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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

December 13, 2013

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

MINUTES

8:30 AM

Present: Morrill, Flewelling, Granger, Bohlen, Eckert, Stevenson

1. Introductions of Board and Staff

- The Board, Staff and Assistant Attorney General Mark Randlett introduced themselves
- Staff present: Jennings, Fish, Connors, Tomlinson, Bills

2. Minutes of the October 18, 2013, Board Meeting

Presentation By: Henry Jennings
Director

Action Needed: Amend and/or Approve

- **Flewelling/Eckert: Moved and seconded to accept the minutes as written**
- **In favor: Unanimous**

3. Request for Amendment to Chapter 22, Standards for Outdoor Application of Pesticides by Powered Equipment in Order to Minimize Off-Target Deposition

Chapter 22 contains a requirement to identify and record sensitive areas, but exempts from this requirement commercial application categories 3B (turf), 3A (outdoor ornamental) and 7A (structural general pest control). A constituent has requested that the Board consider also exempting categories 7E (biting fly and other arthropod vectors) and 6B (industrial/commercial/municipal vegetation management).

Presentation By: Gary Fish
Manager of Pesticides Programs

Action Needed: Provide Guidance to the Staff about Whether/When to Initiate Rulemaking

- Fish referenced the staff memo, and explained that many companies are expanding into tick and mosquito control in urban areas and that for those and weed control, such as along sidewalks, fence lines for municipalities, it doesn't make sense to identify all sensitive areas within 500 feet. For other

categories the rule is to post instead of identifying sensitive areas; people who want to be notified can request it. Randlett indicated that this would have to be done through rulemaking, not a policy.

- Jennings explained that when the drift rule was written there was discussion around the idea that there was more public benefit to posting than to identifying sensitive areas when everything is a sensitive area, but when the rule was written a couple of categories were overlooked. There is confusion from people in the area who wonder why there is no posting, but they don't understand that if it's for mosquitoes or ticks, posting is not required.
- Bohlen noted that it's not so much the type of application as it is the characteristic of the location.
- Morrill stated that the majority of companies are doing both lawn care and mosquito control; they have to post for one, not the other, which is confusing to the public, so most companies are posting even though it's not required.
- Eckert noted that it is important for people to be aware of the sensitive areas. Morrill said that in urban areas, to go 500 feet you're trespassing on neighbor's lawns, so you would be drifting if the spray went there anyway.
- Granger said that it bothers him that they don't have to map the sensitive areas when farmers have to map on their own property.
 - **Consensus was reached to add to the rulemaking queue.**

4. Streamlining the Applicator Licensing Process

At the September 6, 2013, Planning Session, the Board discussed streamlining of the commercial applicator licensing process, which had been identified as the highest priority topic. The Board debated several ideas to improve the system. Companies are trying to get new and seasonal employees licensed quickly in the spring and summer. At the October 18, 2013, Board meeting, some of the ideas from the Planning Session were further discussed. The three ideas that seemed the most feasible were an optional combined application for exam and licensing, a temporary license/receipt and accepting credit card payments. The staff has done research and is prepared to discuss these options with the Board.

Presentation By: Gary Fish
Manager of Pesticides Programs

Action Needed: Provide Guidance to the Staff about Potential Changes

- Fish summarized the staff memo. Credit card payments can be done either by machine or on the internet; Jennings said the intent was to have this in place by the spring. Fish referenced the combination application which would allow applicants to pay up front and potentially lose the license fee if the exam was not passed within 12 months. He also pointed out the temporary license that could be given when an applicator paid the license fee and exams have been passed. He noted that the combination application was only for those who chose to use it; others could continue using the current system.
- Stevenson said he was concerned that the temporary license was good for only 30 days and suggested 60 days. Consensus was reached on 60 days for the temporary license.
- Fish explained that the Department is looking at a new business process management system called PegaSystems; if that were in place, we would have an online licensing system, people could look up their status; it would help the office staff as well as customers.
 - **Granger/Morrill: Moved and seconded to direct the staff to make changes to the licensing process**
 - **In favor: Unanimous**

5. Review of Variance Policy for Chapter 29

At the October 18, 2013, meeting, the Board discussed the process for issuing variances from Chapter 29 for the control of invasive plants and instructed the staff to draft a policy allowing multiyear variances, provided certain conditions are met in the application. The staff has drafted a policy for the Board's review and discussion.

Presentation by: Gary Fish
Manager of Pesticides Programs

Action Needed: Provide Guidance to the Staff about the Policy

- Fish referenced the staff memo and proposed policy, explaining that it attempted to incorporate the ideas suggested at the last meeting: long-term strategy, consistent with IPM; BMPs; multi-year because we want them to have a multi-year strategy. The biggest question was what to include as invasive plants, so the Invasive Plants Atlas of New England website was referenced; seemed like a good choice.
- Jennings added that there was some difficulty in framing the wording to capture what the board wanted regarding BMPs. The staff tried to frame it that they should have some knowledge of BMPs, but didn't force them to use them. BMPs are kind of in the eye of the beholder, applicators choose which ones work for the particular situation.
- Randlett pointed out that in the first sentence it should state that authority is delegated to the staff.
- Eckert asked if the list was a good one. Bohlen replied that it is very broad; it has a lot of species that are not problematic, e.g. forget-me-nots, but since it is unlikely anyone would want to control them it's not a problem. Using the language "not limited to" is wise; there are some things on the list that shouldn't be, it's not perfect, but the best we have. Do not want to develop our own list?
- Fish stated that there is a new position in the Maine Natural Areas program dedicated to invasives. One of the first tasks for that person will be the list. He noted that just because a plant is on this list doesn't mean the staff has to approve a variance for it.
- Granger said that the second bullet the words "consideration and incorporation", should be one or the other, "consideration" alone is better; "incorporate implies that they are required to use them.
- Jennings replied that we are trying to ensure that they look at them, are aware of them; in the application they would say which they are going to use.
- Randlett pointed out that the background information is just a history of why the policy is before the board; the policy itself is just the last two paragraphs. If adopted as written, the language above does not control the variance, so changes should focus on the last two paragraphs.
- Bohlen stated that he likes "consideration of BMPs" in the top section; in the policy itself, "evidence of knowledge"-how would they show that?
- Eckert said there had been talk of a three-year variance and asked if there would be assessments along the way. Jennings replied that the Board had said they didn't want annual reports. Bohlen said that an annual report defeats the purpose of a multi-year variance.
- Stevenson said that if the application is thorough, the applicant promised to use these practices- low pressure, etc., even if it's in the third year, if they don't follow they would be in violation.
- Morrill noted that after the first year you won't know if a site is re-vegetated. Once the variance is issued, give the faith to the applicator that he is doing the right thing.
- Randlett pointed out that if they don't follow the terms of the variance it is a violation of the rule, punishable under pesticide statute. If the staff is concerned about not having a provision that allows for revocation the Board could add to the end of the policy statement: "provided that the applicator complies with the variance."
- Consensus was reached to amend the draft policy by:
 - Striking the words "and incorporation" from the sentence referencing BMPs;

- Specifying that the Board is delegating the authority to the staff;
 - Substituting “demonstration” for “some evidence of” knowledge of efficacy; and
 - Adding “conditioned upon compliance with all variance requirements” to the end of the last sentence.
- **Eckert/Stevenson: moved and seconded to adopt the policy as amended**
 - **In favor: Unanimous**

6. Increasing the Availability of Online Continuing Education Options

At the September 6, 2013, Planning Session, the Board discussed increasing online continuing education options, which had been identified as its third highest priority topic. At the October 18, 2013, Board meeting, there was further discussion around the topic and the Board asked the staff to provide data on what topics are currently covered by available online training. The staff has prepared a summary and is prepared to further discuss the subject with the Board.

Presentation By: Gary Fish
 Manager of Pesticide Programs

Action Needed: Provide Guidance to the Staff

- Fish summarized the staff memo, noting that this was one of the top priorities identified at the planning session. There are 11 providers offering over 170 credits and 150 courses. Some categories are not covered, those with less than 50 applicators. Fish talked to Steve Johnson, who is working on two more videos and is still working with administration to make sure they’re okay with him doing them. Fish talked to Handley and Yarborough about doing videos for other crops, but he’s not sure if they have the time. Staff has been working with the Forest Service about borrowing some equipment and sharing expertise. The first plan is to work on a Power Point presentation, adding narration. There’s already a lot available, the staff might try to make it more visible on the website.
- Eckert said that she went on the website and didn’t find it very difficult to find.
- Flewelling asked if a test were required after watching the video. Fish said that some do have a test; all of them have a system so they can’t jump ahead. There’s always going to be a concern that some people are going to cheat, but that’s true of live presentations as well. Randomly he asks people if they get anything out of these courses; usually they say it’s just as good as a live presentation, rarely does he get a negative report.
- Eckert asked if there are crops or situation so unique to Maine that they aren’t covered. Fish replied that blueberries are the biggest. Some of the vegetable crops are also not covered well.
- Bohlen asked if there was any training available online for organic growers; there is a lot of IPM-related stuff, but doesn’t seem to be much organic. Eckert suggested Eric Sideman and others could post some of their presentations. Katy Green remarked that they only recently started offering pesticide credits for meetings, so they haven’t thought about online yet.
- Fish asked about webinars; Bohlen said he finds them less effective; conversation can drift away from what you’re interest in. He noted that if someone has to click through an entire presentation they have to work pretty hard to NOT learn something. You can’t force someone to learn, you can only force them to be there.
- Bohlen asked if there was any way to point out which are the best; there are a lot of offerings, not sure which one to go to. Fish said that most people seem to like PestNetwork.com. Cornell only came online a year ago but they are a lot more expensive.
- Stevenson said he thought this came up because applicators are not aware of the availability and suggested making it more noticeable on the website.

7. Review of the Board's Enforcement Protocol

At the September 6, 2013, Board meeting, concerns arose about the proposed fine imposed by a pending consent agreement. At the October 18, 2013, meeting, the Board reviewed the enforcement protocol, and discussed when enforcement cases should be presented to the Board prior to negotiating an agreement, as well as the Board's options regarding executive sessions. However, because the Assistant Attorney General was not present, it was agreed that discussion of this topic should be continued at the next meeting.

Presentation By: Henry Jennings
Director

Action Needed: Determine Whether Changes Should be Made to the Board's Enforcement Protocol and Provide Guidance to the Staff

- Jennings noted that when the medical marijuana case came up there was some difficulty in understanding how the numbers were arrived at and what are the Board's options if they are concerned with a penalty.
- Enforcement protocol: why hadn't the issue been brought to the Board in advance? Section 3 outlines two paths the staff can take to resolve a violation; first, if it's a routine matter and there is no disagreement between violator and staff around facts or law, Section 3A directs the staff attempt to negotiate an agreement before presenting the matter to the Board. The orchard situation is an example of when the staff cannot reach an agreement, so it came to the Board under Section 3B. The other way it comes before the Board first under Section 3B is if there is a substantial threat to the environment or public health. It's a judgment call. At the last meeting, the Board seemed to be narrowing in on a dollar threshold as an additional criterion to trigger the 3B option. Most fines are \$1500 or less. The Board wanted to have this discussion when Randlett was present. The staff has already taken note that it needs to be mindful and pay attention to whether or not we should bring cases to the Board first. At the last meeting, Jennings described the pitfalls around bringing all to the Board-it takes a lot of time at Board meetings, etc.
- Randlett stated that it is the Board's determination on how it wants to address enforcement matters initially. It can be based on a dollar amount; the Board could include a criterion about "substantial public interest" instead or in addition to the criteria about the environment and health. It's up to the Board, it can set up any way it wants. Randlett noted that with any violation, no matter how serious, the maximum penalty for a first offence is \$1500; larger amounts are allowed with multiple violations, either of the same rule, or spanning multiple rules, or over a period of time. The seriousness varies. To some extent it will most likely be based on the staff's initial determination; if you base the penalty on possible violations, the Board would see them all.
- Morrill said that the protocol is well written and captures the Board's sentiments. He is not comfortable assigning a dollar figure threshold; one guy goes out one day and treats 15 lawns, that's 15 potential violations. The staff gets the idea. In five years there were two that the Board would have liked to see. Paragraph 3B says it, the Board wants to see the unusual ones.
- Jennings commented that Randlett said that the Board can provide some direction to the staff on a dollar figure without changing the policy.
- Bohlen asked whether the Board could be alerted without bringing a consent agreement before the Board formally. The Board couldn't act at that point, but the frustration earlier was that by the time it came to the Board it was a done deal. The question is how do we do it without getting into the negotiation process, because once we get into the process, it's the Board's.
- Randlett stated that once it is brought to the Board's attention, it's public information. If an agreement hasn't been reached and it gets reported, that could interfere with the process. In the marijuana case the staff and Randlett were able to sit down with the attorney and responsible parties

from the facility and have an open and frank discussion about violations and what we were looking for; he's not sure that would have been possible if it had been brought in front of the Board and it became known that the fines could potentially reach \$24,000.

- Eckert asked if the Board could have been told that it was a case involving marijuana and multiple violations. Randlett said they probably would not have been able to give the Board as much information as it would like. Jennings noted that if the violator is identified they would have to be invited to the meeting, so it would have to be very general terms.
- Granger said that he wasn't uncomfortable with the dollar amount in the marijuana case, but with the violations. Usually the rules are pretty clear; in this instance there was a pest problem and no licensed tools to deal with it. When something doesn't fit, there are extenuating circumstances, and there is no good clear legal path to deal with the problem, that should be taken into consideration.
- Jennings questioned what would happen if the Board just refused to ratify a consent agreement; it puts the staff in a difficult spot but it sends a clear message to the violator. Randlett stated that this would put the state in the position of having to return any monies collected and would seriously impact the ability of the staff to negotiate a settlement.
- Eckert and Morrill asked if the Board could review the consent agreement before the penalty was collected. Randlett said that accepting payment does lock the violator in. Legally there is no reason the consent agreement couldn't be negotiated initially and payments not collected until after the Board approves. At least if the Board rejects it, the state wouldn't have to return the money. It does present some difficulty; to what extent are conversations regarding penalty amount made public, and which can be made in executive session. Ultimately it's the AG's determination of what to do.
- Eckert noted that in the marijuana case there was some disagreement of whether this was a threat to public health and suggested the words "novel situation." Randlett suggested "or other extraordinary situations", would still be at the discretion of the Board.
- Granger said that he liked the idea of not collecting money first; when the violator has written a check it makes it more difficult for the Board to disagree with the consent agreement. He noted that he doesn't want the Board determining what the penalty should be, just that there should be a discussion with the Board. Randlett noted that any discussion with the Board prior to an agreement would have to be in the context of a public meeting, which might impact some negotiations.
- Jennings noted that if payment is not collected at time of signing, the staff is going to have to chase people down to collect.
- Morrill reiterated that the current protocol is fine; if it's covered under 3B it should come before the Board first.
 - **Morrill/Eckert: Moved and seconded to add the words "or other extraordinary circumstances" to section 3B of the enforcement protocol.**
 - **In favor: unanimous**
- Randlett broached the subject of executive sessions, noting that this discussion refers only to enforcement matters. Meetings are open to the public; there are limited reasons why the Board may go into executive session, which are spelled out in Subsection 6. paragraph E (M.R.S.A. 1 Section 405, included in Board packet) is the one that applies to the Board, with conversations with AG concerning legal rights and duties of Board regarding pending enforcement actions. The end is the relevant part: "when premature public knowledge would clearly place the State... at a substantial disadvantage" The AG would need to make a couple of determinations, does it involve legal questions and would it clearly place the Board at a substantial disadvantage? It's tough to make those determinations. Having discussions involving the merits of the case, quality of the evidence, the type of penalty ranges that might be considered-those might place the Board at a disadvantage, difficult to say whether it "clearly" places the Board at a "substantial" disadvantage. There's also an impact on the individual; premature knowledge of the severity if disclosed might have an impact.

These laws are skewed in favor of having things done in a public forum, so there are few circumstances where Randlett would agree to go into executive session.

- Jennings referred to the staff memo and suggested the Board look at the fines/history and give guidance to the staff on which are of higher/lower importance.
 - **Consensus was reached that there is no interest in reviewing the fine structure.**

8. Review of the Board's Reciprocal License Policy

Since 1992, the Board has had a policy requiring all applicators to pass Maine exams for certification (no reciprocal licenses). However, the Board promulgated emergency rule amendments to allow for reciprocal licensing when potato fields were too wet for ground spraying two different times. In addition, if a mosquito-borne health threat arises, and the Maine CDC recommends aerial spraying for mosquito control, the urgency of this situation may not allow sufficient time to license aerial applicators through the normal, sometimes time-consuming, process. The staff is suggesting that the Board consider amending its policy to allow issuance of reciprocal licenses when the staff determines an urgent need exists in which out-of-state applicators are likely to be needed.

Presentation By: Henry Jennings
Director

Action Needed: Provide Guidance to the Staff about Potential Policy Changes

- Jennings explained that the statute says the state MAY accept a license from another state if it is “substantially equivalent.” The Board adopted its policy in 1992 because Maine has unique laws, it’s easier to get licensed in some states and we definitely want applicators to know Maine laws. The problem is that Chapter 31 is silent on reciprocity except under master standards where it clearly states that they have to take a closed book exam based on Maine regulations; the Board couldn’t call another state’s exams substantially equivalent because no other state will test on Maine laws. Twice in the last 25 years there has been emergency rulemaking to allow reciprocal licensing because of unusual wet situations where ground equipment couldn’t get into fields (potatoes) to control fungi at regular intervals and we were trying to get aerial applicators into the state quickly to deal with an emergency situation. In the unlikely event that we get into a public health emergency around mosquitoes, we may be in the same situation. People from out of state invariably flunk the regulations exam and have to wait two weeks to take it again. We could end up in a situation where there is no one in the state who could spray for mosquitoes during a public health crisis; mosquito spraying requires specialized equipment, very few companies in the country capable of that type of work. In Vermont they sprayed within a week of making the decision. Should the Board amend the policy to allow for issuance of a reciprocal license in certain situations where there is an urgent need to control a pest? Master regulation exam would still be a problem and would require rulemaking.
- Eckert noted that it would still be a good idea for applicators to know Maine law. Jennings suggested a meeting with staff in lieu of an exam. Aerial applicators rarely make any key pest management decisions about what to apply, where, why, and how much to use. Many of the regulations are really not very applicable to aerial applicators.
- Flewelling asked if it could be a short-term license; Randlett said there is no provision in rule for that, and that we are actually talking about certification, which would be for six years.
- Morrill said that he thought it would be opening a can of worms to start issuing reciprocal licenses and suggested companies hire Maine applicators. Jennings replied that there are only two companies in the country that do this type of work. It’s unlikely they would want to go to the trouble of getting licensed in Maine for something that’s unlikely to happen.
 - **Consensus reached to consider amending Chapter 31.**

9. Consideration of a Consent Agreement with Barry Churchill of Fort Fairfield

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 and resolve the matter. This case involved an application of a “weed & feed” product to an area open to the public by an unlicensed applicator.

Presentation By: Raymond Connors
Manager of Compliance

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

- Connors summarized the case; the violator admits that he applied a granular pesticide to islands in the parking lot at the Fort Fairfield IGA. It wasn't a broad expanse, the applicator used non-powered equipment, and there wasn't evidence that this was a big part of Churchill's business.
 - **Flewelling/Stevenson: moved and seconded to accept consent agreement as written**
 - **In favor: Unanimous**

10. Update on Persistent Herbicides

Persistent herbicides have been the cause of numerous plant injury incidents in recent years. During the summer of 2013, the staff received an anonymous complaint from an organic farmer whose crops had been diagnosed with damage caused by persistent herbicide contamination of his compost. The farmer had purchased hay from a local supplier, and the hay land had been treated with ForeFront (aminopyralid). The ForeFront label prohibits movement of treated hay from the farm where it originated. The staff will update the Board on its investigation.

Presentation By: Henry Jennings
Director

Action Needed: None—Information Only

- Jennings summarized the memo; hay land treated with aminopyralid can end up in compost, manure or hay. Another question is if there's a persistent herbicide causing damage after composting manure, is it also leaving a residue in produce? Who is at fault? A hands-off, landowner, hires someone to spray the pasture because it has bedstraw. Hires a commercial applicator. A third person harvests and sells the hay; hay comes from many fields and is mixed together in a barn. The staff asked the applicator if he made the landowner aware that the hay shouldn't be taken off-site, he says yes; landowner says he knew nothing about it. The hay broker doesn't know anything about the issue either. State and federal law state it is unlawful to apply pesticide contrary to label; our attorney says you can't apply that standard to persons who have not applied the pesticide, such as the landowner or the harvester. The staff doesn't feel we can go after the landowner or the harvester/broker for applying a pesticide inconsistent with the label. Not a lot of this product was applied in Maine. Dow is not happy about spending a lot of money paying for analysis of crops, the potential liability and public perception. They are trying to get the product out of the agricultural market in Maine; not sure how long that will take. Currently there are approximately 20 gallons in

the state at various suppliers. The staff will include information in our outreach. If Dow weren't trying to get this off the market, the Board might want to intervene. The idea now is to get the word out.

- Fish pointed out that the material breaks down by soil microbes, but not in compost.
- Bohlen noted that the people who need to know about this are not going to the BPC training; the people growing vegetables, those with the new Ag Basic license, might need to now. Jennings suggested a targeted mailing to the commercial applicators. We might suggest having landowners sign something, but it will difficult to enforce. Dave Bell noted that there are probably only a handful of people using the product. Morrill suggested talking to Cooperative Extension personnel about it. Rick Kersbergen is already planning to include in his talks.
- Staff will make a fact sheet that applicators can give landowners with a place to sign.

11. Other Old or New Business

- a. Legislative Update—H. Jennings
 - Jennings briefly summarized the three pesticide-related bills that will be considered by the ACF committee this session, noting that it is unusual for there to be so many in a second session.
- b. BPC Website Changes—Anne Bills
 - Bills briefly showed the new website to the Board and asked that they peruse it and give suggestions for improvements.
- c. Other?

12. Schedule of Future Meetings

January 8, February 21, March 28, May 9, and June 27, 2014, are tentative Board meeting dates. The January 8 meeting will take place at the Maine Agricultural Trades Show, along with a Listening Session cohosted by the Maine IPM Council. The exact schedule for the Trades Show proceedings still needs to be finalized. The June 27 meeting is tentatively planned to be held in the Madison/Skowhegan area, following a tour of Backyard Farms. The Board will decide whether to change and/or add dates.

Adjustments and/or Additional Dates?

- The IPM Council requested that the Board meet from 3:00-4:00 and 5:00-6:00 with the listening session from 4:00-5:00; the Board agreed to the change.
- Tomlinson said that a tour of Backyard Farms has been scheduled for June 27. The Board meeting can be held at the Madison High School in the afternoon.

13. Adjourn

- **Flewelling/Eckert: moved and seconded to adjourn at 11:48**
- **In favor: Unanimous**