



PAUL R. LEPAGE
GOVERNOR

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

WALTER E. WHITCOMB
COMMISSIONER
HENRY S. JENNINGS
DIRECTOR

BOARD OF PESTICIDES CONTROL

December 16, 2011

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: Bohlen, Granger, Eckert, Jemison, Flewelling, Ravis and Stevenson

1. Introductions of Board and Staff

The Board, staff and Assistant Attorney General introduced themselves

2. Minutes of the November 18, 2011, Board Meeting

Presentation By: Henry Jennings
Director

Action Needed: Amend and/or approve

Jemison noted there were slight inaccuracies with the description on page 3 of the survey he conducted in cooperation with the Maine Organic Farmers and Gardeners Association about the use of foliar *Bt*. He agreed to provide edits to the staff to clarify the survey details.

Eckert/Flewelling: Moved and seconded approval of the minutes with corrections provided by Jemison.

In Favor: Unanimous

3. Adoption of Proposed Amendments to Chapters 28, 41, and 60, and the Proposed New Rule Chapter 33

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

On September 14, 2011, a Notice of Agency Rulemaking Proposal was published in Maine's daily newspapers, opening the comment period on the proposed amendments to Chapters 28, 41, and 60, and the proposed new rule Chapter 33. A public hearing was held on October 7, 2011, at the Hampton Inn in Waterville, and the written comment period closed at 5:00 PM on October 21, 2011. Five people spoke at the public hearing and five written comments were accepted by the close of the comment period. The Board reviewed the rulemaking record at the November 18, 2011, meeting and directed the staff to prepare the documents necessary for rule adoption for the December 16 meeting. The Board will now

review the rulemaking documents and determine whether adjustments are necessary and whether to adopt the proposals.

Presentation by: Henry Jennings
Director

Action Needed: Adjust the rulemaking documents as appropriate and determine whether to adopt the new rule and/or amendments

- Jennings stated that the Board needed to adopt four separate documents in adopting rulemaking amendments: the new rule language, the basis statement, the response to comments and the statement of impact on small business. Jennings mentioned an e-mail from Deven Morrill in which he questioned the hourly rate used for calculating costs in the impact on small business statement.

Chapter 28—Jennings asked whether Board members were ready to approve the four individual rulemaking documents. The Board approved three of them as written, with the exception of the statement of impact on small businesses. A discussion ensued about what constituted a realistic hourly rate to use for cost calculation purposes. The Board has been using \$20 per hour for that purpose, but members generally expressed the view that \$20 per hour was too low, especially when considering benefit costs. Consensus was reached to change the hourly rate to \$50 per hour for that purpose. Jennings stated the staff would amend the statement of impact on small business for each of the four proposed amendments accordingly.

Eckert/Stevenson: Moved and seconded approval of the amended rule, the basis statement, the response to comments and the amended statement of impact on small business for Chapter 28

In Favor: unanimous

Chapter 33—Jennings directed Board members to the four documents necessary for rule adoption. Granger inquired about why the staff was requiring a social security number as part of the license application. Fish stated that agencies issuing professional licenses are required by state law to obtain that information.

Jemison asked what the staff planned to call the new license, since it sounds a lot like a private applicators license. Fish stated the staff hadn't made a decision yet, but he agreed it would need to be distinguished from the private license.

Bohlen asked whether there would be issues with applicants who do not speak English. Fish responded that states have not attempted to offer exams in other languages because it presented too many logistical problems. However, unlicensed agricultural applicators may apply pesticides under the supervision of a licensed applicator. In that circumstance, the federal Worker Protection Standard requires that the applicator receive safety training in his/her native language.

Flewelling/Stevenson: Moved and seconded approval of the amended rule, the basis statement, the response to comments and the amended statement of impact on small business for Chapter 33.

Chapter 60—Jennings reported there was only one comment received, which supported the change. He suggested that the proposed change appeared completely logical. Board members agreed that the critical area designation should be limited to areas where it serves a meaningful purpose.

Eckert/Ravis: Moved and seconded approval of the amended rule, the basis statement, the response to comments and the amended statement of impact on small business for Chapter 60.

In Favor: Unanimous

A short discussion ensued about whether to consider agenda item 4 prior to discussing the amendment to Chapter 41, since the discussion around item 4 could have some bearing on the outcome of the amendment consideration. Ultimately, the Board decided to consider the amendment first.

Chapter 41—Jemison described his research on whether the record keeping language in Section 5 of Chapter 41 could be amended to accommodate refuge-in-the-bag (RIB) products should the Board elect to approve them. However, it was noted that it isn't possible to change that section of the rule without restarting the process, since it wasn't related to the initial proposal and wasn't supported by any comments.

Jennings briefly reviewed the proposed changes and the comments. The staff had prepared three options covering refresher training as directed by the Board at the previous meeting. One option left refresher training as it currently is, one would extend the period over which the refresher was required, and one would eliminate the refresher training.

Jemison noted that the new licensing requirement will not cover dairy operations, so moving the *Bt*-corn refresher training into the licensing/recertification process will still miss the largest group of *Bt*-corn users. Fish observed that some training generally occurs at the distributor meetings, but not consistently. He pointed out that there are currently about 125 *Bt*-corn certificate holders. A discussion ensued about the need for refresher training and, if it's retained, what the appropriate period should be. Flewelling questioned whether refresher training was really necessary, while Jemison argued that there were enough concerns with the technology to warrant it. Eckert suggested aligning the refresher training with the licensing period. Fish stated that private licenses are effective for three years. Consensus was finally reached to retain the refresher training, but extend the period to three years instead of two. Ravis noted there were a number of typographical errors in the statement of impact on small businesses. Jennings stated the staff would address the errors prior to filing the paperwork.

Eckert/Ravis: Moved and seconded approval of option two of the amended rule, with a three-year refresher training requirement, plus the corresponding basis statement, response to comments and amended statement of impact on small business for Chapter 41.

In Favor: Bohlen, Jemison, Eckert, Ravis, Flewelling and Stevenson

Opposed: Granger

4. Consideration of the Plant Incorporated Protectants (PIP) Technical Committee Report

Pioneer Hi-Bred International, Inc., submitted registration applications for two new *Bt*-corn seed products that feature both reduced refuge requirements and the newly popular refuge in a bag (blended seed) technologies. Since the PIP Technical Committee had not evaluated the new refuge approaches, a review of this technology was warranted. The Board's PIP Technical Committee met on November 21, 2011, to discuss risks associated with reduced refuge technologies. The Board will now review the Committee's final report, and additional information received after the meeting, in order to decide whether the new refuge requirements pose an increased risk of insect resistance.

Presentation By: Lebelle Hicks
Staff Toxicologist

John Jemison
Board Chair and PIP Technical Committee Chair

Action Needed: Determine whether the risks associated with new refuge approaches pose acceptable risks

- Jemison reviewed the findings from the *Bt*-corn Technical Committee Meeting of December 6, 2011. He indicated that the Committee focused its discussion by addressing a series of questions that had been provided by Jennings. The Committee was not unanimous in its views about the propriety of the new technology, but the majority was sufficiently comfortable that the advantages of the refuge-in-the-bag (RIB) technology outweighed the disadvantages, and they therefore recommended its approval.

Flewelling inquired about why the resistance concern is focused on the *Bt* seed, as opposed to foliar products. Hicks explained that the foliar product is a mixture of a wide variety of proteins that can have toxic effects on certain insects, and it's less likely that resistance will develop to all the proteins simultaneously. A short discussion followed about factors that influence resistance development.

Eckert tried to summarize the conclusions contained in the Committee report. Alyokhin (University of Maine) stated that the reduced refuge technology is likely more prone to resistance development. However, the increase in risk is offset by several mitigating factors, including the automatic nature of the RIB approach (compliance is guaranteed), natural refuge areas that are present in Maine, the fact that many corn pests do not overwinter in Maine, and the relatively small acreage grown here. Committee member Eric Sideman (MOFGA) opposed the reduced refuge products, citing the importance of foliar *Bt* to organic growers. Stating that better enforcement made more sense, he did not believe that reduced refuge/RIB was the logical way to address low compliance with refuge requirements. Jemison observed that university research to date has not demonstrated a yield advantage to planting traited corn in Maine. However, he also concluded that, overall, the benefits likely exceed the risks.

With respect to RIB, Ravis pointed out that even if no spatial refuge is required, Chapter 41 still provides that the *Bt*-corn grower "maintain at least a 300-foot *Bt*-corn-free buffer to non-*Bt*-corn crops." Discussion then followed as to how to define RIB and whether it does qualify as a refuge. Randlett stated that, if clarification is needed, an enforcement policy could be put in place until rulemaking occurs. It was decided that this subject should be brought back for discussion at a future meeting.

Flewelling/Stevenson: Moved and seconded to accept the Committee's report

In Favor: unanimous

5. Decision on Registration of Two New *Bt*-corn Products

Pioneer Hi-Bred International, Inc., has submitted registration requests for two new *Bt*-corn products—Optimum[®] AcreMax (EPA No. 29964-12), with 5% blended refuge, and Optimum[®] AcreMax Xtra Insect Protection (EPA No. 29964-11), with 10% blended refuge. The Board will now decide whether these new products should be registered in Maine.

Presentation By: Lebelle Hicks
Staff Toxicologist

Action Needed: Decide whether to approve/disapprove the registration requests

- Following the discussion and acceptance of the Technical Committee's report (*see above*), the Board proceeded with its consideration of the registration of the two new *Bt*-corn products. Assistant Attorney General Randlett guided members through the following list of criteria required by Title 7, Section 607(8-A)(A)(1-5) for determining whether a pesticide should be registered:

- the composition warrants the proposed claims;
- the labeling complies with the requirements;
- the product will not cause unreasonable adverse effects on the environment ; and
- a need for the product exists.

Board members agreed that the pending registration requests satisfied the statutory requirements.

Flewelling/Granger: Moved and seconded to approve the registration of the two new *Bt*-corn products

In Favor: Granger, Bohlen, Jemison, Eckert, Flewelling and Stevenson

Opposed: Ravis

6. Review of Board Policy on Delegation of Registration Request Decisions for PIPs

In May 2010, the Board adopted a policy which deferred to the staff approval of applications that are substantively identical to PIP products already registered. If the Board approves the new PIP products allowing reduced refuge size and blended refuges, the Board may also wish to review this policy, to see if amendment is needed, or if Board approval will still be required for new products with other than 20-percent spatial refuges.

Presentation By: Lebelle Hicks
Staff Toxicologist

Action Needed: Decide whether to amend the policy

- Board members discussed issues relating to its PIP registration policy, and the question of whether the existing policy provides adequate guidance for the staff. Members reasoned that Board review is not needed, unless new products submitted for registration had significant differences, such as different proteins, refuge requirements, or commodities. Consensus was reached that the current policy covers all PIP products where the *Bt* proteins and refuge requirements have been reviewed by the Board, and that the policy is not in need of amendment at this time.

7. Review of the Report Outline and Draft BMPs Pursuant to Resolve 2011, Chapter 59

Resolve 2011, Chapter 59: Resolve, To Enhance the Use of Integrated Pest Management on School Grounds, passed by the Legislature in May 2011, requires the Board to develop best management practices (BMPs) for the establishment and maintenance of school lawns, playgrounds, and playing fields; assess compliance with Board rule Chapter 27: Standards for Pesticide Applications and Public Notification in Schools; and report back to the Joint Standing Committee on Agriculture, Conservation and Forestry, no later than February 1, 2012. The staff will now update the Board on its progress toward fulfilling the requirements of the resolve.

Presentation by: Henry Jennings
Director

Action Needed: Review staff efforts to date and provide guidance on legislative recommendations and the report to the Maine Legislature

☑ Fish introduced the topic by describing the components of the draft report in its current form. He reiterated that the report is due to the Maine Legislature by February 1, so it would need to be close to final by the January meeting. He suggested that Board members focus on the draft recommendations to the Legislature, the compliance assessment, and the best management practices (BMPs). Fish indicated that the report—in its current form—comprises little more than an outline, although certain sections, such as the BMPs and the compliance assessment, are more developed. He alerted the Board to some updates for the findings from on-site school surveys and reviewed some of the products that are commonly used at schools based on annual summary reports submitted by commercial applicators.

Eckert suggested there may be some logic to limiting pesticide applications at elementary schools because risks are higher with younger children. Fish reported that evidence suggests that very little is done at elementary schools anyway. Fish also noted that the IPM coordinators often don't know what's happening on school grounds. Jennings echoed the concern that the position has evolved into more of a record keeper than a coordinator and, as a result, the position has moved down the organizational hierarchy. Bohlen stated that the observations and insights about the evolution of the IPM coordinator position would be extremely important to highlight in the legislative report.

A short discussion ensued about how the notification requirements are driving pest management practices at schools, and are serving to minimize pesticide use, and that many schools are still confused about the notification requirements. Bohlen commented on the lack of small districts represented in the on-site surveys, and he suggested that it may be a result of a lack of capacity to respond.

The Board then focused on the draft BMPs. Bohlen emphasized that the introductory language lacked clear and prominent wording describing what behavior the Board is hoping to affect. Additionally, he felt it was important that the BMPs do not encourage schools to increase their use of pesticides, which they might in the case of schools that aren't currently doing high levels of maintenance. Eckert questioned the need for highly manicured athletic fields. Bohlen observed that research shows communities will pay a lot of attention to what their neighbors are doing. Overall, he felt the draft BMPs were well done.

Jesse O'Brien from Downeast Turf Farms supported the draft BMPs. He stressed that training would be key to their success. He also suggested that useful information should be available to school decision makers before new fields are constructed, because proper construction can help reduce wear-related problems down the road. He commented that some of the recommendations may be unrealistic for schools and stressed that proper mowing techniques are important. O'Brien didn't believe that nematodes are particularly effective against grubs and questioned whether they should be recommended.

O'Brien brought up the issue of artificial turf fields. Fish alerted the Board to the use of disinfectants on artificial turf and stated the staff planned to conduct some research on the subject. Deven Morrill from Lucas Tree Experts stated that—contrary to public perception—pesticide use on school grounds is uncommon, because it's too expensive. He believed that adhering to the BMPs will present challenges for schools, and suggested that a robust training effort will be necessary in order for school personnel to make best use of the recommendations. Morrill observed that some of the recommendations—such as aeration—may not be realistic. Many of the current athletic fields were poorly constructed many years

ago, before construction recommendations were established. He liked the way the BMPs were separated into levels, which he thought schools would be able to grasp. He questioned the weed percentage thresholds which he thought were too high for Level 1 fields. He also questioned both the thresholds for grubs and the effectiveness of nematodes for grub control. He didn't support additional reporting requirements for commercial applicators and wasn't comfortable with posting pesticide-use information on-line. Morrill observed there are advantages to artificial fields, but suggested schools probably don't realize that disinfectants are pesticides.

Kathy Murray from the Maine Department of Agriculture discussed her experience in surveying schools about outdoor pesticide use. She was struck by the lack of outdoor pesticide application records and pointed out that this shortcoming made it impossible to verify that very little pesticide use is occurring on school grounds.

Flewelling asked if superintendents were aware of the document. Fish explained the staff efforts to publicize the work, but there was general recognition that it probably wasn't high on the priority list for superintendents. Eckert explored some ideas to better reach schools via associations. She also wondered about requiring that the IPM coordinator's position be assigned to a specific job title within the school. Bohlen thought it made more sense to give the position more responsibility. Bills mentioned that mandatory training for the coordinator was another potential recommendation. Stevenson stated that his company has found that it had to take over all of the administrative aspects of the rule in order to ensure it gets done. He observed that the state provided IPM training has made an impact. Fish observed that training needs to be mandatory or school personnel won't go. Bohlen argued that mandatory training is likely to have a greater impact on reducing exposure than mandatory record keeping.

There was a short discussion about whether the BMPs are too technical for the audience, but the final consensus was that it would be difficult to make it less technical and still convey the information. Supplemental training will be the key. The staff was directed to bring back an updated version for the next meeting. Ravis believed that the level of care should reflect the community's expectations. He felt the BMPs were useful and well done.

8. Other Old or New Business

- a. Crisis Exemption Report for use of Avipel[®] on corn to repel crows, grackles, and other blackbirds—M. Tomlinson
 - Jennings conveyed a concern that Avipel may not be available in 2012 unless the state is able to generate some meaningful yield reduction data. The staff hasn't had much luck obtaining that data from the pesticide distributors.
- b. Discussion of holding regular Board meetings at the Deering building in Augusta—H. Jennings
 - Jennings relayed a suggestion that the Board move its meeting location to the Deering Building for efficiency reasons. Consensus was reached to try meeting there and see if the space is adequate for the attendees.
- c. Other?
 - Jennings relayed a suggestion from the Animal Welfare Board. They send the meeting packet electronically and bring the paper copy to the meeting—which only saves postage. Board

members opposed the suggestion, because many of them carry the paper packet around with them a.

9. Schedule of Future Meetings

January 20 and February 24, 2012, are the tentative dates for future Board meetings. March 30, 2012, is the tentative date for a Board planning session. The Board will decide whether to change and/or add dates.

Adjustments and/or Additional Dates?

- Board members agreed to add May 11, 2012, to the list of tentative Board meeting dates.

10. Adjourn

- Ravis/Eckert: Moved and seconded that the meeting adjourn at 1:50 PM.

In Favor: Unanimous

NOTES

- The Board Meeting Agenda and most supporting documents are posted one week before the meeting on the Board website at www.thinkfirstspraylast.org.
- Any person wishing to receive notices and agendas for meetings of the Board, Medical Advisory Committee, or Environmental Risk Advisory Committee must submit a request in writing to the Board's office. Any person with technical expertise who would like to volunteer for service on either committee is invited to submit their resume for future consideration.
- On November 16, 2007, the Board adopted the following policy for submission and distribution of comments and information when conducting routine business (product registration, variances, enforcement actions, etc.):
 - *For regular, non-rulemaking business*, the Board will accept pesticide-related letters, reports, and articles. Reports and articles must be from peer-reviewed journals. E-mail, hard copy, or fax should be sent to the attention of Paul Schlein, Public Education Specialist, at the Board's office. In order for the Board to receive this information in time for distribution and consideration at its next meeting, all communications must be received by 8:00 AM, three days prior to the Board meeting date (e.g., if the meeting is on a Friday, the deadline would be Tuesday at 8:00 AM). Any information received after the deadline will be held over for the next meeting.
- During rulemaking, when proposing new or amending old regulations, the Board is subject to the requirements of the APA (Administrative Procedures Act), and comments must be taken according to the rules established by the Legislature.