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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

August 8, 2014

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

MINUTES

8:30 AM

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

1. Introductions of Board and Staff

- The Board, Staff, and Assistant Attorney General Randlett, introduced themselves.
- Staff Present: Chamberlain, Connors, Fish, Hicks, Jennings, Patterson

2. Public Hearing on Proposed Rule Amendments to Chapters 20, 22, 28, 31, 32, 33, and 41

The Board will hear testimony on the proposed amendments to the following seven rules:

- ***Chapter 20 Special Provisions***—Add a requirement for applicators making outdoor treatments to residential properties to implement a system to positively identify application sites in a manner approved by the Board. This requirement is currently in policy.
- ***Chapter 22 Standards for Outdoor Application of Pesticides by Powered Equipment in Order to Minimize Off-Target Deposition***—Improve the effectiveness of the rule by eliminating the requirement of identifying sensitive areas for commercial applications conducted under categories 6A (rights-of-way vegetation management), 6B (industrial/commercial/municipal vegetation management) and 7E (biting fly & other arthropod vectors [ticks]). Applications conducted under category 6A and to sidewalks and trails under category 6B will require the applicator to implement a drift management plan.
- ***Chapter 28 Notification Provisions for Outdoor Pesticide Applications***—Add to the list of categories that require posting: 6B (industrial/commercial/municipal vegetation management) except when making applications to sidewalks and trails, and 7E (biting fly & other arthropod vectors [ticks]). Require advance notice be published in a newspaper for applications conducted under 6A (rights-of-way vegetation management), and to sidewalks and trails under 6B (industrial/commercial/municipal vegetation management). This aligns with the proposed amendments to Chapter 22, eliminating the requirement for mapping sensitive areas, in lieu of posting or public notice.
- ***Chapter 31 Certification and Licensing Provisions/Commercial Applicators***—Three amendments are proposed:

1. Clarify that certain applications are exempt from commercial licensing requirements. These are currently in policy:
 - Adults applying repellents to children with the written consent of parents/guardians;
 - Persons installing antimicrobial metal hardware.
 2. Exempt aerial applicators certified in other states from passing a written regulation exam and allow for issuance of reciprocal licensing when the staff determines that an urgent pest issue exists and when staff verbally reviews pertinent Maine laws with the applicator.
 3. Shorten the time period a person must wait before re-taking an exam they have failed to 6 days.
- ***Chapter 32 Certification and Licensing Provisions/Private Applicator***—Shorten the time period a person must wait before re-taking an exam they have failed to 6 days.
 - ***Chapter 33 Certification & Licensing Provisions/Private Applicators of General Use Pesticides (Agricultural Basic License)***—Shorten the time period a person must wait before re-taking an exam they have failed to 6 days.
 - ***Chapter 41 Special Restrictions on Pesticide Use***—Amend Section 3 to eliminate the restrictions on hexazinone relative to pesticide distributors and air-assisted application equipment.
 - See summary of comments for information on the hearing

3. Minutes of the June 27, 2014, Board Meeting

Presentation By: Henry Jennings
 Director

Action Needed: Amend and/or Approve

- Item 5, bullet 4, change egress to ingress
- Item 5, bullet 6, Herczeg is misspelled
 - Stevenson/Eckert: Moved and seconded to approve the June minutes as amended.
 - In favor: Unanimous

4. Final Adoption of Amendments to Chapters 20, 22 and 51

The Board held a public hearing on proposed amendments to Chapters 20, 22, and 51 on March 1, 2013. The proposed amendments were intended to allow governmental entities to conduct public-health-related, mosquito-control programs in the event of an elevated mosquito-borne disease threat. The Board reviewed the comments on April 12, 2013, and provisionally adopted revised proposals on May 24, 2013. The Joint Standing Committee on Agriculture, Conservation and Forestry held public hearings and work sessions on the provisionally adopted rules on June 26, 2013, and January 14, 2014, and a work session on January 23, 2014. The Committee voted to recommend authorizing final adoption in a divided report on January 28, 2014, and three resolves became law on February 26, 2014. Since the resolves were not passed as emergency legislation, they did not become effective until August 1, 2014. The Board has 60 days from the effective dates of the resolves to finally adopt the rules.

Presentation By: Henry Jennings
Director

Action Needed: Final Adoption of the Rule, Basis Statement, Rulemaking Statement of Impact on Small Business, and Response to Comments for Chapters 20, 22, and 51

- **Eckert/Granger: Moved and seconded to adopt the rule as amended, the basis statement, the impact on small business, the summary of comments and responses for Chapter 20 as written.**
- **In favor: Unanimous**
- **Eckert/Jemison: Moved and seconded to adopt the rule as amended, the basis statement, the impact on small business, the summary of comments and responses for Chapter 22 as written.**
- **In favor: Unanimous**
- **Eckert/Jemison: Moved and seconded to adopt the rule as amended, the basis statement, the impact on small business, the summary of comments and responses for Chapter 51 as written.**
- **In favor: Unanimous**

5. Consideration of a Board Policy Interpreting “Food Production” for the Purposes of Determining Applicability of Public Law 2011, Chapter 169

Public Law 2011, Chapter 169, “An Act To Require Certification of Private Applicators of General Use Pesticides,” requires anyone who grows and sells more than \$1,000 worth of edible plants annually to become certified if they use general-use pesticides in “food production.” A number of questions have arisen about what constitutes “food production” for the purposes of the licensing requirement. At the June 27, 2014, meeting, the Board reviewed questions and discussed what it thought the legislative intent was. After reaching consensus, the Board directed the staff to draft an interim enforcement policy for review at a future meeting. The staff has prepared a draft policy for the Board’s consideration.

Presentation By: Henry Jennings
Director

Action Needed: Approve/Revise Draft Policy

- Fish referred to the draft policy in the board packet. He explained that it is important to be clear about who does and doesn’t need to be licensed, especially as the 2015 deadline approaches. The draft is based on the discussion which took place at the last meeting.
- Fish questioned the last sentence in the draft. Jennings explained that it was a revision of a sentence about applications being done in a greenhouse when food crops are present, for instance on petunias in one corner of the greenhouse while tomatoes are in the other corner. The original sentence would have required a license whenever applications were made in the vicinity of a food crop, which Jennings did not think was consistent with the previous Board discussion or the statutory language. He noted that crops grown outside, where food and non-food crops are present, are not in the spirit of the law unless an application was done in a manner that it would leave residue everywhere.

- Morrill questioned whether adding fumigations, etc. in the last bullet muddied the issue. Jemison said that the bullet clarified things, but the last sentence muddled them.
- Morrill stated that in his opinion if something is sprayed and it drifts onto food crops, then it is in effect a foliar application to a food crop.
- Jennings said the last bullet lacks specificity around where the application is happening.
- Bohlen noted that this policy is specifically around licensing. If somebody came to us who was growing tomatoes next to petunias and they sprayed the petunias, we would clearly like them to have a license. If they are growing food crops and applying pesticides nearby, they should be strongly encouraged to be licensed. Jennings noted that something like that should probably be separate from the policy.
- Jennings pointed out that the Legislature used the term “food production” and it is up to the Board to figure out what that means in this context. If the Board wants to encourage growers in the gray area to be licensed, they can, but not in this policy. This policy is trying to clarify the Legislature’s intent.
- Fish noted that if a grower is using pesticides on petunias then 99 percent of the time they’ll also be using them on their food crops and will be licensed.
 - **Morrill/Eckert: Moved and seconded to amend the draft policy by removing the last sentence and adopt as final.**
 - **In favor: Unanimous**

6. Interpretation of CMR 01-01A, Chapter 24, Section 7(D)

Chapter 24, Section 7(D) requires that, “Any outdoor pesticide display area must be securely fenced and must have a roof to protect the material from the elements.” When the original rule was adopted, the Board wanted to make sure that pesticides stored at distributors were protected from vandalism and the weather. Some questions have arisen about how this requirement should be applied in certain circumstances.

Presentation By: Raymond Connors
 Manager of Compliance

Action Needed: Provide Guidance to the Compliance Staff

- Connors referred to the staff memo, noting that the staff needs clarification on what it means to be “securely fenced.” Some places, rather than fence the pesticides themselves, have a partial fence around the facility, where there’s a gate so cars can’t get through, but people can walk around. Does that meet the spirit of the rule?
- Granger asked whether the issue is pesticides being stolen or customers not being counseled in how to use the products. Connors said that he thought it was about preventing unauthorized loss of materials or vandalism.
- Eckert said that as she remembers the rule being written they were thinking about outdoor plant areas where stores may have some pesticides and other things located and were trying to make sure they were secure, as in a hurricane, not get blown around.
- Connors noted that this part of the rule is about self-storage areas; customers have access to it as opposed to a storage area that only store employees have access to.
- Morrill asked if there have been issues with pesticides being stored outside getting wet or stolen. Connors replied that it has not been a major problem, but the staff would like some clarity so when an inspector comes across different scenarios he/she can know what is sufficient.
- Eckert noted that problem might be in the word “fence” when there may be other ways to secure the products.

- Connors asked whether a facility that had a gate across the entryway into the facility so a car couldn't drive in, and was set back from the road, but had pesticides on the porch of the building, would be considered securely fenced.
- Bohlen said if the risk is vandalism, thinking about teenagers who have had too much to drink and are out to cause trouble, can they get to it; if they can, then it is not secure enough. A major storm event is a different risk, hopefully the owner would want to protect their products anyway. This is a difficult area for the Board to regulate. Bohlen would argue that a gate across the driveway with no associated fence is not secure enough; it is easy for somebody to walk in and do something stupid.
- Jennings noted that these are mostly bags of solids, weed-and-feed, etc.
- Morrill said if the store is staffed, then that's okay; if someone can just drive in and pick up a pallet, then that's not okay.
- Eckert said (during the initial rulemaking process) they were thinking about major events like fires and hurricanes. The other concern was stores like Mardens that had a self-service display which was not secure and the bags were easily ripped, material being dragged all over the store on people's feet. The Board was trying to protect against those types of things.
- Jennings noted that originally a lot of stores had weed-and-feed products right out in the parking lot, and they were in paper bags, not weather-resistant bags. There was concern about leaching; that's why they put in requirement for a roof.
- Granger said that he is concerned about practicality. Ames Supply on Route 1 in Woolwich has all kinds of stuff out in front of the store, under cover but still out in the open. Customers come in and pick up; he assumes it's all weed-and-feed. There are options; if they want to have the products out there, they are going to have to put up gates or move the material inside every night, or they can make customers order and pick up materials out back, or move the products indoors, which might be more of a risk. Better outside than inside a confined space. If it were an economic problem they would be securing them.
- Morrill noted that the wording is "securely fenced" and is not specific about the type of fence. What about a moveable gate? Something that delineates the area, if the Board is concerned about open access when the store is closed.
- Stevenson said an alternative is to specify the type of fence, but he would hesitate to do that. Requires making an investment, may change the look of the property. The Board would have to weigh costs of implementing requirements against what problem we're trying to solve. If vandalism is a problem, then the store is already going to deal with it.
- Eckert suggested changing the language to "must be secure" as opposed to being fenced. But then the Board would have to define what is secure. She is okay with a gate and fence.
- Connors asked about a partial fence—the front and sides are fenced, but not the back of property.
- Stevenson suggested that the staff make the decision in the field based on the specific circumstances. Look at what is the product—it seems unlikely that someone would take a bag of weed-and-feed—how much harm could they do with it?
- Morrill asked what would be involved with changing the rule. Jennings replied that it would need to go through rule-making, but noted that the Board could provide guidance without doing that. Currently the inspectors have some level of discomfort. If it's a pallet of weed-and-feed they're uncomfortable telling the store that they have to spend \$10,000 on a fence. How strictly does the Board want this enforced?
- Patterson noted that there are other ways the stores are securing the products. To make them move it causes undue hardship and might not solve the problem in a better way. Inspectors could just force the letter of the law, but a store's current solution may work fine, but not follow the letter.
- Eckert suggested that the staff work with the stores.

- Morrill said he liked the idea of “secure.” Look to your gut as to what the intention is; to prevent theft or leaching or unauthorized contact with products.
- Patterson noted that another thing that happens is a store is told they need a fence and they put up something that’s not really adequate, like a snow fence or a barricade of peat moss bales.
- Connors and Patterson agreed that the Board had given them sufficient guidance.

- **Consensus was reached to add to the list of items for rule-making.**

7. Interpretation of CMR 01-026, Chapter 31, Section 1(E)(IV)

Section 1(E) of Chapter 31 currently lists four “exemptions,” presumably to the requirements for a commercial applicator’s license. The fourth exemption reads, “Certified or Licensed Wastewater or Drinking Water Operators.” A question has arisen about the intended scope of this exemption.

Presentation By: Gary Fish
Manager of Pesticide Programs

Action Needed: Provide Guidance to the Staff

- Fish explained that the intent in Chapter 31 was for wastewater and drinking water operators to be exempt from needing a commercial license when using disinfectants to control microbes in drinking and waste water. York Water District has a pond that they want to treat with copper sulfate. While this is treating water that is going to be drinking water, he does not think it is what the Board originally intended. The exemption is for when they bring water into a treatment plant and treat it right before sending out for distribution; this is more of a wide-area treatment next to where the input is. Clarification is needed.
- Fish said there are also cases where people who work for a water district want to do herbicide treatments adjacent to the water supply, usually to take out invasive plants. We have allowed them to do that without additional licenses. In other situations they are asked to take care of weeds around buildings, fences, etc. Fish had a call the other day about poison ivy on a five-mile fence around the property. He had interpreted that circumstance as needing a license because they don’t get training for that with their wastewater treatment license.
- Jemison agreed that they are trained for use of disinfectants, not wide use of pesticides. Copper sulfate is especially worrisome, it has a “Danger” label, applicators don’t want to make mistakes with it. He feels strongly that someone should have appropriate training to use it.
- Eckert noted that the intent at the time was to identify people that had other training and certification that was essentially equivalent; whatever they’re trained for, we could let them do without a license, but poison ivy control is outside of that.
- Morrill remarked that if they are treating water, they’re probably pretty good at it, but treating fence lines is different and they should not be exempt from licensing. He asked what the training the personnel in York have. Fish replied that they are mostly trained for doing injections. He discussed concerns with Teresa Trott, Department of Health and Human Services, Center for Disease Control, and she felt it was not a good idea for them to be doing this type of application (copper sulfate) without a license, that they did not have that type of training.
- Bohlen noted that is directly related to the water; if they don’t do the application it will affect what happens inside the plant. It is directly related to the disinfecting that needs to happen. The people at the water districts don’t want people drinking copper sulfate so they’re not doing these treatments unless they have to. The Board needs to find out whether they’re receiving training on this. He is concerned that they might do this without proper training.
- Jennings said that once you’re treating surface water you’re getting into the whole NPDES and the permit piece, so if we don’t require licensing, how can we be sure they are aware of all the

requirements? He has concerns about operators moving outdoors and treating ponds based on the certification they have. A big part of it is calculating the amount of water and how to determine how much pesticide to use. He is not sure they're getting that kind of training.

- Bohlen said that the people he has dealt with are in touch with the regulatory agencies; everyone is looking over their shoulders. Not worried about the big districts, they will be aware of the regulations, but there are some providing water for 30-40 houses; what is their training?
 - Fish commented that the drinking water people are tied in with DEP; he's more worried about wastewater people. Bohlen said that the large wastewater plants already have NPDES permits.
 - Stevenson asked whether the training BPC gives would be appropriate for this. Fish replied that it would not be perfect, but would be adequate. It does cover the volumetric calculations to determine how much water you're treating and application rates, especially looking at different depths and water circulations so you're getting the correct concentrations throughout. IF&W has the most experience with this, sometimes even they have problems because of water coming in, not an easy thing to do.
 - Stevenson asked whether there's any question of liability for the Board if they choose not to require a license. Randlett said there is no liability concern; even if there were some negligence or failure, as a state agency the Board would be exempt.
 - Stevenson said even if there is no legal liability, would the Board not hold some responsibility? Are we not being irresponsible by saying they don't need a license if this is clearly a pesticide application?
 - Bohlen noted that the language is pretty clear: The way this rule is written, if you are a certified or licensed wastewater operator, you are exempt from licensing, period. This is something that needs to be fixed. In the near term, you could probably have a conversation with them about it. Concerned about language in rule, doesn't say "in pursuit of duties as a water treatment professional". Stevenson pointed out that this is why they think they can treat fence lines and whatnot without an applicator's license.
 - Morrill said that in the near term the Board should provide guidance to staff and suggested that licensed wastewater or drinking water operators should be exempt from pesticide licensing when they are doing applications as part of their duties, actually treating the water in the plant, disinfecting, etc. Once they step outside and do applications to a pond that's publically accessible, or to fence lines, etc., they should be licensed.
- **Consensus was reached consistent with Morrill's suggestion and it was agreed to put on the list for future rulemaking.**

8. Other Old or New Business

a. ERAC sampling update—Mary Tomlinson

- (Note: Tomlinson was not present) Jennings explained that Tomlinson had been spending a lot of time identifying sites along the coast. The lab in Montana couldn't do some of the analyses. After considerable research, Mary found a lab in San Antonio, Southwest Research Institute (SWRI) that will test for pyrethroids, methoprene and fipronil. The team is planning on sampling 20 sites; water and sediment samples to both labs, the staff is also trying to get the state lab to do some testing. The staff will also send samples to Orono for analyses of grain size. The team is also looking for soluble pesticides in water that may potentially impact marine organisms. The Montana lab can test for 96 analytes in one sample. SWRI will test for methoprene, fipronil, pyrethrin, and pyrethroids that other labs don't do. It's difficult because it's a mix. Testing is time-sensitive because the staff is trying to capture storm water.

- Bohlen noted that he has been working with Tomlinson on researching sampling sites. They did a scan of the Maine coast for areas with tidal flats that were accessible. In southern Maine, they are looking at urban or suburban landscapes. They are deliberately biasing samples toward where we're most likely to find something. In eastern Maine they are looking more at agricultural fields.
 - Morrill asked whether there would be any samples in deeper water. Bohlen said perhaps next year they'll look at deeper water; this year they are focusing on where we're most likely to find something, trying to determine risk pathways. They are biasing samples to get higher properties of risk; shallow water is where the chemicals are most likely to be, and we're not expecting to find most of these substances. If we don't find anything where there is the highest risk, that's a good indication that there is nothing to find.
 - Donna Herczeg asked if there are any sites in Portland. Bohlen said there are only 20 statewide, but at least half a dozen sites are in the greater Portland area: Portland, South Portland, Falmouth, Freeport. Herczeg remarked that she had read recently that 61% of storm drains in Portland drain into Casco Bay. She frequently sees pesticides applied prior to rain, washed right into the storm drain. Bohlen noted that that is what this testing is designed to look for.
- b. Variance permit to Urban Tree Service for control of poison ivy in York, Maine—H. Jennings
 - c. Variance permit to The Lawn Dawg for control of invasive plants in South Portland, Maine—H. Jennings
 - Jennings explained that both variances had been granted based on policies. This is just keeping the Board informed; it's important for the Board to know about them.
 - d. Other—DACF and UMaine Cooperative Extension are co-sponsoring a Pollinator Conference in November. Would really like the Board to participate. Will send details.

9. Schedule of Future Meetings

September 12, October 24, and December 5, 2014, are tentative Board meeting dates. The Board will decide whether to change and/or add dates.

Action Needed: Adjustments and/or Additional Dates?

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

10. Adjourn

- **Morrill/Granger: Moved and seconded to adjourn at 10:25.**
- **In favor: Unanimous**