



STATE OF MAINE
DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY
BOARD OF PESTICIDES CONTROL
28 STATE HOUSE STATION
AUGUSTA, MAINE 04333

JANET T. MILLS
GOVERNOR

AMANDA E. BEAL
COMMISSIONER

BOARD OF PESTICIDES CONTROL

May 6, 2022

9:00 AM Board Meeting

MINUTES

1. Introductions of Board and Staff

- The Board, Staff, and Assistant Attorney General Mark Randlett introduced themselves
- Board: Adams, Bohlen, Carlton, Ianni, Jemison, Lajoie
- Staff: Boyd, Bryer, Brown, Connors, Couture, Nelson, Pietroski, Tomlinson

2. Minutes of the April 1, 2022 Board Meeting

Presentation By: Megan Patterson, Director

Action Needed: Amend and/or approve

- **Jemison/Ianni: Moved and seconded to approve the minutes as amended**
- **In Favor: Unanimous**

3. Consideration of a Request for Variance from Chapter 29 from Davey Tree Expert Company—Railroad Division, to Treat Railroad Rights-of-way in Maine

Davey Tree Expert Company—Railroad Division, is seeking a variance from and Chapter 29, Section 6, Buffer Requirements, in order to treat the Canadian Pacific rail tracks rights-of-way in Maine. Board policy indicates that first-time variance requests must be considered by the Board. Policy further stipulates that railroad variance requests need to be consistent with the Maine Department of Transportation standards.

Presentation By: Megan Patterson, Director and Pam Bryer, Pesticide Toxicologist

Action Needed: Approve/disapprove the variance request

- Patterson stated that this was a new railway right-of-way request from a company that had not previously submitted a variance. She added that Bryer had compiled information regarding the behavior of some of the chemistries and could share that information if it was of interest to the Board.
- Carlton asked how fast the spray rig went when spraying and if there was a truck that preceded it informing them of where to buffer.
- Terry Waggoner, Railroads Operations Analyst from Davey Tree Expert Company, responded that it traveled between ten to fifteen miles per hour. He added that a truck did precede the spray rig, and they communicated over the radio.
- Carlton asked if sprayer output could be adjusted when moving down the track if, for example, there was no vegetation on the tracks but there was on the ballast.
- Waggoner responded that there were six different boom sections, and each section could be controlled independently and spray pressure auto-adjusted based on speed.
- Ianni asked the rationale for not being able to meet the buffer standard and what percentage of the track was in the buffer area.
- Geoff Gordon, Vegetation Manager for Canadian Pacific Railway, responded that the reason was for track safety. He said that weeds and growth on the ballast section caused instability and hampered track inspections. Gordon added that they needed unimpeded drainage on the track and vegetative growth decreased drainage and increased track instability. He stated that he did not know how much track was in the buffer zone but that he could get an answer from the detailed track maps that showed water crossings to one-eighth of an inch.
- Ianni asked if the spray would be turned off in areas that do not need spraying.
- Gordon responded that it would be turned off.
- Jemison asked about the products proposed for use and stated that Roundup was a contact herbicide, so needed the presence of vegetation to be of use. He also asked if the other products were pre-emergent.
- Waggoner responded that Esplanade was preemergent for broadleaf and grasses. He added that they had control to turn off Roundup if there was no growth and it was not needed.
- Bohlen asked if there had been consideration of scouting wet soil conditions around sites.
- Waggoner responded that they take that into consideration, never spray in standing water and monitor the forecast so they do not apply if there is heavy rain forecast.
- Ianni stated that she looked for drinking water standards for these chemicals and asked if Bryer would also be looking at alternative herbicides that could be used that might be less impactful.
- Patterson responded that historically there was a lot of communication between DOT and BPC regarding what chemicals were used in right-of-ways and there was not a large breadth of active ingredients available for use in these areas. She added that staff could compare the relative risks of active ingredients used in right-of-way applications and that Bryer had prepared relevant information.
- LaJoie added that he thought this variance was critical for the rail industry.
- Bryer told Board members to please reach out at any point if they wanted or needed extra data. She shared a spreadsheet went over spreadsheet detailing herbicide half-lives and all available toxicity values for aquatic organisms. Bryer stated that she was most concerned about an acute exposure in this scenario. She also demonstrated a model of the spray pattern from an eight-foot boom and how far droplets would go.
- Ianni thanked Bryer for presenting the data.

- **LaJoie/Carlton: Moved and seconded to approve the variance request**
- **In Favor: Unanimous**

4. Review and Potential Adoption of Proposed Amendments to Chapter 20 and Re-initiating Rulemaking for Chapter 41

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

On December 22, 2021, a Notice of Agency Rulemaking Proposal was published in Maine’s daily newspapers, opening the comment period on the proposed amendments to Chapters 20 and 41. A public hearing was held on January 14, 2022, by remote meeting on the Microsoft Teams platform and the written comment period closed at 8:00 AM on January 24, 2022. The Board reviewed the rulemaking record on February 25, 2022 and again on April 1, 2022, addressed the comments and provided direction to the staff on appropriate revisions to the proposals. The Board will now review the changes to the proposed amendments, the Response to Comments for Chapters 20 and 41. The Board will also review the Basis Statement and Statement of Impact on Small Business for Chapter 20. The Board will then determine whether it is prepared to adopt the proposed amendments to Chapter 20. Given the substantial changes to Chapter 41, the Board will also determine whether it is prepared to reinstate rulemaking for Chapter 41.

Presentation By: Megan Patterson, Director

Action Needed: Provide direction to the staff on the final adoption of Chapter 20 and reinitiating of rulemaking for Chapter 41

- Patterson stated that regarding Chapter 41 it appeared the Board would have to pursue rulemaking again. She added that Chapter 20 may be able to move forward but the Board would need to vote to adopt the rule, along with the basis statement and impact on small businesses. Patterson noted that there was one change from HDPE containers to all fluorinated containers.
- Randlett stated that he did not consider that a substantial change but that it was up to the Board to make that determination.
 - **Bohlen/Jemison: Moved and seconded to finally adopt Chapter 20 of proposed rule, the basis statement, impact on small businesses, and the summary of and response to comments received**
 - **In Favor: Unanimous**
- Patterson told the Board that the current version of Chapter 41 had major changes in reference to the definition of emerging invasive invertebrate pests and the section on permitting. She noted that since the last meeting there was language added pertaining to emergency permit and in Section 6(A)(I)(c) the term ‘species on a Board approved list’ was added.

- Randlett stated that it was the Board’s determination as to whether a rule change was substantial. The Board needed to consider how people might have commented on a portion of rule. The definition of pest significantly narrowed the scope of the pest to which this would apply and that may have been something applicators would have wanted to comment on. Randlett added that the permitting process broadened the scope of when these pesticides could be used and people in opposition may have wanted to be heard.
- Bohlen commented that he felt the changes were in response to public comments and that it was a little frustrating. He inquired about bringing forward the existing public comments that had been received.
- Randlett responded that once a rule proposal died the Board would need to accept new comments, but they could certainly use the previous comments to inform decision making.
- Jemison noted that he would like to see the section on plant-incorporated protectants get brought up to the present-day level of knowledge.
- The Board decided to wait on that section of rule but to eventually go back to rulemaking to correct it.
 - **Bohlen/Jemison: Moved and seconded to authorize Board staff to bring proposed changes to Chapter 41 and initiate rulemaking**
 - **In Favor: Unanimous**

5. Chlorpyrifos Use Permit Policy for Applicators Intending to Use Existing Stocks of Chlorpyrifos, Purchased Before January 1, 2022, On Sites Other Than Crops Intended For Human Consumption

On June 8, 2021 LD 316 was signed into Maine law. This law prohibits, beginning January 1, 2022, the distribution of pesticides containing chlorpyrifos as an active ingredient. The law allows the Board to grant temporary permits from January 1, 2022 to December 31, 2022 authorizing licensed pesticide applicators to use pesticides containing chlorpyrifos, as long as the product was in the State and in the possession of the applicator before January 1, 2022. The law directs the Board to post on its website a list of the temporary permits issued. In 2021, the Board initiated rulemaking related to the use of chlorpyrifos. Proposed rules clarified statutory prohibitions on the distribution of chlorpyrifos and Board issuance of permits for use of existing stocks of chlorpyrifos purchased before January 1, 2022. Due to delays in the rulemaking process, applicators in possession of chlorpyrifos are seeking guidance on how to pursue a Board permit that will allow them to use up existing products during the 2022 growing season. The proposed policy incorporates the related proposed amendment to Chapter 41 and is suggested as a temporary response while rulemaking proceeds.

Presentation By: Megan Patterson, Director

Action Needed: Discussion and approve/disapprove the proposed policy

- Patterson told the Board that the policy, if approved, would allow staff to issue permits for use under the guidelines outlined in Chapter 41.

- **Carlton/LaJoie: Moved and seconded to approve the policy and implement immediately**
- **In Favor: Unanimous**

6. Review of the Board Budget

In early 2017, the Board reviewed the budget with the goal of identifying potential resources that could be allocated to Board priorities. At that time the Board requested ongoing annual updates on the status of the Pesticide Control Fund.

Presentation By: Megan Patterson, Director

Action Needed: Provide guidance to the staff on Board budget priorities

- Patterson said that most revenue is received from November through February and then the program is sustained on that funding for the duration of the year. She also provided projections for 2023 and 2024.
- Bohlen asked about the reasoning for the forecast showing expenditures greater than revenue for the next two years.
- Patterson responded that it was due to salary increases and the increase in support for MePERLS since the BPC would be required to take on the full cost because Maine IT would no longer be subsidizing the work. She explained that there was an effort by Maine IT to decrease costs and they would be going out to bid for hosting and the related support and maintenance contract in upcoming months.
- Bohlen stated that his concern was that this was an unsustainable budget forecast.
- There was discussion about an increase in the pesticide registration fee.
- Patterson stated that Maine's registration fee used to be close to the national average pesticide registration fee but now was on the low end compared to similar states. She added that there had not been a fee increase in many years and that any fee increase would need to be pursued through the legislature.
- Adams asked Patterson to bring back to the Board the process of how they would petition the legislature to ask for an increase in the registration fee.
- Patterson responded that it would possibly entail submitting a bill and that staff could get information on the fees assessed in other states. She added that staff could also bring forward intent on what the funding would support.
- Tomlinson stated that she had kept a record of fees since 2001 and there was a fee increase in 2014 from \$150 to \$160 but the extra ten dollars went to UMaine Cooperative Extension.

7. Consideration of a Consent Agreement with Brownies Landscaping, Whitefield, Maine

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 involved an unlicensed and unauthorized application of pesticides on public property as well as a failure to post the applications and a failure to follow label directions pertaining to application and personal protective equipment.

Presentation By: Ray Connors, Manager of Compliance

Action Needed: Deny or approve

- Connors stated that this violation was reported by staff from the City of Augusta in the recreation department. They stated that the owner of Brownie’s Landscaping approached them about making applications for browntail moth in Williams Park and Buker Community Center. The owner was unlicensed at the time and proposed working under the park supervisor’s license who did not have the 3A category. The park staff stated that they wanted to first check with Board staff about the legality of working under their license and the owner of Brownie’s proceeded to make the applications without authorization. Injection applications of avermectin were made into trees at both William’s Park and Buker Community Center. Injection units that had not drained within a few hours post application were required by the label to be removed, but they remained in the trees nine days after the application. Required posting was not made. A consent agreement was sent to Brownie’s Landscaping in the amount of \$3,000 and was paid.
- Carlton commented that costs incurred by the State in a violation should be tacked onto consent agreements even if the monies did not go to the BPC.
- Ianni asked if there was guidance on how to estimate the penalty fee.
- Connors responded that the rationale used was to consider past penalties, the regulation criteria, the violation history of the company, damage incurred, and actions taken by the company after the violation was known. He added that he could send the Board the criteria looked at when assessing a penalty.
- Ianni asked if time spent investigating cases was tracked so that the penalty amount would be commensurate with the consent agreement amount. She suggested that possibly in the future a portion of time spent by staff could be covered because it was related to the complexity of the violation.
 - **Jemison/Carlton: Moved and seconded to approve the consent agreement**
 - **In Favor: Unanimous**

8. Other Old and New Business

a. LD 2019—An Act To Require the Registration of Adjuvants in the State and To Regulate the Distribution of Pesticides with Perfluoroalkyl and Polyfluoroalkyl Substances

- Patterson stated that the bill passed without the governor’s signature and it gave the Board authority to regulate adjuvants in the same way they regulated pesticides. Additional staff and funding were not granted and so it likely would not be something to which staff could dedicate significant resources but they appreciated the responsibility and would implement the authorities as they were able. She stated that the term ‘contaminated’ did not have an

existing definition and that the term ‘adulterated’ was currently recognized in state and federal law. If the Board wanted to provide clarification they could do this through the rulemaking process. Patterson stated that there was also direction for the Board to develop rules around containers by January 2023 but that staff needed additional guidance on how the Board would like to address this directive.

b. LD 2021—An Act To Collect Pesticide Sales and Use Records for the Purpose of Providing Information to the Public

- Patterson stated that staff, at the direction and approval of the Board, had built into the MEPELRS database a way to electronically collect annual sales and use reports and would report this information out to the Board. She added that staff were aware of the public’s interest in this information and were trying to collect it as best as possible while relying on existing resources.

c. Variance Permit for CMR 01-026 Chapter 29, Vegetation Control Services, Inc.—Robinson’s Wood, Cape Elizabeth

- Bohlen stated that he was interested to see what products were being used and what was triggering the variance applications.
- Ianni stated that she would like to see the applications for variances included in the packet.

d. Variance Permit for CMR 01-026 Chapter 29, New England Spray Technologies—Marginal Way, Ogunquit

e. Update on risk assessment of herbicide use on school grounds and human health impacts as proposed by the Medical Advisory Committee

- Patterson explained that the MAC requested a risk assessment be completed studying herbicides used on school grounds. Staff received a quote of \$100,000 from the first contractor. It is the literature review that is much more costly. Staff have rewritten a scope of work without the literature review included.

9. Schedule of Future Meetings

June 17, 2022, August 5, 2022, and September 9, 2022 are the next tentative Board meeting dates. The Board will decide whether to change and/or add dates.

- A public hearing on Chapter 41 will be held at the June 17, 2022 meeting. The comment period would end June 27, 2022.

10. Adjourn

- **LaJoie/Carlton: Moved and seconded to adjourn at 11:35 AM**
- **In Favor: Unanimous**