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BOARD OF PESTICIDES CONTROL
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BOARD OF PESTICIDES CONTROL

November 18, 2011

John E. Dority Safety & Performance Training Center (Conference Room, Lower Level)
10 Mountain Avenue (off Route 201 going toward Skowhegan), Fairfield (Exit 133 from I-95)

MINUTES

9:30 AM

Present: Granger, Eckert, Jemison, Ravis, Flewelling

1. Introductions of Board and Staff

The Board, staff, and Assistant Attorney General Randlett introduced themselves

2. Minutes of the October 7, 2011, Board Meeting

Presentation By: Henry Jennings
Director

Action Needed: Amend and/or approve

Eckert/Granger: Moved and seconded approval of the minutes

In Favor: Unanimous

3. Workshop Session to Review the Rulemaking Record on the Proposed Amendments to Chapters 28, 41, and 60, and the Proposed New Rule Chapter 33

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

On September 14, 2011, a Notice of Agency Rulemaking Proposal was published in Maine's daily newspapers, opening the comment period on the proposed amendments to Chapters 28, 41, and 60, and the proposed new rule Chapter 33. A public hearing was held on October 7, 2011, at the Hampton Inn in Waterville, and the written comment period closed at 5:00 PM on October 21, 2011. Five people spoke at the public hearing and five written comments were accepted 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 stated that the objective for this meeting was to determine how the Board wished to proceed with each of the four rulemaking proposals: whether Board members believed revisions were appropriate, or whether they wished to abandon any of the proposals. Based on the Board's input, the staff will then prepare the documents necessary for adoption of the amendments for the December meeting. He suggested that members consider each amendment separately in numerical order.

Chapter 28—Eckert observed there is a law mandating the proposed change and felt it was fairly straightforward. Granger alerted the other members to a glitch in the law: the sponsor had intended to exempt forestry from the new 1,000-foot notification distance for aerial spraying. Randlett stated the law was very clear in its directive, and didn't leave sufficient latitude to craft an exemption in rule. Jemison wanted to make sure he understood Randlett on that point by asking if the Board had any discretion to adjust the rule consistent with the sponsor's intent. Randlett reiterated that such an adjustment would be inconsistent with the law. Jennings stated that most aerial forestry spraying occurs after the middle of August, so there should be ample time for the Legislature to correct the law. Eckert found there was consensus to adopt the amendment as it was proposed.

Chapter 33—Jennings stated the Board had received only one comment on Chapter 33. It was from Ivan Hanscom, who suggested that the exams and continuing education should be available over the Internet. Jennings pointed out that some continuing education is available online already, and more is likely to be added in the future. The staff sees significant verification issues with online exams.

Granger inquired about the purpose of the mandatory waiting periods listed in the rule for retaking exams. He saw them as restrictive and thought the point was to get people licensed. Fish responded by stating that the wait period was instituted to discourage people from trying to pass the exam without studying by just retaking the exams until they finally pass. The waiting period was designed to provide a disincentive for failing the exam and to allow time to adequately study before retaking. Since all the licensing rules contain the same waiting period, Jennings suggested that the issue be set aside for now so that any potential changes to the waiting period could be implemented across all applicable chapters. Eckert mentioned the idea of open book exams over the Internet. Fish stated that open book exams are more difficult and time-consuming for both the applicant and the staff.

Eckert inquired about how the staff planned to determine the \$1,000 threshold for requiring the new license for general-use pesticides. Jennings didn't think the staff would spend too much time trying to sort out the borderline cases. He didn't think it was appropriate to request financial information. He said he thought acreage would be one simple indicator. Lauchlin Titus, AgMatters LLC, suggested that a quick evaluation of the produce available at a farmstand would be another easy indicator. Consensus was reached to move forward with the rule as it was proposed.

Chapter 41—Jennings stated the majority of the comments were received for the Chapter 41 proposal. Jemison offered to provide a little background on Plant Incorporated Protectants (PIPs) for the benefit of the new Board members. On face value, PIP use should reduce the use of conventional pesticides which is consistent with the Board's mission. But there are other concerns with PIPs—insect resistance and gene transfer—that the Board needs to consider. He explained that herbicide-resistant traits are not regulated by the Board because they do not contain pesticidal properties. The Board approved the *Bt* potato in the early 1990s, but it failed as a commercially viable product. When *Bt* forage corn was first considered, it was not approved by the Board due to a lack of need. Insect pressure is relatively low in

Maine and forage growers had not been treating for the pests that *Bt* corn controlled at that time. More recent versions of *Bt* corn provide control of additional pests that forage corn growers were more likely to treat for, leading to Board approval in 2007. Jemison noted that the PIP Technical Committee was meeting on the following Monday to review product applications with reduced refuge requirements. The outcome of that meeting may have some bearing on training needs, because one reduced refuge option, “refuge in a bag,” would negate a portion of the training purpose.

Eckert commented that some people are philosophically opposed to the use of genetically modified organisms in general. She saw value in fostering communication between the various factions. She believed resistance is inevitable. Ravis saw value in retaining the training requirement. He felt it was an area of rapid change that would be important to keep up with.

Jennings alerted Board members to Titus’ comment relating to seed distributor obligations. He questioned whether it was necessary to impose a policing requirement on them. Jemison agreed that it appeared inappropriate.

Jemison reviewed a survey he conducted with Eric Sideman of the Maine Organic Farmers and Gardeners Association (MOFGA) about the use of foliar *Bt* products by organic growers. Of the 59 people who responded to the survey, 61 percent stated they used *Bt*; of those, 92 percent used only one type of *Bt*, and 69 percent stated *Bt* was important to their operation; 8 of 40 respondents who reported the crops on which *Bt* was used, reported brassicas.

Board members discussed their views on how to move forward with the proposal. Consensus was reached to direct the staff to bring three versions of the proposed amendment back for consideration at the December Board meeting: a version which only drops the seed distributor obligation to verify training, a version which drops the seed dealer obligation and extends the interval for refresher training, and a version which drops the seed dealer obligation and makes the refresher training voluntary.

Chapter 60—Jennings stated the only comment received was from Darin Hammond of Jasper Wyman & Son, who requested the change. Hammond simply explained why the need for the Deblois Fish Hatchery Critical Pesticide Control Area no longer existed. Board members agreed that the change was very straightforward and logical, and they directed the staff to move forward with the change as proposed.

4. Consideration of a Board Policy to Delegate Approval of Chapter 29, Section 6, Variance Requests for Control of Plants that Pose a Dermal Toxicity Hazard

Chapter 29, Section 6, of the Board’s rules, prohibits most broadcast applications of pesticides within 25 feet of certain defined surface waters. Applications to control stinging insects and arthropod vectors of human disease are exempted, but control of vegetation that causes public health issues is not. Under certain circumstances the Board may grant variance permits and the staff is authorized to approve repeat variance requests when there have been no problems. However, a long delay in granting a recent variance request for control of poison ivy led to general agreement that Board approval of individual permits to address a poisonous plant problem is a cumbersome and slow approach, and that a policy that does not delay treatment and stresses Best Management Practices makes more sense. The staff has developed a draft policy for Board consideration.

Presentation by: Gary Fish
Manager of Pesticide Programs

Action Needed: Approve/disapprove the proposed policy

- ☑ Fish explained the sequence of events that led to a five-week delay for Green Thumb Lawn Service in obtaining a variance to treat poison ivy infesting a large area of lakefront. Upon receiving his variance, Green Thumb owner Michael Legasse called into question the necessity of the current process for such requests. As a result, the Board had directed the staff to investigate a streamlined process that focused on the use of Best Management Practices (BMPs). The staff drafted a policy which, if approved, would delegate authority to the staff for issuing permits for control of plants with a dermal toxicity hazard.

Granger inquired about the circumstances under which a permit would not be issued. Fish responded that the staff could not issue a permit unless the applicant complied with the conditions listed in the policy. Otherwise, permit applications would need to be brought in front of the Board.

Granger questioned whether the Board's policies relative to spraying adjacent to surface water were placing requirements on trained professional applicators without affecting untrained applicators such as homeowners. He wondered if a permit should even be necessary for professionals using BMPs. Jennings said that would require a rule change. Fish pointed out that homeowners are technically subject to the Chapter 29 provisions, but admitted that most probably are not aware of the requirement.

Flewelling asked what applicators would need to do to obtain a permit. Fish explained there is a short form that must be completed and submitted to the Board's office. Katy Green of MOFGA asked if the staff inquires whether non-chemical control options have been attempted. Fish responded by pointing out that all of the factsheets listed on the Board's website contain a variety of control approaches.

Eckert/Ravis: Moved and seconded approval of the proposed policy

In favor: Unanimous

5. Consideration of Staff Negotiated Consent Agreement with Scotts Lawn Service of Gorham

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 in 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 the application of herbicides to the wrong property.

Presentation By: Raymond Connors
Manager of Compliance

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

- ☑ Connors explained that a company employee applied pesticides to the wrong property even though there was a company policy requiring checking the customer's electric meter number. Jemison asked how he arrived at the wrong address. Connors explained that he used a GPS unit and, apparently still uncertain, called the customer to confirm the location, and then proceeded to make the application. Ravis asked if the staff had reviewed the company's policy on confirming the location. Connors said the company agreed to modify the plan in an effort to improve results. Jemison asked how they vacuumed the pesticide. Connors believed they attempted to vacuum the granules, which wouldn't have picked up the pesticide applied as a liquid. Jemison noted the company had six violations in three years, and suggested that future violations consider the recent history.

Ravis/Flewelling: Moved and seconded approval of the consent agreement

In favor: Unanimous

6. Discussion of the Fee Exemption Contained in Chapter 28, Section 2—the Maine Pesticide Notification Registry for Non-Agricultural Pesticide Applications

A recent inquiry from a Rockport resident about registering his property in order to receive notification about outdoor pesticide applications led to a request for clarification of what “extenuating circumstances” means under the fee exemption clause of Chapter 28, Section 2(G). The Board will now discuss this question.

Presentation by: Henry Jennings
Director

Action Needed: Clarify meaning of “extenuating circumstances” for the registry fee exemption

- Jennings explained that the staff received an inquiry from someone asking about the Chapter 28 language which allows the annual registry fee to be waived in cases of financial hardship or “where other extenuating circumstances exist which justify granting a waiver.” The individual wanted to know what qualified as extenuating circumstances. Jennings stated the staff never encountered that question before.

Eckert discussed the origin of the fee. She thought it was intended to cover Board expenses. She agreed with the points Stevenson made in the e-mail he sent to the Board in his absence. Jennings recalled that applicators argued for the fee to prevent arbitrary sign-up. Board members discussed different scenarios and came to the consensus that the extenuating circumstances would need to be financial concerns that are not covered under the current criteria. Otherwise, applicants could request Board review on a case-by-case basis.

7. Other Old or New Business

a. Submission of the completed GEA Report to the ACF Committee—H. Jennings

- Jennings alerted Board members to the final version of the GEA report. Jemison complimented the staff on the report and said he already used it in one of his classes. Ravis suggested it would be valuable for new Board members.

b. Discussion of scheduling a Board planning session and possible topics—H. Jennings

- Jennings stated that the Board used to hold a planning session annually, but there was not one in 2011. He suggested March of 2012 might be a good time to hold one. There was a short discussion about whether it needed to be a public meeting. Randlett stated it was best to publicize the meeting and invite the public to attend. Granger suggested that the Board allow the public to participate. Eckert believed it was useful to occasionally have an opportunity for the Board and staff to have frank discussions. Granger suggested the press articles that accompany the Board packet as topic of discussion. March 30 was tentatively set for the planning session. This would take the place of a regular Board meeting, depending on whether there are pressing business matters.

c. Discussion of how the monthly Board packet should be sent to Board members—P. Schlein

- Schlein explained that Jemison had inquired about whether it was necessary for Board members to receive paper copies of the packet. A short discussion ensued in which there was general agreement that a paper copy was necessary to have for reference during the meeting. David Lavway from the Maine Department of Agriculture observed that a large percentage of the paper packet was comprised of articles that don't pertain to any specific agenda item. Consensus was reached to continue with the paper copies, but only provide the articles electronically.

d. Other?

- The Board discussed the e-mail submitted by Robert Butler of Phippsburg, urging the Board to monitor combined sewer overflows for pesticides. After a brief discussion, Board members directed the staff to respond by describing the water monitoring that has been done in a similar vein.
- Jennings called the Board member's attention to a draft policy included in their meeting day folder concerning the copper hardware classified as a pesticide. Research indicates that copper alloys have antimicrobial properties and have been shown to significantly reduce pathogen populations on commonly touched surfaces and reduce disease transmission in critical care units. A distributor hoping to provide such hardware to schools and other institutions had inquired about whether a pesticide applicator's or distributor's license would be required. Jennings couldn't envision any public benefit to requiring either license in that circumstance. Consequently, the staff offered a draft enforcement policy for Board consideration.

Board members discussed the issue briefly. None of them believed there was any practical reason to require licenses for copper hardware.

Granger/Ravis: Moved and seconded approval of the draft enforcement policy cover copper hardware

In favor: Unanimous

8. Schedule of Future Meetings

December 16, 2011 (snow date December 23), and January 20 and February 24, 2012, are the tentative dates for future Board meetings. The Board will decide whether to change and/or add dates.

Adjustments and/or Additional Dates?

- March 30 was added as a tentative date for a Board planning session.

9. Adjourn

- Ravis/Granger: Moved and seconded that the meeting adjourn at 12:20 PM.

In favor: Unanimous