was general support for the changes in waiting periods for exams in Chapters 31, 32 and 33. There were two comments on the amendments around hexazinone in Chapter 41; one from Hammond, who was in support, and one from an individual who was opposed to removing the restriction on air-assisted sprayers. Jemison questioned why someone

would use an air-blast sprayer for an herbicide, especially hexazinone, as you would get very uneven coverage, over-applying in some places and under-applying in others. Jennings said that when the rule was written, some growers only had one piece of equipment. Now they usually use boom sprayers for certain applications. He agreed that it would not be advisable to use an air-blast sprayer for this material. Jemison said that if the Board takes the restriction out of the rule, someone will do it and there will be drift issues. Bohlen asked whether it was necessary to treat hexazinone differently from other similar compounds—in terms of water risks, is it more of a drift risk than other herbicides? Is there more of a risk of drift onto neighbors? Jemison said he didn't think hexazinone is worse than other herbicides, but the crop production method is different—blueberries are different from other crops.

- Flewelling said that if you drift with hexazinone, it will be obvious, so most growers are hopefully smart enough to realize that.
- Morrill suggested the Board consider each chapter individually beginning with Chapter 20.

Chapter 20:

- **Consensus to keep amendments to Chapter 20 as drafted.**

Chapter 22:

- Morrill commented that there is already a lot of language in the rule on what is required for managing drift. He suggested scrapping the requirement for drift management plans because drift is already covered in the rule.

- **Consensus for Chapter 22 to remove the language requiring a drift management plan; other amendments to remain as drafted.**

Chapter 28:

- Jennings noted that most of the comments were around public notice, on page eight. One option is to rewrite so that it only applies to public rights-of-way and, for those, there might be a requirement to implement a public notification consistent with Board policy, which would have a menu to choose from. The Board doesn't get many calls on railroad rights-of-way except where the tracks are essentially in the water. The greatest interest is with trails and sidewalks.
- Bohlen suggested that public versus private might not be the best way to distinguish where there is significant benefit to public notification. Land trusts are privately owned, but they may have public trails. Jennings suggested borrowing wording from the commercial licensing criteria: "areas open to use by the public."
- Bohlen and Morrill agreed that requiring newspaper ads may no longer make sense. Is there anything the Board can do to encourage other channels of communication?
- Fish pointed out that there are a lot of calls about sidewalk applications, especially when done on the back of a golf cart. People wonder whether they can walk on them right away. Flewelling noted that people aren't going to look in newspapers for that. Fish noted that posting is difficult.
- Jennings suggested that towns may be in the best position to inform the residents—posters in the town office, posting on the town website.
- Morrill noted that there is agreement on public notice based on categories. He suggested putting in text about where posting is not practical, such as sidewalks, a notice be published on the town website.
- Jennings said that he preferred a policy because we don't know how things will change. In some circumstances posting will work well. Using the words "open to the public" would cover trails and sidewalks.

- Morrill noted that that covered 6B, but what about 6A. Bohlen said he would be uncomfortable writing a rule for people who are trespassing.
- Hicks noted that an applicator can't control whether a municipality posts notice on the town website. The requirement should be that it be sent to the town.
 - **Consensus was reached to change section B to sidewalks and trails open to the use by the public, and change newspaper notice to methods approved in Board policy.**

Chapter 31

- Bohlen referred to the comment about antimicrobial hardware and asked whether the definition was clear. Jennings said that it clearly says metal. Eckert suggested sending him a letter explaining the Board's interpretation.
 - **Consensus was reached to keep all amendments as drafted.**

Chapters 32 and 33

- **Consensus was reached to keep all amendments as drafted.**

Chapter 41

- Flewelling asked if hexazinone was used only on blueberries. Granger said there was limited use for Austrian pine and Scotch pine.
- Flewelling asked why air-blast sprayers were prohibited. He noted that blueberry barrens are generally rough. Jennings said they had transitioned to boom sprayers for many applications, but some smaller growers might have only one piece of application equipment.
- Jennings reminded the Board that the original request from a constituent was to repeal the entire section on hexazinone because all growers will soon be licensed because of the new Ag Basic license requirement. There was a question about whether homeowners might be able to buy and use hexazinone, but decided that it would be impractical. The Board directed the staff to remove all except the licensing part from the hexazinone section.
- Eckert said, if the point was to control drift, is there something that can be put in the rule? Morrill said drift is covered under Chapter 22. Jennings said it was not just about drift; air-blast sprayers don't provide uniform coverage. Air-blast sprayers tend to apply more material near the sprayer, and less material farther away. There's potentially an increased risk of leaching where soil concentrations are higher. Patterson noted that the Velpar label requires "uniform coverage"; would that cover the concerns?
- Granger stated that he is concerned about telling growers how to apply pesticides on their own property, as long as there's no issue of drift. Even with insecticides, there's not always uniform coverage, so he sprays from both directions when using an air-blast sprayer. Are we getting too restrictive putting constraints on growers, as long as they're not affecting others and they're not putting on more per acre than allowed?
- Bohlen said he thought the issue was water contamination. Is the method of application relevant to water contamination? Jennings said that any time you have high concentration of material in one spot it increases the likelihood of water contamination.
- Morrill noted that it would damage the crop; no one wants to buy the product, spend time putting it out, just to kill the crop.

- Eckert described the two cases she remembered. One was spraying an adjacent property, which was a sensitive area because there was a house, and the other was spraying a neighbor's blueberry field by mistake. Morrill replied that in both of those instances, it didn't have to do with the product or the application method, it had to do with applicator misapplying, which is covered in Chapter 22.
- Stevenson said that because applicators are certified, they will have training. Fish noted that someone getting an Ag Basic license will not have to read the blueberry-specific manual, or take the exam, which include information on hexazinone. Eckert suggested that the information be included in general training, including drift, water concerns, and talking to neighbors. Hicks noted that those concerns are not unique to hexazinone.

- **Consensus to keep all amendments as drafted.**

4. Consideration of a Consent Agreement with Maine Organic Therapy of Ellsworth, Maine

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 involved use of an unregistered pesticide and use of pesticides inconsistent with the product labels.

Presentation By: Raymond Connors
Manager of Compliance

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

- Connors summarized the agreement; it started with a marketplace inspection. There was a summary sheet listing products. The inspector asked personnel at the facility to send him confirmation of products that the company had purchased. Because of those findings, the inspector did an inspection at the Biddeford growing site and documented only two products that they acknowledged using: one used during some construction repair to control insects and the other, sulfur, which was not on the original list, but was found on the site. When the inspector asked about the products documented as having been sold to the company he was told they were given to the employees to take home. Because the products purchased by the company were similar to products used by other dispensaries for insects and diseases on medical marijuana, the staff took the position that the available evidence indicated a likelihood of use on medical marijuana.
- Jemison asked what the current regulation around pesticides on marijuana is. Jennings replied that they can use any pesticide where the use is not contraindicated on the label. If the label is specific as to the site(s) on which it may be applied, or the type of crops, then it can't be used. Most labels are not general enough to be used; there are some products that say for use on all plants; they tend to be FIFRA exempt (25b) products, but there are a handful of registered pesticides available also.
- Jennings noted that there are two types of growing facilities: dispensaries and caregivers. The Board does not have access to the identity of authorized facilities. The staff does not have confidence that all facilities are aware of or following the rules. They are required to have an Ag Basic license.
- Fish said that there are stores catering to this industry around every corner. We are trying to get them licensed as general use dealers, then we can send them information. The inspectors are visiting, getting them licensed, checking that the products are registered. Jennings noted that they would probably not be a great ally for communicating with growers because they

would essentially be telling the growers they couldn't use the products that the stores are selling.

- Granger noted that part of the rationale for settlement was the use of an unregistered product. If the product was sold in Maine, should the grower be penalized for that? Connors replied that the regulations are clear that products must be registered in Maine in order to be used in Maine. Granger said that he buys a lot of products and doesn't check the registration. He would hate to think that he was liable for using a product that he purchased locally. Fish said that the staff constantly reminds growers that they need to check that. You have to know that you're applying products that have been approved, especially to food. Jennings remarked that the compliance staff generally does not go after the end user for use of an unregistered product. Tomlinson said that the staff does go after the companies to get the products registered. Granger reiterated that we should not penalize people for something that is not practical to check on a routine basis. Jennings noted that this is usually not a problem in agricultural areas, because the distributors check registration. But this industry is not using common agricultural products.
- Bohlen said that if product registration was the only problem, there probably wouldn't be a consent agreement. In this case it is part of a pattern of not looking at the rules. Also, the Board shouldn't get in between those making the agreements, or take a tool away that the enforcement staff has. The issue should go up the food chain to the distributors and/or manufacturers.
- Connors noted that one reason for a consent agreement is to serve as a deterrent. It also serves as an educational tool to let people in an industry know about the regulatory requirements. It's not just part of the enforcement process, but part of the educational process also.
- Stevenson noted that as a homeowner he would never look at whether things are registered, he trusts the store, but, as a business, they check everything they use.
- Morrill agreed that, as it's written, it looks like the grower assumes all the responsibility where it should really be shared with the distributor. Connors replied that the Board hasn't traditionally penalized a distributor selling unregistered products, choosing instead to work on correcting the problem. In some states, that is an automatic penalty. The Board can decide if that's how they want it to be enforced. Randlett observed that it might be more appropriate for the Board to discuss "big picture" enforcement priorities relative to all pesticide law at another meeting and not in the context of this consent agreement.

- **Stevenson/Flewelling: Moved and seconded to accept consent agreement as written.**
- **In Favor: Unanimous**

5. Other Old or New Business

- a. ERAC sampling update—M. Tomlinson
 - Tomlinson explained that the 20 sites have been sampled for sediments. The staff is waiting for a rain event for the stormwater sampling. Jennings said water sampling may have to wait until next year. He wanted to recognize the amount of effort that went into this, especially from Tomlinson, Patterson and Nelson—deciding what to sample for, finding labs, locating sites, and then getting out there at low tide. Tomlinson said that, in addition to samples shipped to Montana and SWRI, samples were also sent to the UMaine soil lab. She said she met a lot of interesting people who were interested and supportive of what the Board was doing. She felt it was a good public relations exercise.

- b. Pollinator Health and Safety Conference update—G. Fish
 - The conference is scheduled for November 20; it has been advertised widely, mostly through emails to everyone we could think of. Cooperative Extension is taking care of the registration process. It's a good agenda; it was difficult to get speakers, but Jim Dill did a good job.
- c. Other?
 - Jennings mentioned that the Department is working on amending statutes around budworm spraying, both for the Forest Service and in the BPC statute. The requirements for monitors and spotters are no longer necessary with current technology.

6. Schedule of Future Meetings

October 24, and December 5, 2014, are tentative Board meeting dates. The Board will decide whether to change and/or add dates.

Note: Interest was expressed in having a meeting during the Agricultural Trades Show again next year. The Show is scheduled for January 13-15, 2015.

Action Needed: Adjustments and/or Additional Dates?

- **The Board added January 14, at the Agricultural Trades Show, and March 13, as meeting dates.**

7. Adjourn

- **Granger/Eckert: Moved and seconded to adjourn at 10:28 AM**