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STATE OF MAINE
MAINE DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY
BOARD OF PESTICIDES CONTROL
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COMMISSIONER
HENRY S. JENNINGS
DIRECTOR

BOARD OF PESTICIDES CONTROL

July 10, 2015

AMHI Complex, 90 Blossom Lane, Deering Building, Room 319, Augusta, Maine

MINUTES

Present: Eckert, Granger, Jemison, Morrill & Stevenson

1. Introductions of Board and Staff

- The Board, Staff and Assistant Attorney General introduced themselves.
- Staff Present: Connors, Fish, Hicks & Jennings

2. Public Hearing on Proposed Rule Amendments to Chapters 31, 34 and 35

The Board will hear testimony on the proposed amendments to the following three rules:

▪ **Chapter 31 Certification and Licensing Provisions/Commercial Applicators**

1. Change the license period from two years to three; change the certification period from six years to three and align the licensing and certification periods.
2. Amend the description of Category 6B to clarify what types of applications are included.
3. Change the requirement for passing both the core and category exams within one year of each other to within five years.
4. Clarify that certified or licensed wastewater or drinking water operators are exempt from licensing only while applying pesticides to the wastewater or drinking water and not while performing other duties such as weed management.

▪ **Chapter 34 Certification and Licensing Provisions/Dealers**

- a. Shorten the time period a person must wait before re-taking an exam they have failed to align with other licensing rules.
- b. Change the license period from one year to three; change the certification period from five years to three and align the licensing and certification periods.

▪ **Chapter 35 Certification and Licensing Provisions/Spray Contracting Firms**

1. Remove the requirements for spotters and monitors for forest insect aerial spray programs.
2. Change the license period from two years to three.

- The public hearing opened at 8:33 AM

- Morrill summarized the proposed changes and Jennings mentioned that written comments were due by July 24th
- No comments were received

3. June 5, 2015, Minutes:

Presentation By: Henry Jennings
Director

Action Needed: Amend and/or Approve

- Jemison requested the following changes
 - Page 2, fourth bullet, last line should be “high “off” target residues...” and,
 - Page 3, 8th bullet, should start with, “Granger suggested a third option:...”
 - **Stevenson/Jemison: Moved and seconded to adopt as amended**
 - **In Favor: Unanimous**

4. Board Discussion About Herbicide Label Plant-Back Restrictions as They Apply to Cover Crops

At the April 24, 2015 meeting, John Jemison requested that the Board review the herbicide plant-back label restrictions and how they currently prevent farmers from planting cover crops that are being recommended by the United States Department of Agriculture. The staff has been researching the question and will update the Board on the current status.

Presentation By: Lebelle Hicks
Staff Toxicologist

Action Needed: Provide input to staff

- Hicks introduced the issue and explained that there are many cover crops that may be recommended in Maine cropping systems, each with different susceptibilities to the herbicides commonly used on forage and vegetable crops. She also mentioned there are over 500 herbicide products which could potentially be applied to forage and vegetable crops, which is too many to review individually.
- Hicks looked at various cover crops like those that might follow corn or barley and compared those cover crops to the labels on both broadleaf and grass herbicides. Some of the herbicides would cause stunting on the cover crops but most would not affect grain development. Residues from some of the broad spectrum herbicides might affect most of the cover crops.
- Some of the herbicides are PrePlant or PreEmergence and they only have tolerances for the primary crop (as opposed to a cover crop). The herbicide needs a tolerance for the cover crop too if it will be used for food or feed. Green manure is not defined as a non-food use so that complicates things. Ideally there should be no need for a tolerance for a green manure.
- USDA recommends plant mixes as cover crops with 2 – 4 different plants in them which makes the analysis even more difficult. Some are not recognized as human food, but they are forages for animals. Some also provide feed for wildlife.
- Hicks described the table she has been working on. Thirty-two labels were reviewed. She only looked at commodities grown in Maine and only captured information for the Northeast region or Maine. Twelve out of thirty-two labels had specific language regarding cover crops: the others did not. Some had directions on doing bioassays before planting the cover crop to see if the plant grows well or not. A few examples of specific label language include:

- Shaper herbicide - don't count frozen ground time as part of the rotation restriction,
 - Sandea – 3 year restriction on planting cover crops
 - Rimsulfuron – very confusing label. Rotation intervals had guidelines and restrictions which depended on rain, irrigation etc. to determine when you could plant a new crop
- Eckert asked the staff to define “plant-back restriction.” Planting back the same crop?
 - Hicks explained that it was label restriction relating to planting of crops on a specific site after treating that site with an herbicide.
 - Jemison noted that USDA is encouraging multispecies cover crop mixes and some growers qualify for cost share money. He is concerned that the government may be paying for a grower to do something that is not completely legal. Because there are many benefits and the cover crop will not be used as food or feed, Pennsylvania has a huge program to promote the use of cover crops. Other states allow it for just soil cover. Jemison's objective is to make sure Maine allows soil management practices that are the most sustainable without the potential of getting farmers in trouble. He asked what can we do as a Board to affect this end? Rational public policy would allow Maine growers to use recommended cover crops even if they don't get a full stand. Otherwise they will just use glyphosate and that will result in glyphosate resistant weeds.
 - Lauchlin Titus was asked to speak. He said he was sorry that he started this and he is passionate about cover crops. He sought recertification credit for the last cover crop presentation he developed. He looked at labels on-line. Has done this for a long time and thought nothing of it.
 - In preparing for the Board Meeting, Titus did research and found a reference from the University of Nebraska Lincoln which states: “cover crops can be planted after any herbicide application if not used for food or feed.” If it will be used for food or feed it is breaking the law.
 - A statement from Penn State indicates, “cover crops not harvested can be planted after any herbicide application.” Cary Giguere, from the Vermont Agency of Agriculture, said growers can plant cover crops if they will accept a reduced stand and the crop will not be fed to animals. In those circumstances, it is considered green manure.
 - Jennings explained that all the statements Titus read are not from EPA. There are two important questions around cover crops: is it legal and is it beneficial. Cary Giguere gave a practical answer to a legal question. It is unfortunate that herbicide labels appear to prohibit most recommended cover crops. It's a shame to not allow this because it has environmental and agronomic benefits, but the Board is stuck because it was asked a legal question, which was then sent to EPA to interpret. We cannot give a practical answer to a legal question. We can't say a cover crop is not a crop. We need EPA and USDA to work together to figure this out. We need to ask the registrants to move this forward.
 - Tim Hobbs asked, what are the implications for potato growers? Titus replied that if a grower uses Sencor or Matrix they could have problems if they plant a mixed stand cover crop following potatoes.
 - Stevenson asked whether EPA has addressed this at all. Hicks replied that they have not and that she is trying to get the State FIFRA Issues Research and Evaluation Group's (SFIREG) Pesticides Operations and Management (POM) subcommittee to do an issue paper to send to EPA to address this problem and hopefully get USDA there as well. Stakeholders need to figure out what are the liability issues, what happens if an off label recommendation kills a cover crop? Can the grower sue the manufacturer? There have been problems in the past like this. Twelve of the thirty-two products have specific crop restrictions.

- Morrill asked whether this could be done with a 24C label? Hicks said not if it is a tolerance issue. Morrill asked, is it a tolerance issue? Hicks explained that if it is food or feed then it is a tolerance issue.
- Hobbs asked, what is the intended use? Morrill replied, I think you go with the intent of the use. Hicks said since the Starlink corn issue EPA probably won't allow the intent to be enough.
- Jennings explained that if you explicitly do a 24C where the cover crop is limited to green manure it might work but the company may not support the 24C label. He noted that there might be too many products to do this for. Jemison disagreed and asked whether the Board could adopt a policy that would allow for this use? Jemison distributed a draft policy.
- Randlett stated that adopting this policy would encourage growers to violate federal and state law. Stevenson said that isn't good. Morrill said the label is the law.
- Jennings suggested that maybe the Department could issue a policy? Randlett said he would not want that to happen either.
- Stevenson asked, how long has this been an issue? Hicks mentioned that in 1991 we had a similar plant-back issue.
- Morrill asked whether Hicks go to the SFIREG POM with this issue. Eckert asked, is the SFIREG POM the official committee? Hicks replied that it is.
- Stevenson mentioned the 24C registration idea again. Hicks said it is not a local need and that it is a national need.
- Morrill suggested the manufacturers should tackle this. Jemison said they will not because the companies are afraid of lawsuits for injured crops.
- Hicks offered another way to deal with it: have USDA come up with cover crops that are herbicide specific.
- Eckert asked is there a way to meet the letter of the law, or is that too difficult? Or is it impossible?
- Jemison said it would be a lot of work to offer specific cover crops. They might be able to do the research and develop an App for a smart phone. Growers will resort to the simplest solution. Growers do not have the time to figure it all out.
- Hicks said the Stinger label allows any grain but no legumes. So you could do a good mix following a Stinger application.
- Titus explained that tank mixes make this a lot more complex. The combination of herbicide products, as many as nine different active ingredients, makes it very complex to figure out what cover crops are allowed. Manufacturers are trying to get good residual control. They can't have that and then allow grass or brassica cover crops because those plants are the same families as the weeds they are trying to control. Farmers accept many risks and will plant a five species mix and realize some species are not going to do well.
- Katy Green said prescribed mixes just would not work for their growers, they need legumes, etc.
- Jennings asked how many herbicides are actually involved. Hicks said Titus and Jemison picked the thirty-two. Titus said forage growers use about fifteen and vegetable growers use a lot more.
- Eckert asked, don't potato growers sell some of their cover crops for feed? Hobbs replied that some are used for feed and he asked whether this could be a low priority enforcement wise. Can we work and educate the growers on this? Jemison agreed with that in theory. He said it would be hard for Cooperative Extension to make recommendations. If we could adopt the policy it would make it easier for him to educate the grower about this issue. They are still trying to get growers to do cover crops.
- Hobbs said Cooperative Extension just hired an agronomist to help promote rotational crops for potatoes.

- Jemison realized that Randlett was not going to approve of the policy statement.
 - Eckert wanted to add language to make this a low priority and use enforcement discretion.
 - Hicks mentioned again that she would bring the issue to the EPA -SFIREG POM committee. Morrill supported that.
 - Jennings asked if the Board still wants the staff to send a letter to EPA on this topic. Morrill replied that, if a letter will help, we should do that. Morrill suggested a letter to EPA and Congress, Marge Kilkelly that works for Angus King and Representative Pingree's office. Jennings said the staff will draft the letter but does not like being in this situation.
 - Morrill asked the staff to make it a low priority for enforcement. Jennings stated that the enforcement staff must weigh the public consequence when determining an appropriate enforcement response. In this circumstance, there's actually a public benefit associated with this violation. That fact should give regulators cause to reconsider.
 - Stevenson asked, is the USDA ignoring this issue? Hicks said they are talking about it.
 - Morrill said we should not hold companies liable.
 - Jemison said we won't have a policy.
 - Jennings suggested the Board had reached a consensus on enforcement discretion.
 - Hobbs said the letter should not go to USDA because it might put the cost share money in jeopardy. He wanted the Board to let EPA inform USDA. Morrill suggested we only send the letter to the EPA.
 - Jennings wondered if working with SFIREG POM was good enough.
 - Hobbs said a letter to EPA from the Board and to the congressional delegation will be enough. Send no letter to USDA.
- **Consensus reached to have Hicks work with SFIREG-POM and to have Jennings draft a letter for Board Chair signature to EPA and the Congressional delegations.**

5. Board Discussion About Further Streamlining of the Agency Licensing and Other Processes

The staff has been working to develop a new, comprehensive technology solution to better manage the licensing processes and provide a self-service internet portal for licensees. Because programming/automating complex business rules is both difficult and expensive, one aspect of the development involves a methodical analysis of the current processes with a view toward identifying opportunities to simplify and/or improve those processes. The staff will provide a brief overview of the current progress and invite input on other potential areas to improve the agency processes.

Presentation By: Gary Fish
 Manager of Pesticide Programs

Action Needed: Provide Guidance to the Staff

- Fish said we are working hard to develop a new licensing, compliance and enforcement portal. We need to find ways to simplify some processes to make the application coding less complicated and costly.
- Jennings said we have seen many situations that need to be changed. One example is the insurance affidavit. We are asking for applicator and public input to help us recognize where we can streamline our application, inquiry/complaint and product registration processes. Now is a good time for people to chime in.

- Eckert noted that our rules are very complicated. Jennings said some are hard to figure out. Like company affiliated licenses. It drives business rules that make the database application very complicated. We are trying to sidestep processes where we can but have to pay attention to the rules and statutes. Soon applicators will be able to pay for a license on-line, but it has to be checked to make sure all the requirements are satisfied. The Board doesn't have enough money to fully automate most processes. In the future we hope we can simplify so it can be fully automated.

- **Information only. Board was supportive of potential rule changes.**

6. Review of Letter to from Justin Nichols Recommending Changes to the Board's Posting Requirements

Justin Nichols and Gail Jones, landscapers, were working at a client's property in Falmouth for about 35 minutes when both of them started feeling ill. Shortly thereafter they discovered a sign indicating the lawn had been sprayed just prior to their arrival. Nichols called the telephone number listed on the sign but was unable to get any timely information about what had been applied at the site. Nichols subsequently wrote to the Board inspector with the goal of providing input and recommendations for the Board to consider.

Presentation By: Henry Jennings
Director

Action Needed: Determine the appropriate response

- Jennings said we need to separate the question of compliance issues from the suggestions for changes to the rules. Nichols met with Inspector, Eugene Meserve. When Nichols began explaining his suggested procedural changes, Meserve suggested that Nichols convey those ideas to the Board. We usually put the letters on the agenda. We just did rulemaking on the posting issue. Nichols has a series of recommendations. Chapter 28 says you just have to list a phone number but it doesn't assign any duties beyond that. Is that an issue? Is there liability for the lawn care company?
- Eckert asked if he found someone to answer his toxicity questions. Hicks and Jennings said that he did. Connors also helped him find out what products were involved. However, when Meserve did the use inspection the products used were different from the list given on the phone.
- Eckert said they should be able to go to Poison Control. It's unacceptable that they could not get the info on what was used quickly.
- Granger asked, was the sign posted at the end of the driveway (street end)? Don't we have a requirement that it show out to the road? Randlett explained that the rule is very subjective. Connors said the sign was not at the sidewalk end of the driveway. It was not directly facing the street, but you could see it from the road.
- Granger asked whether the landscaper could see it as they came into the property. Connors said the landscapers came in from the road not by the driveway. So they missed the sign until they worked their way to the driveway.
- Granger asked whether the rule requires information on the product used to be included on the sign. Connors said, no, just "Caution Pesticide Application".
- Granger suggested that since it was hard to get the active ingredient information, should we require the EPA number on the sign? Connors said that would be more consistent with the other parts of Chapter 28.

- Morrill expressed concern that all companies are different. The number of applications that require posting is really high for some companies. The real problem was the phone number not being answered. The customer had the information.
- Granger said the information did not get to the person that needed it. How hard is it to just write the EPA numbers on the sign? Is that unreasonable to require? There is no fail-safe backup. EPA numbers are necessary if it is not unreasonable.
- Eckert said Nichols and his partner (landscapers with a pesticide license) had knowledge others would not have.
- Hicks said EPA numbers get you into all the databases. Morrill replied some EPA numbers are a lot of numbers, there will be high potential for a mistake. The common name will be better. Granger said the common name can be even longer. Hicks added the common name will not give you the solvent in the mix.
- Stevenson said sharpies are hard to read. Do lawn care companies mix products? Hicks replied three or more products are mixed sometimes.
- Stevenson stated recording products on the signs presents challenges. The big problem was no one answered the phone. Do we make a rule for one company that did not follow the rules?
- Eckert asked is it logical to require a local phone number? 800 numbers go to nowhere.
- Stevenson added could it be the Master Applicator number? Local numbers may go outside Maine too?
- Jennings said phone answering is sometimes contracted out. Many go to a call center instead.
- Stevenson noted that the posting rules have been in place for a long time. Jennings inquired whether this rises to the level of making rule changes?
- Jemison added we could do a spot check to see if you can reach someone in 5 minutes each time. He is worried that it probably would not be good. This brings home why we need to improve the signs. He sees problems with using EPA numbers, as a dyslexic.
- Morrill said the sign has to be rigid and waxed and a sharpie is necessary to write on it. The big issue is to make sure someone answers the phone and can respond to information requests.
- Jemison added that we need to make sure the signs are posted properly. Do we need to have more signs?
- Hicks said we may need to do an educational program on how the number should mean something. Morrill suggested the staff send an advisory out to companies about making sure the phone number is answered.
- Jennings wondered if the Board needs to set clearer expectations around the posting locations? We can encourage companies to make sure the phone is answered.
- Morrill said it is not in the spirit of the rule. We need to address the phone number issue. It is time to do a better job communicating issues.
- Hicks asked can they use stickers with EPA numbers. Stevenson replied that there are-already too many stickers.
- Jemison offered could we ask the 5 inspectors to spot check 4 or 5 signs and call the number and see if they get anyone as a survey and see how widespread the problem is? Can you get the information needed?
- Jennings replied the field staff could do this, but a question arises about who is entitled to pesticide application information? What if a pesticide opposition group started calling those numbers? Stevenson said those within 500 feet have the right to know.
- Connors asked whether it is worth documenting the posting practices at each site as well? Bring that in as part of the discussion.
- Jennings asked whether it is the Board's intent to require posting to alert people entering a treated site from the sidewalk or is it just where people normally enter the property?
- Morrill indicated there are instances where more signs are needed.

- Stevenson said the real issue is making sure the phone is answered. Shouldn't the landscaper have been more diligent in checking the surroundings before working on the property? Seems like the existing rule is adequate as long as the phone number is answered and the questions are answered.
- Connors added that the landscaper did talk to the homeowner. Stevenson asked whether the landscaper ask the property owner what was applied. Katy Green, MOFGA, said yes and the homeowner gave incorrect information.
- Stevenson replied the invoice should have been there. Jemison asked, doesn't the invoice go on the door?
- Jennings asked if they had consensus on the need to provide a phone number that works. Should we do a survey? What is the Board's expectation on the signs?
- Morrill said yes on sending a communication about the phone number.
- Eckert also said she likes the survey idea.
- Morrill was worried about the time it will take to get the information about what was applied. Eckert said it seems like it would not be that hard.
- Stevenson added that this is a posting for information. It is not an emergency number. Companies should be able to provide the information in a reasonable amount of time, but not for emergencies.
- Jennings indicated the staff would benefit from further guidance on what the Board wants for an interpretation of the rule where it is vague and performance based. We have one point of consensus so far.
- Eckert said we just surveyed land trusts why not survey on this? Morrill said he would support a survey if it is mailed out. The survey could ask, what number, where does it go, who answers the number? Connors felt it would be self-graded and it would not work that well.
- Granger asked whether the Board would be content if someone on the urban registry could not get the label and SDS? These options do not allow for providing the information that someone needs if they may have been exposed. Hicks said having the label or SDS also helps to rule out the pesticide if they have a copy of either one or both.
- Eckert added that workplaces have SDSs and employees can get that information quickly. The landscaper should have the right-to-know too.
- Stevenson said the homeowner has all the information on the invoice. Signs must be bigger to incorporate this information. How many people are being poisoned?
- Hicks asked how often people would work on a lawn and not know what was applied, get a reaction and never report it to us?
- Morrill observed the discussion could go on indefinitely. We agree to write a letter. Jennings said should the letter go out to everyone that has to post? Morrill and Stevenson said yes to all that have to post.
 - **Granger/Eckert Moved and seconded to require all applicators that need to post get a letter.**
 - **In Favor: Eckert, Morrill, and Stevenson**
 - **Against: Jemison and Granger**

7. Consideration of a Consent Agreement with the Town of Hartland

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 on 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 to resolve the matter. This case involves two unlicensed

municipal employees who applied sodium bisulfite to control weeds on municipal sidewalks and walkways.

Presentation By: Raymond Connors
Manager of Compliance

Action Needed: Approve/Disapprove the Consent Agreement Negotiated by Staff

- Connors summarized the issue. It involved an application of sodium bisulfate with a hand can to weeds on sidewalks.
- Hicks asked whether the product is registered. Connors indicated it was not. Jennings said it constitutes use of an unregistered product. Connors said it still is a pesticide because of their intent.
- Morrill asked how toxic is it? Hicks replied corrosive.
- Morrill inquired if it is also used in wine. Hicks replied it is used at a very low concentration as a food preservative. Here it was much more concentrated. The SDS says it could cause blindness, corneal damage, and digestive tract injury.

- **Jemison/Eckert: Moved and seconded to accept the agreement as presented**
- **In Favor: Unanimous.**

8. Draft Policy Regarding Interpretation of CMR 01-026, Chapter 10, Section 2 (P) (2), Definition of Property Open to Use by the Public as Regards Outdoor Applications

At the December, 2014 and the April and June, 2015 meetings the Board had discussions about the definition of “property open to use by the public,” as it applies to treating small areas within a large land holding. Section 2 (P) (2) of Chapter 10 provides the exemption, “where the public has not been permitted upon the property at any time within seven days of when the property received a pesticide application.” The discussion included information from a survey made of land trusts which use this exemption to apply pesticides to control invasive vegetation. The staff has drafted a policy based on that discussion.

Presentation By: Henry Jennings
Director

Action Needed: Approve/Disapprove the Policy

- Jennings said the staff submitted a cleaner document as requested by Randlett. The staff re-wrote the policy consistent with the last meeting discussion.
- Granger asked, will this conflict with the rules at all? Fish replied it would not.

- **Stevenson/Eckert: Moved and seconded to approve as presented.**
- **In Favor: Unanimous.**

9. Other Old or New Business

a. Department of Agriculture, Conservation and Forestry Pollinator Protection Plan

- Jennings said the Department plan is in Board packet. The public may submit comments to Ellis Additon, Bureau Director.
- Hobbs commented that he was surprised there was no public process and asked whether there needs to be.

- Eckert asked what happens with it now. Will it just be filed, will it be shared? Jennings said it is posted on web, it was distributed to AGCOM and it will be revised over time.
- Eckert mentioned that an editorial in the KJ commented that a local town was spraying a park and it was not good for bee protection. She concluded that the Board must not have gotten a complaint. Should this message be sent out to municipalities? She thought it might have been Gardiner.
- Stevenson asked a question about CCD: what qualifies as CCD? Jennings said it must meet certain standards. Could be varroa mites, winter die-off, etc.

b. Other - None

10. Schedule of Future Meetings

a. August 27-28, October 9, November 13, and December 18, 2015, are tentative Board meeting dates. The Board will decide whether to change and/or add dates.

a. August meeting:

- Who is planning to travel in the state van from Augusta?
- Who will be staying at the Machias River Inn?
- Make sure to sign up for sandwiches and drinks before leaving today.

b. Adjustments and/or Additional Dates?

11. Adjourn

- **Jemison/Granger: Moved and Seconded that the meeting adjourn at 11:01 AM**
- **In Favor: Unanimous**