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BOARD OF PESTICIDES CONTROL
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MEMORANDUM

DATE: September 3, 2008
TO: Board Members
FROM: Staff
SUBJECT: Summary of Board Consensus of Aerial Concepts

Since July of 2007, the Board has been discussing possible changes to regulations covering aerial spraying. Because the Board has now discussed the gamut of topic areas, this memo will attempt to integrate all the concepts relative to aerial spraying into a single document.

Proposed Changes to the Definition of Sensitive Areas in Chapter 10 (Definitions)

- Delete reference to the 100-foot restriction to sensitive areas surrounding occupied buildings. Subdivide the current list of sensitive areas into two groups:
 - Sensitive Area Likely to Be Occupied (SALO) (unless it is the intended target) to include:
 - Residential buildings together with any associated developed areas, such as lawns, gardens, livestock and recreational areas, which are part of the same property [**Note: The term “developed” is used throughout the sensitive areas definitions. The staff wonders if “managed” better describes the areas we’re concerned about.**]
 - School buildings, together with any playgrounds, athletic fields or other such facilities designed for use by persons in the vicinity of the school
 - Commercial, institutional or other buildings where human use occurs, together with any associated developed areas, such as lawns, gardens and recreational areas which are part of the same property
 - Developed recreational areas open to the public including developed public or commercial campgrounds, developed park and recreational facilities, playgrounds, playing fields and other areas developed for organized sports or recreation
 - [**New**] Rights-of-way [**Note: The Board must determine which rights-of-way.**]
 - [**New**] Other areas where there is evidence or a reasonable likelihood that people may be present when spraying will occur
 - Other Sensitive Areas (unless they are the intended target)
 - Apiaries
 - Critical areas
 - Potable water sources
 - Water bodies
 - Wetlands
 - Crop or livestock land that is not associated with a SALO

General Proposed Changes to Chapter 22 (Drift Rule)

- Delete the current unenforceable provisions from Chapter 22 that describe “applicator considerations.”
- Revise the paragraph requiring equipment to be calibrated from the current “reasonably close to specifications” standard to “within 5% of specifications.” Five percent is a generally accepted guideline found in nozzle guides and Cooperative Extension publications.
- Revise the requirement for identifying and recording sensitive areas to require that an updated site map be maintained depicting the type and location of sensitive areas located within 500 feet of the target area.
- In the case of custom application, require the applicator to have a copy of an updated site plan in his/her possession at the time of the application and maintain a copy of the site plan as part of the application records for a period of 2 years.
- Delete the entire “prima facie evidence of a violation” section and replace it with a new “Standard of Harm” section. Under the Standard of Harm, an applicator would violate the standard if he/she applies a pesticide in manner that drifts from the application site and results in any of the following:
 - Damage or injury to non-target species
 - Documented illness in human(s)
 - Illegal crop residues
 - Residues on certified organic crops that cause the crop to no longer qualify to be marketed as organic
 - Residues on a SALO [**Note: The Board may want to consider applying the prima facie evidence standard to this criterion only – or rely on the considerations below**]
- The Board shall consider the particular circumstances of violations arising from this section in determining an appropriate response, including, but not limited to:
 - The standard of care exercised by the applicator
 - The degree of harm or potential harm that resulted from or could have resulted from the pesticide application
 - The risk (toxicity and exposure) from the pesticide applied

Proposed Changes to Chapter 22—Specific to Aerial Spraying

- Create a new section in Chapter 22 specific to aerial spraying. This section would not apply to aerial applications for control of biting insects and other vectors of public health concern or Major Forest Insect Aerial Spray Applications as defined in Title 22 (projects of greater than 1000 acres). Requirements of this section would include:
 - A minimum setback (buffer) to SALOs for aerial applications [**Note: Distance to be determined by the Board**]
 - Prior to making an aerial application, the person contracting for the application must provide the applicator with a detailed site plan to include:

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- A detailed, scaled target site map depicting:
 - The boundaries of the target area
 - The property boundaries
 - Type and location of SALOs (including roads) located within 1000 feet of the target area
 - Type and location of other Sensitive Areas located within 500 feet of the target area
 - Significant landmarks and flight hazards
 - A plan for protecting persons using roads within 1000 feet of the target area, including the school bus schedule
 - Prior to making an aerial application within 1000 feet of a SALO, the applicator shall review the site plan, giving particular attention to wind speed and direction in relation to the SALOs listed on the site plan.
 - Prior to making an aerial application within 1000 feet of a SALO, the applicator shall complete a Board-prescribed pre-spray checklist and record:
 - Date, time and description of the target area
 - The location of where weather conditions are measured and what equipment is used to measure wind speed and direction
 - Location of SALOs relative to the wind direction
 - The measures the applicator will employ to protect SALOs described on the site plan
 - The measures that will be employed to protect people using roads described in the site plan
 - The aerial applicator shall maintain a copy of the site plan together with the pre-spray checklist for a period of 2 years. Such records shall be available for inspection by representatives of the Board at reasonable times upon request.
 - Unless otherwise specified by the product label, a person may not make an aerial application of pesticides within 1000 feet of a SALO unless the wind speeds are between 2 and 10 miles per hour
 - Add a section that would waive the requirements of the new aerial application section in the case of an agricultural emergency, as declared by the Commissioner of Agriculture with the following conditions:
 - Unusual environmental and/or pest conditions that require unexpected large-scale aerial spraying to prevent severe economic loss.
 - Spraying must occur promptly without sufficient time for land managers and/or aerial applicators to complete the requirements set forth in this section.
 - Land managers and aerial applicators shall make good faith efforts to comply with the intent of this section and minimize impact on SALOs within 1000 feet of the target site.
 - The Commissioner shall issue a press release notifying residents of the affected regions of the agricultural emergency and the likelihood of aerial spraying in the affected regions.

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- Add a variance section allowing the Board to waive specific requirements of this section when land managers and/or aerial applicators can demonstrate that those requirements will be impractical or unnecessary under certain instances. Waiver applications shall be submitted on forms provided by the Board. The applicant for such a waiver must show evidence the proposed application(s) will be conducted in a manner that provides substantially similar protection to SALOs within 1000 feet.
 - The current section on “consent” described in Chapter 22 remains in effect and is applicable to all types of applications covered by the rule.

Proposed Changes to Chapter 28 (Notification)

- Amend Section 1 of Chapter 28 to specify that abutters have the right to request timely advance notice of individual applications similar to the provision in Section 2 of Chapter 28 for the Maine Outdoor Notification Registry.
- Set a specific period, i.e., 3 – 5 years, that requests for notice are valid for, or the request could be indefinite.
 - The information included in the notice might include:
 - The location and purpose of the pesticide application;
 - The date and approximate start time of the pesticide application (within a 24-hour time period) and, in the event of inclement weather (wind, fog, rain, etc.), an alternative date or dates on which the application may occur;
 - The brand name and EPA registration number of the pesticide product(s) which will be used; and
 - The name and telephone number of the person or company making the pesticide application.
- Create a definition for SALO (*see above*).
- Amend Chapter 28 to create a new section covering aerial applications (*see above*).
- For aerial spraying, make advance notice to SALOs within 1000 feet mandatory, with two procedural options to allow maximum flexibility:
 - The first option would require that land managers make annual contact (through a letter, phone call or personal visit) with adjacent property owners occupying sensitive areas, informing them that the agricultural land may be sprayed by air during the upcoming season and of their right to receive timely notice in advance of when spraying will occur. The annual letter could be used until some set time prior to spraying, such as 30 days or two weeks, to make sure recipients receive the letter and have time to read it, respond, and then be placed on the notification list.
 - There will also need to be a separate system for notifying SALOs that are sporadically occupied, i.e., parks, picnic areas, etc.
 - Possibly the notice might go to the park manager and they in turn could post a sign, or
 - We might require the grower/manager or aerial applicator to post a sign.

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- The second option would be for land managers to simply provide advance notice to persons occupying SALOs within 1000 feet, similar to the manner used for the Maine Outdoor Pesticide Notification Registry. Land managers must first attempt contacting abutters via telephone calls or personal contact, but if this approach is not successful, a door hanger is affixed to the principal entry of the residence. The notice should be provided just before the spraying, such as 24 to 48 hours in advance. The same notification procedure could be used in conjunction with the option above once a list of who wants to be notified has been developed.
 - If agreed upon by both parties, allow notice to be made via fax, e-mail or any other means.
 - Carry forward provisions from Section 1 of Chapter 28 that allow abutters to request additional information, such as the label and MSDS, and the provision that specifies that the Board will arbitrate notification disputes.
 - Notice for aerial spraying should include a statement about the possibility that the spraying could be delayed due to unfavorable weather. If spraying is delayed, the Board will need to decide what its expectations of the land manager will be. A couple of staff options are outlined below:
 - Require the land manager to continue to call until the spraying is completed; or
 - Have a statement in the notice specifying that if the person receiving the notice wants confirmation of whether the spraying has occurred, they must call the land manager.
 - Electronic communication should also be an option for this part of the process as long as all parties agree upon it.
 - Should agricultural fields also be a posted when they are treated aerially?
 - Should we consider addressing notification to people on public roads in a similar way to Massachusetts? They have adopted the Federal Worker Protection Standard sign. (*See excerpt from their rules at the end of this memo.*)
 - Add a variance section allowing the Board to waive specific notification requirements (*see above*).
 - Add a section that would waive the notification requirements in the case of an agricultural emergency (*see above*).
 - Improve the way the Board communicates notification rights to the public.

13.02: General Provisions

(3) Agricultural Applications Near Public Ways. No application of a pesticide bearing the signal word “Danger” on the label and classified as a restricted use or state limited use pesticide pursuant to 333 CMR 8.04(1)(b) shall be made for the purpose of producing an agricultural commodity to a site within 50 feet of a public way unless notice of the application is given by the posting of a sign. Such sign shall:

- (a) Be posted at least every 200 feet along the perimeter of the treated area facing the public way and at every principal entrance to the treated area facing the public way;
- (b) Be posted between 2 and 24 hours prior to the application;

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- (c) Be removed no sooner than 48 hours after the application and no sooner than the expiration of the Restricted Entry Interval (REI) stated on the label instructions under the heading “Agricultural Use Requirements”;
 - (d) Be removed no later than 48-hours after the expiration of the REI stated on the label instructions under the heading “Agricultural Use Requirements”;
 - (e) Have a background color that contrasts with red. The words “Danger” and “Peligro,” plus “Pesticides” and “Pesticidas” shall be at the top of the sign, and the words “Keep Out” and “No Entre” shall be at the bottom of the sign. Letters for all words must be clearly legible. A circle containing an upraised hand on the left and a stern face on the right must be at the center of the sign. The inside of the circle must be red, except that the hand and a large portion of the face must be in a shade that contrasts with red. The length of the hand must be at least twice the height of the smallest letters. The length of the face must be only slightly smaller than the hand. Additional information such as the name of the pesticide and the date of application may appear on the warning sign if it does not detract from the appearance of the sign or change the meaning of the required information; and
 - (f) Be at least 14 inches by 16 inches in size, with letters at least one inch in height.