



JOHN ELIAS BALDACCI
GOVERNOR

STATE OF MAINE
MAINE DEPARTMENT OF AGRICULTURE, FOOD & RURAL RESOURCES
BOARD OF PESTICIDES CONTROL
28 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0028

SETH H. BRADSTREET III
COMMISSIONER
HENRY S. JENNINGS
DIRECTOR

BOARD OF PESTICIDES CONTROL

August 27, 2010

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: Jemison, Eckert, Simonds, Bohlen and Ravis

1. Introductions of Board and Staff

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

2. Minutes of the July 23, 2010, Board Meeting

Presentation By: Henry Jennings
Director

Action Needed: Amend and/or approve

Jemison/Eckert: Moved and seconded approval of the minutes

In Favor: Unanimous

3. Continuation of Board Discussions on the Development of a Comprehensive Notification Registry

On April 1, 2010, Governor Baldacci signed Public Law 2009, Chapter 584, LD 1547, An Act To Revise Notification Requirements for Pesticide Applications Using Aircraft or Air-carrier Equipment. Among other things, the new law directs the Maine Board of Pesticides Control to establish a comprehensive pesticide notification registry which encompasses both existing registries and is expanded to include other types of pesticide application equipment. As the first step in the process, the Board hosted five Public Information Gathering Sessions at different locations around the state. The Board will now continue deliberations about development of a comprehensive registry, with emphasis on the following areas:

a. The feasibility and advisability of requiring signs around treated sites

- Jennings surmised that the Legislature included the sign assessment as a potential substitute for the pre-season notification requirement which was repealed. The statute specifies that the sign assessment is limited to aircraft and air-carrier applications. While the Board hasn't indicated any appreciable support for requiring signs around the perimeter of an application site, there has been some discussion of requiring a single sign, in a conspicuous location, possibly for aerial spraying only. Jennings inquired about the Board's opinions on this front.

Simonds stated any sign requirement should be associated with a type of application equipment. Forestry is comfortable with the use of signs, but agriculture is opposed to it. Bohlen stated the purpose would need to be clear. It would be more appropriate for people who do not reside in the neighborhood. Jemison believed a single sign made some sense. Not everyone knows what's involved in agricultural production. Ravis suggested a sign could simply indicate that pesticides may be used at this site and list a contact to obtain additional information. Bohlen preferred a sign where the farmer had leeway to include marketing information, so that it could serve a dual purpose and strengthen understanding of agricultural practices. Patricia Kontour noted that many fields are very small—one or two acres. Simonds reminded members that any requirement will create a burden. Bohlen wanted to be sure that any requirement serves a useful purpose. Signs in remote locations will not accomplish anything.

- b. A review of Chapter 51 and which elements should be included in a consolidated rule

- Jennings explained that Chapter 51 arose from the budworm spray projects. Title 22 sets forth public notification requirements for both major and minor forest insect aerial spray applications, so the Board does not have authority to revise those provisions. The other aerial applications covered by Chapter 51 include other forest applications, ornamental, biting fly and public health, and right-of-way applications. The chapter includes sign requirements for forestry applications because most of the people using those areas do not reside adjacent to the application sites; they tend to be recreating. In that setting, signs are more effective than notice to adjacent landowners. Dave Struble believed that's why Chapter 51 works. There are a limited number of access points making a sign requirement manageable. Struble favored leaving Chapter 51 as it is. Simonds expressed concern about having different standards for different use sectors.

Jennings stated he had not heard a lot of opposition to retaining the posting requirements for forestry operations. Simonds saw value in the notice to the Board's office because the public will feel more comfortable about spraying that the state is fully aware of, and it allows the staff to communicate from a position of knowledge. He wondered why the Board notice only applied to certain aerial spraying and whether it made sense to make it more universal. Jennings believed that forestry applicators will eventually need to comply with the registry, so maybe the registry should be substituted for the requirement to notify abutters.

- c. Review of the current Board Working Paper and the proposed applicability of the registry

- Bohlen stated we should be working toward an automated system, but not an Internet-based system, so we don't discriminate against low-income participants. Jennings asked the Board about moving the deadline for signing up for the registry back, since commercial applicators are sometimes starting work by April 1, and they will need additional time to process and implement the registry. Board members saw no reason not to move the deadline back, since it's only

important during the first couple of years of operation. Chuck Cotton from Lucas Tree Company preferred to have access to periodic updates to allow the company more time to process the list. There was consensus to move the deadline back at least two months, and possibly to January 1.

Jennings asked about the Board's view on requiring homeowners to comply with the registry. The staff believes it's more practical to regulate homeowners with an approach similar to that used in the non-agricultural registry. Under that system, anyone who wants to be notified about applications made by their neighbor would send the neighbor a Board-approved letter detailing their desire to be notified and the neighbor's responsibility under the law.

Jemison discussed adding a provision for special circumstances in which people have legitimate reasons for notification beyond the distances prescribed in rule. He thought the current "by request" option might be an option. Other Board members saw pitfalls to making exceptions. They felt the system will ultimately need to rely on prescribed distances, otherwise the system would be ripe for abuse.

d. Discussion of the report that will go to the Legislature

- Jennings said the staff will begin drafting the report to the Legislature for initial review at the next Board meeting. The staff has adequate information to write a couple of sections, while others will need to be further developed during subsequent Board discussions. Simonds suggested that the report include a concise executive summary.

Presentations By: Henry Jennings
Director

Action Needed: Provide Input to the Staff on Registry Development

4. Review of the Market Decisions Report on the Survey of Mainers About the Registry

Public Law 2009, Chapter 584 requires the Board to report to Legislature no later than February 1, 2011, on five topics, including the effectiveness of the public awareness activities mandated by the statute. The staff contracted with Market Decisions of Portland to survey Maine residents about whether they had heard of the registry. The results of that survey will be presented and the Board will discuss the future course of the campaign.

Presentation By: Paul Schlein

Action Needed: Provide Guidance to the Staff

- Schlein reminded the Board that the statute requires the Board to evaluate the effectiveness of the public awareness campaign. He explained that the staff decided to contract with a marketing firm, often used by DEP in their work, to randomly survey Mainers about their awareness of the notification registry. Market Decisions out of Portland, Maine, conducted a randomized phone survey of 401 adult Mainers between July 14 and August 3, 2010. Eighteen percent of the respondents indicated they were aware of the registry.

Bohlen said 18% sounds like a small number, but it actually represents a large number of people. How the statistics are presented is important. Tim Hobbs observed that 18% is up from virtually zero, when the awareness campaign began. Simonds thought 18% was a good result, given the budget and the short timeframe. Bohlen and Eckert wondered if the survey was based solely on land lines or whether cell phones were included. Excluding cell phones creates a bias against younger portions of the population. Jennings stated the staff would begin writing the Legislative report and include the survey results.

5. Board Review and Discussion of Its Statutory Purpose and Policy Statements

During the course of the Board’s deliberations on the development of a comprehensive notification registry, questions were raised about whether the Board is familiar with and adhering to its statutory purpose and policy statements. The Board will now review and discuss its policy statements and how they affect its process of public policy development.

Presentation by: Mark Randlett
Assistant Attorney General

Action Needed: None—Informational Only

- Assistant Attorney General Randlett lead the discussion and started by stating that it’s important to look at the purpose language as a whole, and not to focus on any particular clause or sentence in isolation. He said it’s also appropriate to review the legislative history, including repealed sections of statute when trying to determine the legislative intent. Randlett believed the staff memo was self explanatory and covered the relevant sections of statute.

Jennings asked about the idea of promoting the benefits of pesticides, since it was brought up at the recent confirmation hearings. Randlett stated he saw nothing in the purpose language to indicate the Board should promote pesticide benefits. Bohlen pointed out that the 22 M.R.S.A. § 1471-X does direct the Board to promote IPM and other science-based technology to minimize reliance on pesticides. Eckert also observed that the Board has a directive to educate pesticide users about IPM.

6. Consideration of the Board Policy Clarifying the Applicability of Chapter 26, Standards for Indoor Pesticide Applications and Notification for All Occupied Buildings Except K–12 Schools

Chapter 26 of the Board’s rules was first adopted in 2006 and amended in 2008. The rule was intended to regulate the use of pesticides indoors, because the airtight environment can increase the risk of exposure for airborne pesticides. However, a recent inquiry revealed that Chapter 26 applies to pesticides applied inside a structure, even if the structure has no walls. The Board will now consider whether it’s appropriate to adopt a policy clarifying the applicability of Chapter 26.

Presentation by: Henry Jennings
Director

Action Needed: Determine whether to adopt a policy

- Jennings explained that some of the big box retailers in the state are using a product derived from grape skins to repel birds in the outdoor section of the stores where garden supplies are housed. Part of this section has a roof, but is open on one or more sides. The product is applied using an automated

dispenser which produces a fine aerosol. The staff received an inquiry about whether the provisions of Chapter 26 apply to these areas. A literal reading of the definition of “occupied building” revealed that it includes any “structure” that is normally occupied. The definition of “structure” includes almost anything that has been constructed. Consequently, it appears that Chapter 26 technically applies to this situation, although the intent was to regulate indoor environments only. Therefore, a policy clarifying the Board’s intended scope of Chapter 26 is recommended until a housekeeping amendment can be made. Simonds did not believe that the Board’s intent was to regulate any structure under Chapter 26. Bohlen stated his concern, related to the large number of people who could potentially be exposed, whether the risks had been adequately evaluated. He wondered whether similar devices were already in use in other settings, and whether the BPC should be exerting some level of oversight over these applications. Heather Spalding asked if there had been any air monitoring. Board members discussed this concern and there was general agreement that risks should be evaluated. Jennings agreed that the Board has the authority to further regulate pesticide use intended to become airborne in areas where the public may be exposed, but he advised Board members not to use Chapter 26 for that purpose. There was general sentiment to revisit the broader issue in the near future.

Jemison/Eckert: Moved and seconded approval of the draft policy

In Favor: unanimous

7. Consideration of the Staff Negotiated Consent Agreement with the Petro’s Ace Hardware of Auburn

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 unlicensed distribution of general use pesticides during 2008, 2009 and 2010.

Presentation By: Raymond Connors
Manager of Compliance

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

- Connors stated that this case was similar to a recent one in which a pesticide retailer had the required distributor’s license, but failed to renew it for a period of three years. He then reviewed the current penalty formula that the staff is using for unlicensed distributors.

Eckert/Jemison: Moved and seconded approval of the consent agreement

In Favor: Unanimous

8. Consideration of the Staff Negotiated Consent Agreement with Advantage Landscaping of Portland

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 an unlicensed landscaping company making commercial pesticide applications.

Presentation By: Raymond Connors
Manager of Compliance

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

- Connors explained that an individual on the non-agricultural registry observed a property maintenance contractor applying herbicides to an adjacent property. Since he had not been notified about the application, he went out to inquire why. The applicator was unaware of the notification requirement, prompting the registry participant to call the Board's office. A staff investigation revealed the applicator was not licensed.

Jemison/Eckert: Moved and seconded approval of the consent agreement

In Favor: Unanimous

9. Discussion of Concerns About Unlicensed Commercial Agricultural Producers

At the recent Board Planning Session, concerns were raised about the evolution of state and federal pesticide laws which now allow many commercial growers to apply pesticides to their crops and/or livestock without a pesticide applicator's license or any formal training. The basic standard for requiring a private pesticide applicator's license—triggered by the use of a restricted pesticide—was established in the early 1970s, and has never been updated by the federal EPA. Since that standard was established, a number of legal requirements have been imposed and a series of public health and environmental risks have been identified that were not well documented in the 1970s. Some members of the agricultural community have questioned whether the existing standard is still appropriate. Board members discussed this issue at their June 25, 2010, meeting, and will continue those discussions now.

Presentation by: Henry Jennings
Director

Action Needed: None—Discussion Only

- Simonds stated he believed this to be a policy question for the Legislature. Jennings said he felt it was inappropriate for the Board to advocate for expanding its regulatory purview. Simonds asked what the staff was looking for. Jennings replied that the subject had been brought up at the planning session and felt it was important to have a public discussion of the topic. If the Board has an opinion about whether individuals involved in commercial food production should be required to have training or demonstrated competency, then it can be recorded in minutes. Eckert recalled that the last time the topic was discussed, the Department of Agriculture agreed to provide a list of agricultural producers so that the Board's staff could direct educational mailings to them. She asked if there had been developments in that area. Robert Batteese stated the Department had a group of interns working on that project this past summer. Simonds asked if there were any compliance issues with the unlicensed agricultural applicators. Staff members cited the WPS, record keeping, food safety and basic label compliance as

issues that have arisen. Simonds suggested that Jennings inform his supervisor that the Board has identified a gap in the pesticide training requirements and ask that the issue be brought to commissioner's attention.

10. Update on the Clean Water Act/National Pollution Discharge Elimination System Impact on Pesticide Applications

In 2009, the Sixth Circuit Court of Appeals vacated EPA's interpretative rule which asserted that pesticide applications made in compliance with the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) are not subject to the Clean Water Act (CWA) and its National Pollution Discharge Elimination System's (NPDES) permitting requirements. Consequently, beginning in 2011, the court ruling will require NPDES permits for pesticide applications made in or around surface water when excess pesticide or residue is deposited in jurisdictional waters. EPA has been developing a "general permit" that pesticide applicators can work under in some states. States like Maine, which have been delegated authority to administer the NPDES program, will need to issue their own permits. The staff will review some of the basic concepts and parameters of NPDES program in Maine.

Presentation by: Henry Jennings
Director

Action Needed: None—Informational Only

- Jennings stated that Robert Stratton is the lead person for the Maine DEP with respect to the CWA permits. Stratton was present so he could participate in the discussion. Jennings went through a short PowerPoint presentation that provided a brief history of the events leading up to the Sixth Circuit Court's decision that vacated EPA's interpretive rule which attempted to maintain the separation between the two federal statutes.

Stratton pointed out that Maine is a delegated state with respect to the NPDES system under the CWA. Stratton gave an overview of Maine's Pollution Discharge Elimination System (MEPDES) permitting requirements. He stated that Maine has issued permits since 1981 for direct discharges of pollutants to Waters of the State (WOS), for aquatic applications. Stratton stated that DEP currently has general permits in place for mosquito larvae control, invasive aquatic plants and non-native fish control, and DEP is currently working with the BPC to develop a general permit to cover applications that are subject to the recent Sixth Circuit Court of Appeals decision.

Tim Hobbs spoke about EPA's proposal and wondered if growers would be more likely to be sued under EPA's approach or under Maine's approach. Simonds asked about which agency will have jurisdiction. He stated it's important to avoid overlap. Stratton stated that the Maine DEP administers provisions of the CWA including the NPDES permits. However, to the extent practical, maintaining the historical structure in which the BPC regulates terrestrial use of pesticides and the DEP regulates aquatic use of pesticides is a desirable goal. This means terrestrial applications must be conducted such that no discharge to WOS will occur, making Best Management Practices (BMPs) a critical component of the joint effort. Bohlen said he envisions a three-tiered regulatory structure: (1) applications that follow the BMPs, no permit required; (2) applications under the general permit; and (3) applications under the specific permit. Jennings stated that the DEP and the BPC hope to have a written summary available soon, possibly for the next meeting.

11. Other Old or New Business

- a. Update on the first meeting of the *ad hoc* Public Health Committee—C. Eckert
- Eckert provided a brief overview of the meeting and described the composition of the committee. She explained that the group reached consensus that a risk assessment process will never determine precise notification distances. Eckert also stated there was some discussion about moving more toward an automated system—similar to DHHS’s Health Advisory Network—so that precise distances are less important. At the same time, the committee had some concerns about any system that relied entirely on electronic communications, since it inherently discriminates against lower income families. Jennings observed that the group had inquired about why the Board didn’t just post information about pesticide applications on its website, allowing interested parties to do the leg work themselves. Eckert reported that the staff would provide the committee a more detailed proposal for comments based on the Board’s deliberations.
- b. Other?
- Bohlen publicly expressed appreciation for Fish’s involvement and efforts in DEP’s new iteration of the “Ducky” campaign.

12. Schedule and Location of Future Meetings

October 1 and November 5 are the tentative dates for the next Board Meetings. The Board will decide whether to change and/or add dates.

Adjustments and/or Additional Dates?

- Board members added December 10, 2010, and January 7, 2011, as tentative future meeting dates.

13. Adjourn

- Bohlen/Ravis: Moved and seconded that the meeting adjourn at 1:53 p.m.

In Favor: Unanimous