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MEMORANDUM

DATE: December 10, 2008
TO: Board Members
FROM: Staff
SUBJECT: Summary of Major Comment Themes

Eighteen people testified at the public hearing in Bangor on November 21, and 137 written comments were received before the deadline. Eighty-six of the written comments are variations of three different form letters. This memo will attempt to capture the major themes the staff has identified in the comments received and outline some possible options should the Board determine changes are warranted.

Public Policy Basis for Making Changes

A number of growers and their advocates questioned the Board's basis for initiating changes to the existing rules. They cited the low number of enforcement actions as evidence that no change is warranted. Growers and their advocates also questioned the scientific basis for the proposed changes. Some pointed to EPA's risk assessments and regulatory programs as being adequate. On the other side of the issue, some commenters pointed to the loss of use of their property when pesticide applications are taking place nearby and/or when drift occurs onto their property.

It is important for the Board to evaluate these arguments and make a formal determination for the record before moving forward with any rule changes. It would be useful to address each argument separately. If the Board finds there is no basis for changing existing rules, there is no need to discuss the specific comments that follow.

Proposed Changes to the Definition of Sensitive Areas in Chapter 10 (Definitions)

There was support for the Sensitive Area Likely to Be Occupied (SALO) concept from area residents and environmental/public health/organic constituents. Growers and their advocates voiced concern that the SALO definitions will be difficult to interpret on the ground. Terms like lawns and recreation areas (especially trails), were considered vague and possibly quite expansive. Commenters suggested that landowners may retract their permission for trails to cross their property to avoid potential repercussions from the proposed requirements. Further definition of some of the language may need to be considered.

The Board also received comments from the organic community suggesting that organic farms should be considered SALOs. They point to the labor-intensive nature of organic farming as evidence that people are more likely to be present. The Board needs to address this suggestion.

The most common criticism relates to the idea of including public roads in the definition of SALOs. This change coupled with proposed changes in Chapters 22 (both the aerial buffer and the “Standard of Harm”) and 28 have growers concerned about their ability to apply pesticides near roads. If the Board determines it is necessary to make changes relating to roads, one option is to delete “public roads” from the definition of SALO and address the need to protect people using roads in the Standard of Harm in Chapter 22. Other options include exempting public roads from the 200' buffer for aerial spraying established in Chapter 22 or more narrowly defining public roads.

Proposed Changes to Chapter 22 (Drift Rule)

While some people objected to the need to create maps to identify sensitive areas, most of the comments on Chapter 22 centered around two topic areas: The so-called “zero tolerance” standard in the Standard of Harm section, and the 200' buffer to SALOs for aerial spraying, especially when applied to public roads. Some commenters wondered how the Board would be able to discern extremely low detections from background levels. A couple of commenters believed the reference to the National Organic Program rule is unworkable since the rule prescribes practices that growers must follow. This question has already been cleared up. The National Organic Program rule does contain a reference to tolerance levels that would exclude produce from sale as certified organic (7 CFR, Part 205.671).

For reference purposes, the proposed Standard of Harm amendment is copied at the end of this document as Appendix A.

Under the proposed amendments, the first Standard of Harm clause (II[i]) states that any detectable residue in an off-target sensitive area is a violation. The Standard of Harm section is later tempered by Enforcement Considerations that directly follow, allowing the Board latitude to determine when a violation of this section warrants an enforcement response. This does not change the fact that a violation has occurred, however.

The proposed Standard of Harm also contains a flaw in the logic. Originally, the staff suggested that the “no detectable residue” standard (referred to as the “zero tolerance” standard by many commenters) apply only to SALOs. The Board subsequently decided to broaden the applicability to all sensitive areas. The problem with broadening the scope of that standard is that it negated the utility of the next two standards associated with off-target residues on food crops (II[ii] & [iii]). If an off-target residue has violated one of the food crop residue standards, it has already violated the “no detectable residue” standard.

Should the Board determine that changes are necessary, a few options to consider are outlined below.

- Make the “no detectable residue” standard applicable only to SALOs. Such a move would leave certain sensitive areas subject only to the “damage to non-target species” standard (II[v]).

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- Change the no detectable residue standard to a “prima facie” standard, so that a detection does not automatically become a violation. Logically, you would want to use the same set of enforcement considerations as guidance for determining whether certain detections should be considered violations.
 - Place a floor on the “detectable residue” standard. Currently, the detection limit for most foliage samples hovers closely around 20 parts per billion.
 - Change the current 20% prima facie standard to some other percentage. Five and ten percent have been mentioned in comments. The staff is not enthusiastic about the percentage approach, because adequately proving percentages requires a large numbers of expensive samples.
 - Use established drinking water reference points such as Maximum Contaminant Levels or Health Advisory Levels. The staff has reservations about using drinking water standards to gauge the risks associated with dermal and inhalation exposure.
 - Use the Organic Program Rule standard of 5% of the EPA crop tolerance. The same reservations cited above are compounded in this case by the fact that off-target samples are seldom from crops.
 - Combine two or more of these concepts. For example, you could make the “detectable residue” standard a “prima facie” standard with a floor that applies only to residues on SALOs.

The other area in Chapter 22 that received a large volume of comments is the 200-foot buffer to SALOs for aerial application. Aerial opponents are requesting a much larger buffer, with 700 feet and ¼ mile mentioned frequently. Growers argue the buffer will take land out of production, will put farms out of business, will prevent the practice of perimeter spraying, and ignore best management practices and on-site decision making. Applying the buffer to public roads appeared to garner the most vigorous objections.

Bear in mind that the buffer proposal only applies to aerial applications adjacent to SALOs. However, the staff acknowledges that implementing a large buffer adjacent to every public road will require a substantial departure from current practices for some growers. Some potential changes the Board may consider include:

- Change the buffer distance as the Board deems appropriate
- Modify the SALO definition to exclude public roads
- Exempt public roads from the buffer requirement
- Allow for variances from the buffer where wooded buffers exist (the rule already provides for this)
- Allow neighbors to negotiate the buffers
- If the requirement for buffering public roads is changed, the Board could change course and protect people using public roads by creating a new standard of harm specific to people using roads

A number of people objected to the removal of drift management plans (DMP) from Chapter 22. A few points to consider relating to DMPs:

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- They essentially amount to Best Management Practices, which the Board agreed to keep separate from rulemaking.
 - They have no enforcement value, and the Board has endeavored to remove unenforceable sections of the rule in an effort to shorten and simplify it.
 - Under the existing rule, anyone operating under a DMP must notify the Board in writing. DMPs must be reviewed and updated every two years, and the Board must be notified in writing that the plans have been updated in order for them to continue to be in effect. One such notice was received in 2004 (covering 2004 and 2005), one in 2003 and one in 2002. Two of these were from the same company. Only 7 notices have been received after 1997. Consequently, no DMP has been in effect since 2005 and only 6 have been in effect at anytime since 1998.

Proposed Changes to Chapter 28 (Notification)

The proposed notification changes for ground application contained in new Sections 1A and 1B received few comments. Some supported mandatory notification for all outdoor pesticide applications.

The new proposal relating to notice for aerial applications adjacent to SALOs received extensive objections from the regulated community. Growers stated the logistics and administrative aspects would create an unreasonable burden, making it nearly impossible to use aerial application. Many growers asserted the current system is working fine. Individuals on either side of the issue suggested a registry administered by the Board in lieu of the Board's proposal. Several mention a "web-based" registry. We find the current registry format to be excessively burdensome for the staff. However, we are willing to discuss variations on that theme which could alleviate the administrative burdens. Unfortunately, our counsel has advised us that moving from the current proposal to a registry approach for aerial spraying would amount to a substantive change, requiring that we start over on the rulemaking process for Chapter 28.

Board Action List

General

- Determine whether there is a public policy basis for moving forward with changes

Chapter 10

- Decide whether the definitions of SALOs need greater specificity with respect to vague portions such as lawns and recreation areas.
- Determine whether organic farms should be designated as SALOs.
- Determine whether to remove public roads from the definition of SALOs and address protection of persons using roads elsewhere, or
- Determine whether a more narrow definition of roads is preferred.

Chapter 22

- Determine whether it is necessary to make changes to the requirements for ground applicators to make maps of the target area with the sensitive areas depicted.
- Determine whether to combine the ground application mapping requirement with the aerial requirement.
- Consider concerns relating to the “no detectable residue” standard.
- Determine whether changes are warranted with the proposed buffer to SALOs
- Determine whether to retain the section on drift management plans.

Chapter 28

- Determine whether to abandon the aerial notification proposal in favor of a modified registry approach.

Appendix A

II. ~~Prima Facie Evidence of Violation. Without limiting the generality of subsection I above, the presence of pesticide drift residues in excess of any of the following levels shall constitute prima facie evidence that the applicator did not take reasonable precautions to minimize pesticide drift to the maximum extent practicable Standard of Harm for Off-Target Drift of Pesticides. An applicator may not apply a pesticide in a manner that results in off-target drift and causes harm resulting in:~~

- ~~Pesticide residues detected in or on any off-target ~~sSensitive a~~Area in the vicinity of an application site. ~~which exceed 20% of the residues found, or which with proper application technique would have occurred, within the target area. For purposes of this standard, residue levels, within both a target area and an off-target sensitive area, may be determined by evaluation of one or more ground, foliage or other samples, or by extrapolation or other appropriate techniques.~~~~
- ~~Pesticide residues detected in or on any off-target ~~sensitive area in the vicinity of~~ an application site ~~which result in damage to crops, vegetation or other species within the sensitive area~~ crop that violate EPA residue tolerances for that crop, as established under 40 CFR, Part 180.~~
- ~~Pesticide residues detected in or on any off-target organic farm or garden in the vicinity of an application site which causes the organic products thereof to fail to meet the tolerance standard for organic agricultural commodities, ~~because residue testing detects prohibited substances that are greater than five percent of the Environmental Protection Agency’s tolerance for the residue detected as established under the National Organic Program, 7 CFR, Part 205.~~ This standard shall apply only where, prior to the time the pesticide application occurs, the owner or operator of the organic farm or garden~~

notifies the owner or lessee of the land to be sprayed, with such notice identifying the farm or garden as organic.

(iv) Documented illness in human(s). For the purposes of this section, the Board shall determine what constitutes adequate documentation.

(v) Damage or injury to any non-target species.

~~(iv) The residue standards in this subsection II for off-target drift do not apply where the owner or lessee of the off-target area receiving pesticide drift have given authorization and consent as prescribed under Subsection C of this section.~~

III. Enforcement Considerations. The Board shall consider the particular circumstances of violations arising from Subsection 4(B)(II) in determining an appropriate response, including, but not limited to:

(i) The standard of care exercised by the applicator;

(ii) The degree of harm or potential harm that resulted from or could have resulted from off-target drift from the application;

(iii) The risk (toxicity and exposure) of adverse effects from the pesticide applied.