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## MEMORANDUM

DATE: October 30, 2009  
TO: Board  
FROM: Staff  
SUBJECT: Chapter 28 Comment Themes

On October 30, 2009, the staff met to review the comments on the proposed amendments to Chapter 28, to identify any common themes, and to offer recommendations for potential revisions. Below is a list of common themes, in the approximate order of their frequency, together with any staff recommendations where applicable.

1. The Mandatory Written Disclosure Will Create Unreasonable Administrative Burdens for Applicators, and/or the Current Rules Are Working Fine

The staff evaluated how this requirement would impact different types of spray operations. For relatively small farms contained upon a single property, this requirement does not appear unreasonably burdensome. However, for other spray operations – both agricultural and non-agricultural – that involve applications to a large number of properties spanning numerous municipalities, the mandatory disclosure requirement appears to create a significant administrative burden.

Staff Recommendation: Regulatory agencies must abide by their statutory authorities and mandates. This requirement is set in statute. Representative O’Brien has submitted a bill to streamline the requirements of Public Law 2009, Chapter 378 (LD 1293). Constituents will have an opportunity to make their case before the Legislature at that time. The Board can convey any concerns it may have in the form of a cover letter at the time that the provisional rule is submitted to the Legislature for approval.

2. The 24-Hour Advance Notification Required by Registry Will Conflict with IPM Practices

There was significant testimony about how the 24-hour advance notice requirement will conflict with IPM decision making and encourage preventive spraying. The staff does not believe it is prudent to make progress on notification issues only to lose ground on IPM and the state policy of minimizing reliance on pesticides. At the same time, the staff believes the problem could be partially addressed if applicators who believe spraying may be required simply issue the advance notice proactively. Even with this practice, there will be some circumstances when a pest problem will be detected that would best be sprayed immediately to minimize the damage and the amount of spraying required.

Staff Recommendation: In Heather Spalding’s comments, she suggests reverting to the Board’s proposal of last year which required notice “one calendar day” in advance of the

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spraying. Such a change would allow additional flexibility and foster continuation of current practices that often involve a call the night before an application. However, the staff believes additional flexibility for unusual circumstances is desirable. At the public hearing, John Jemison raised the idea of an exemption when IPM considerations dictate an immediate response to a newly detected pest problem. If the Board favors an exemption, presumably the land manager would still have an obligation to provide notice as soon as possible. The staff recommends combining the “one calendar day” requirement with a carefully crafted exemption for IPM purposes.

3. The Proposed Amendments Are Exceedingly Complex and Overlap or Conflict with Other Board Rules

The staff agrees that proposed amendments are somewhat complex and that they overlap with other BPC rules. Different application scenarios with the same equipment have different requirements. The staff further agrees that a holistic reevaluation and consolidation of all the BPC notice requirements is desirable in the long run. However, the Joint Standing Committee on Agriculture, Conservation and Forestry (ACF) has asked the Board to develop rules necessary to implement the intent of LD 1293, and submit them for review by January 2010. In keeping with this directive, we can only evaluate whether the proposed amendments warrant simplification and/or consolidation.

Staff Recommendation: Some of the most logical ideas relating to simplification and consolidation – such as combining the registries and combining Chapter 28 and Chapter 51 – are not possible under the current rulemaking initiative. Since there is not time to readvertise and begin the rulemaking process again, simplification efforts in the short term should be confined to those “non-substantive” changes that can be accomplished without readvertising the rule.

4. The Proposed Amendments Unfairly Target Certain Application Technologies While Not Affecting Others

The scope of LD 1293 was established by the Legislature and discussions about its scope would most appropriately be directed to the Legislature. The Board is free to comment on the scope of LD 1293 if and when it transmits a provisionally adopted rule.

5. Given that Public Law 2009, Chapter 378, May Undergo Significant Amendments During the Special Legislative Session, the Board Should Suspend Development of This Proposal

The staff does not support this reasoning. Any amendments adopted by the Board will be reviewed by the ACF, probably at the same time as amendments to PL 2009, Chapter 378. The ACF can craft whatever final language it deems appropriate and require that final adoption be consistent with those changes. Or it can vote to not authorize final adoption of the rule. Most of the substantive concerns do not relate to the registry, which is scheduled to become operational in the spring of 2010.

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Staff Recommendation: Given the direction the ACF has provided, and the need to at least establish minimum ground rules for the operation of the registry, the staff believes the most logical course of action is to develop the best rule possible without crossing the “substantive changes” threshold that would require readvertising the rule and delay adoption by several months.

6. The Exemption for Aerial Applications Covered by Chapter 51 Is Unfair and Illogical

The staff originally proposed exempting applications covered under Chapter 51 for two principle reasons: 1) it contained a public health emergency exemption, and 2) it was designed to be workable for wide-area spray programs. Since the amendments were proposed, it has become clear that a broader public health emergency exemption (that includes both aerial and air-carrier equipment) is advisable since most mosquito-control work in New England is done by ground applications. Through the comment process, it has also become clear that there are other types of wide-area spray programs that are not covered under Chapter 51 and are therefore subject to the mandatory disclosure requirements contained in PL 2009, Chapter 378. Examples are agricultural spray operations that include involve hundreds or even thousands of acres across numerous municipalities, or mosquito spraying done by ground equipment. In light of these two revelations, the justification for exempting pesticide applications covered under Chapter 51 has been called into question.

Staff Recommendation: The staff recommends creating a new emergency exemption that covers both ground and aerial applications and applies to both public health and other pest management emergencies. The staff is taking no position on whether or not to retain the exemption for Chapter 51.

7. Airblast Equipment Has the Same Drift Potential as a Boom Sprayer—Remove Airblast Equipment from the Rule

There is clear empirical evidence showing that properly configured boom sprayers will result in the least off-target deposition when compared to aerial or airblast spraying. In any case, PL 2009, Chapter 378, specifies what types of equipment are subject to the law. Those who advocate removing airblast equipment from the law should direct their comments to the Legislature. The Board is free to convey any observations and/or recommendations it deems appropriate to the ACF at the time the provisional rule is transmitted.

8. Providing Too Much Information About Chemical Use to the Public Might Cause Undue Alarm

The staff does not support this argument, which is contrary to the spirit of right-to-know.