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GOVERNOR

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

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COMMISSIONER  
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DIRECTOR

**BOARD OF PESTICIDES CONTROL**

**December 19, 2008**

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: Eckert, Ravis, Jemison, Qualey, Simonds, and Stevenson

1. Introductions of Board and Staff

The Board, Staff and Assistant Attorney General Randlett introduced themselves.

2. Minutes of the October 17, 2008, Board Meeting

Presentation By: Henry Jennings  
Director

Action Needed: Amend and/or approve

Simonds/Jemison: Moved and seconded approval of the minutes

In Favor: Unanimous

3. Board Discussion of Bt Sweet Corn Registration Requests and Potential Amendments to Chapter 41

At the August 1, 2008, meeting, the Board discussed a process for reviewing a request from Monsanto to register a Bt sweet corn product in Maine. Members agreed that reviews by the Board's Bt Corn Technical Committee and the Medical Advisory Committee (MAC) are necessary. The technical committee has finalized its report and the MAC is scheduled to meet in January. Since Bt sweet corn does not have a refuge requirement, Chapter 41 will need to be amended if the Board elects to approve Bt sweet corn. Any amendment affecting Bt corn requires legislative approval. The Board will now consider whether to direct the staff to initiate rulemaking to amend Chapter 41 to accommodate potential approval of Bt sweet corn products.

Presentation By: Lebelle Hicks  
Staff Toxicologist

Action Needed: Determine whether to direct the staff to initiate rulemaking

- ☑ Hicks reported that the MAC is scheduled to meet near the end of January. She also alerted the Board to the report from the technical committee contained in the meeting packet and asked if there were questions or comments. Hicks then moved on to the topic of a potential rulemaking amendment to Chapter 41 to facilitate the potential approval of Bt sweet corn. She explained that Bt sweet corn does not require a refuge like Bt field corn. Consequently, the current rule covering Bt corn needs some minor adjustments.

Simonds wondered why the current rule needed adjustment and indicated the Board should avoid writing rules that will constantly need adjustment. Jemison reviewed the different cultural practices employed for growing Bt sweet corn versus those used for Bt field corn. Sweet corn is grown in small blocks of serial plantings and must be plowed in after harvest.

Eckert also supported writing the rule to account for other possible plant-incorporated protectants in the future. Russell Libby questioned whether the requirement for plowing in the crop was being followed in other states. He suggested it would be better to cite the label in the rule as opposed to the grower agreement. Libby also pointed out that there are some people growing sweet corn for seed in Maine, contrary to statements made in the technical report.

Eckert called for a motion on the rulemaking proposal. Jennings checked to see what the buffer distance should be. Jemison suggested leaving it at 300' for now.

Jemison/Ravis: Moved and seconded directive to staff to initiate rulemaking on Chapter 41 as proposed, with the label requirements added to the language

In Favor: Unanimous

Hicks pointed out that the proposed rule allows Bt sweet corn sales only in amounts sufficient to plant one acre or more. Lauchlin Titus stated that the smallest seed bags available are equivalent to one acre's worth.

4. Board Discussion on Whether to Adopt the Federal Container/Containment Rule by Reference

In August of 2006, EPA finalized regulations affecting pesticide containers and containment for bulk pesticides. The containment provisions go into effect in August of 2009. Under ongoing cooperative agreements, states will be required to enforce the new rule. Enforcement of federal rules requires states to use federal forms and credentials, which adds administrative burdens. The Board can reduce the administrative burden for the enforcement staff by adopting the federal rule by reference, thereby making the federal and state standards the same.

Presentation By: Henry Jennings  
Director

Action Needed: Determine whether to direct the staff to initiate rulemaking

- Jennings explained that adopting the federal rules would have no impact on the regulated community, but would reduce the administrative burden for the compliance staff. Enforcing federal law requires use of federal credentials and forms, and complicates enforcement. Adopting the standard into state law would allow the state to inspect and enforce the requirements as any other state standard. Randlett reiterated that state laws are easier to enforce.

Stevenson/Jemison: Moved and seconded a directive for the staff to initiate rulemaking to adopt the federal container/containment rule.

In Favor: Unanimous

5. Review of Hearing Record on Proposed Amendments to Chapters 10, 22 and 28 [Note: No public input may be received for this agenda item]

The Board held a Public Hearing on November 21, 2008, soliciting comments on proposed amendments affecting aerial spraying and drift contained in Chapters 10, 22 and 28. The deadline for written comments has been extended from December 3 to December 10, 2008. The Board will now review the rulemaking comments and discuss whether changes to the proposed rules are warranted

Presentation By: Henry Jennings  
Director

Action Needed: Review the rulemaking comments and determine whether changes to the proposed rules are warranted

- Eckert introduced the subject and reminded the audience that no public input is allowed at this point in the rulemaking process. Jennings alerted Board members to a checklist that described the major areas of comments and was arranged in the same order as the rules. He suggested they follow the checklist and refer to the proposed rules contained in the packet.

The first point to be addressed was whether there was sufficient public policy basis for making rule changes. Opponents pointed to the low number of consent agreements relating to drift, and a lack of scientific basis.

Randlett explained the legal basis for adopting rule changes. He stated there is no requirement for a scientific basis for the rule amendments. Adopted rules must be within the Board's statutory authority and the Board must articulate its policy and factual basis for adopting a rule.

Board members briefly discussed whether there was a basis to move forward. Eckert cited the lack of enforceability in the current rule, the two citizen petitions and bills in the Legislature. Jemison questioned how many people have never called the Board's office about drift issues due to a reluctance to complain. Simonds cited the proposed changes in Chapter 10 as focusing on protecting people. He believed the current version of Chapter 22 contained impractical and unenforceable sections. Many pesticide use conflicts amount to people conflicts, suggesting improvements in the notification requirements. Ravis didn't feel the number of enforcement cases

was important. He felt it was the Board's charge to discuss drift and to be proactive. Stevenson believed the Board needed to tweak some aspects of the proposal and cited the notification provisions. Jennings concluded that there appeared to be a clear consensus to move forward with changes.

Jennings then asked the Board to skip ahead to Chapter 28 first, because the proposed amendments appeared to be unworkable in circumstances where one grower is managing a large number of fields. This may necessitate abandoning the current proposal and starting over with the rulemaking process for that chapter. Simonds asked Jennings to review the mechanics and timeframes required for major-substantive rulemaking. Jennings responded that any rules provisionally adopted after January 9 (second Friday in January) will only be reviewed at the discretion of the ACF Committee and with approval of the Legislative Council. Since the ACF is aware and supportive of the Board's rulemaking efforts relating to aerial spraying, Jennings is hopeful that the Committee will review any rule completed by March.

The Board discussed issues relating to Chapter 28. The first area of concern related to the requirement that notice be provided 24 hours in advance. Growers argued that 24 hours does not allow flexibility to make last minutes pest management decisions. Jennings stated the only alternative he could think of was to substitute "one calendar day" for the 24-hour provision. The Board discussed the concern and elected to adopt the "one calendar day" option.

Next, the Board discussed the concern about the notification requirement to provide an alternate date in the case of inclement weather. Growers suggested that predicting an alternative wasn't practical. Board members discussed the concern and reached consensus to require an updated notice in the event that a planned application did not occur.

The Board then discussed the merit of the so-called "mandatory notification" proposal. Members of the agricultural community contend the proposal would be unreasonably burdensome, especially for growers managing a large number of fields. Eckert felt some form of mandatory notification for aerial spraying is reasonable. Other Board members were concerned about the difficulty of administering the notification requirements. They discussed the idea of an aerial registry as an alternative. Arguments were made for both approaches, but consensus was eventually reached to abandon the mandatory notification proposal in favor of an aerial registry. Randlett advised that a change of that significance would require the Board to begin the rulemaking over on Chapter 28.

Jemison/Ravis: Moved and seconded a directive for the staff to initiate rulemaking on a new proposed amendment to Chapter 28 to include an aerial registry, with a public hearing scheduled for January 23, 2009.

In Favor: Unanimous

Board members then turned to Chapter 10. They first discussed concerns about the proposed definition of SALO that includes public roads. Many growers stated this would create a hardship when combined with the proposed 200' buffer to SALOs. Jennings reiterated that the real concern is about people using the roads, not the road itself. Eckert suggested limiting the definition to

major roads. Qualey stated that a lot of the best agricultural land abuts major roads. After further discussion, consensus was reached to drop the roads from the list of SALOs.

Board members moved on to the concern about impacts on ATV and snowmobile trails. Growers interpreted the “recreational areas” clause to include trails crossing private land. Board members agreed that trails are not a major concern with respect to aerial spraying. After a brief discussion, consensus was reached to exempt trails crossing private land from the SALO definition.

Whether the terms “lawns” and “recreational areas” need further definition was discussed next. Consensus was reached to leave the definitions as proposed and deal with questions as they arise through policy. Members also reviewed comments about defining organic farms as SALOs and establishing another SALO for other instances in which people are present adjacent to application sites. They decided against adopting these suggestions.

The Board then turned to Chapter 22. They first discussed minor concerns about the proposed language relating to equipment calibration and soon settled on a revision proposed by Ravis that simplified and shortened the language.

The requirements for identifying and recording sensitive areas were discussed next. Members decided that maps should not be required in the case of ground applications as long as the type and location of sensitive areas are recorded.

Board members reviewed suggestions that the mapping and wind speed requirements for ground and aerial applications be combined into one section, but decided against these changes, seeing value in keeping all the aerial requirements in one section.

Concerns about the “detectable residue” standard were discussed at length and a number of potential revisions were reviewed. Consensus was reached to make the “detectable residue” standard applicable only to SALOs, and change it from a standard of harm to a prima facie residue standard.

Board members then entertained the idea of adding a standard of harm designed to protect people using public roads, in light of their previous decisions to drop roads from the list of SALOs. Consensus was reached to add this provision.

Jennings alerted Board members that concerns about the standard of harm relating to organic crops have been clarified and a slight adjustment in the final language is appropriate. The Board also discussed concerns about dropping the drift management plan section of the current rule. Board members agreed it hasn’t been used much lately and fits better with Best Management Practices that the Board plans to address after rulemaking. Finally, the Board reviewed comments from both sides about the proposed 200-foot buffer to SALOs, and decided to leave the figure as originally proposed.

## 6. Discussion of Draft Annual Summary of Complaints

The report by the Stakeholders Committee on Aerial Spraying and Drift included a recommendation for the Board to produce and review an annual summary of complaints received

by the Board's office. The Board briefly discussed the idea at the February 29, 2008, meeting where consensus was reached to direct the staff to explore using its current database to produce a simple annual summary. Simonds suggested possibly sorting the data by category and the nature of the complaint. The staff has developed a draft format for the purpose of discussion. The Board will now review the draft and provide feedback to the staff.

Presentation By: Raymond Connors  
Manager of Compliance

Action Needed: Provide feedback to the staff

- Connors directed the Board to the draft summary of complaints developed at the Board's request. Board members were very supportive of the effort, indicating that the report was succinct and informative. Simonds agreed and suggested the addition of another column to further characterize the nature of the incoming call.

7. Other Old or New Business

a. 2008 Registration Summary—W. Smith

- The Board acknowledged receipt of the summary and were encouraged that the number of registrations had not started to decline.

b. Other?

8. Schedule and Location of Future Meetings

January 23, 2009, is the only tentative date for a future Board meeting. The Board will decide whether to change and/or add dates.

Adjustments and/or Additional Dates?

- Board members added February 20, March 27 and May 8, 2009, as tentative meeting dates.

9. Adjourn

- Jemison/Simonds: Moved and seconded adjournment at 2:00 PM

In Favor: Unanimous