MASSACHUSETTS PESTICIDE BOARD MEETING

Minutes of the Board Meeting held at the McCormick BLDG, 1 Ashburton Place, on Friday, May 9, 2014

The Meeting was called to order at approximately 10:10 A.M.

BOARD MEMBERS IN ATTENDANCE

Lee Corte-Real, MDAR Designee for Commissioner Watson,	Present
Michael Moore, DPH, Food Protection Program	Present
Marc Nascarella, DPH, Designee for Commissioner Bartlett	Present
William Clark (Conservation/Environmental Protection Member)	Absent
Jack Buckley, DFG, Designee for Commissioner Griffin	Absent
Kathy Romero, DEP, Designee for Commissioner Cash	Present
Ken Gooch, DCR, Designee for Commissioner Lambert	Present
Richard Berman	Present
John Looney	Absent
Brian Magee	Present
Richard Bonanno	Present
Laurell Farinon	Absent

The Board did meet or exceed the minimum number (7) of members present to form a quorum and conduct business.

OTHER INDIVIDUALS PRESENT:

Bill Siegel, NEPMA; Steve Oles, NEPMA; Jessica Burgess, Esq., MDAR; Terence P. Noonan, Esq.; (Representing those who are appealing the 2013 NSTAR YOP) and Steven Antunes-Kenyon, MDAR

DOCUMENT(S) PRESENTED

- Minutes from the Monday, March 10, 2014 Board Meeting
- Ruling on Motion to Dismiss, DALA, Docket Nos. MS-13-612-MS-13-638

A. NSTAR DALA Appeal – Motion to Dismiss for Mootness

Note: This matter pertains to the Appeal of a 2013 Department Approved, Right of Way (ROW), Yearly Operational Plan (YOP) submitted by NSTAR.

Attorney Jessica Burgess, Esq. explained on behalf of the Department, that since the Calendar Year (CY) 2013 YOP had indeed expired, no additional actions could take place under the that YOP; therefore, the Department did indeed submit a petition to the Division of Administrative Law Appeals (DALA) to dismiss the appeal as moot. The petitioners also filed a motion with DALA opposing the motion to dismiss.

The DALA denied the Department's petition to dismiss as moot based on their finding that the issues were "capable of repetition yet evading review". This was based-in-part on the belief that the CY 2014 YOP would be similar to that submitted in CY 2013.

Attorney Burgess further explained that NSTAR did indeed submit a CY 2014 YOP. This YOP was also reviewed and presented for public comment through the same process as outlined in the regulations and as used for the approval of the CY 2013 YOP. The CY 2014 YOP was indeed approved without any party filing an appeal.

The Department believes that since each YOP is different, the finding by the DALA that this issue is "capable of repetition yet evading review" does not apply. Under State Law, this decision by the DALA now comes before the Pesticide Board for consideration—to adopt or not to adopt. The Pesticide Board is NOT bound by any decision made by the DALA. The Pesticide Board has the authority to make the decision as to the appeal that was filed. The Board's decision is then appealable to the Massachusetts appellate court system.

It's the recommendation of the Department, presented by Attorney Burgess, that the Board NOT adopt the motion by DALA, but dismiss the appeal as moot—given that the 2013 YOP has indeed expired and no additional actions can take place under the that YOP. Upon the Board's dismissal as moot, the Department will then resubmit to the DALA the Board's final decision.

Upon the approval of every YOP, there is a period of time; whereby, a party with standing has an opportunity to appeal the YOP. The action to file an appeal requires the submission of a letter to the Department in opposition of the YOP. At this point the appeal period for the submitted and approved CY 2014 YOP has closed. Should there be any significant changes to the approved CY 2014 YOP, than a new period of time to file an appeal would open.

On behalf of those parties; whom, filed the appeal and opposed the NSTAR YOP, attorney Terence P. Noonan, Esq. described how the NSTAR CY 2013 YOP was submitted later in the year and was not approved by the Department until the Fall of 2013. At that point, he filed the appeal on behalf of his clients and followed the administrative process.

According to Attorney Noonan, central to the matter at hand is the inability of the administrative appeals process to be effective within the existing time-constraints and within the year that the YOP is approved. He outlined how the appeals process, for such matters as complicated as the potential contamination of the environment, is impeded by the various administrative processes taking place, including procedural motions, motions to dismiss, motions for clarification, discovery, witnesses, days of hearing, etc.

Attorney Noonan added that having the Board dismiss the appeal and point to the opportunity to file future appeals in the following year, fails to acknowledge the various administrative time constraints and procedural challenges.

Attorney Burgess explained that the DALA works in a less formal manner than the courts and as such, it is an extremely efficient agency that is quick to take action. Should a party have filed an

appeal to the 2014 YOP, it would NOT take an excessive amount of time for them to return a decision.

Attorney Noonan asked the Board to review the decision by the DALA and listen to their reasoning. He recommends that the Board accept the DALA decision and let the case move forward at the DALA.

The Board reviewed the dates that the CY 2014 NSTAR YOP was submitted and the timeline (21-days) for filing an appeal. It clarified, its role in taking up the matter at this Meeting; which, is to address the procedural aspects of the case and decide if the appeal stands. It also reviewed the current procedures and processes in place that provide for Public Notice, Review and Comment. It also briefly outlined how the current procedures and processes provide for a review of the issues and any data submitted. In addition to staff review of any data submitted during the 45-day comment period, there are other participants in the State's pesticide regulatory processes, including the Pesticide Board Subcommittee and the Rights of Way Advisory Panel.

The Board also inquired as to the potential for applicants to abuse or take advantage of the regulatory processes by filing the YOP later in the year as was the case for the CY 2013 NSTAR YOP. It was clarified that such late filing is unusual; however, regardless of the filing date, the required 45-day public comment period and review remains applicable. In cases, where there is controversy; such as, the CY 2013 NSTAR YOP, the public comment period is often extended and the Department has the authority to withhold its decision, even when it will prevent the pesticide applications during the time-frame indicated in the YOP. In the case of the CY 2013 NSTAR YOP, the Department also had an inspector observing the applications on four different dates. These use observations were conducted to be sure that the applications were done in conformity with the CY 2013 YOP, product labeling, and other state requirements.

Voted: To not adopt the decision by the DALA in Brianna Larson, et al, Petitioners v. Department of Agricultural Resources, Respondent and to dismiss the appeal as moot.

Moved: Richard Berman
Second: Richard Bonanno

Approved: 7 – 0 – 1
Abstentions: Lee Corte-Real

B. New Employees/Staff Updates

The Department has hired the following two individuals as pesticide inspectors:

- Clayton Edwards, covering the south coast; and
- Jesse Diamond, covering the northeast.

After some 38-years of dedicated service to the Commonwealth, Mark S. Buffone, BCE has retired from the Department. The Department is now in the process of filling his duties across a number of different positions within the Department.

C. Pesticide Program Updates

- Direct Supervision Regulations: The public hearings took place as scheduled and the public comment period was extended for an additional 30-days. The Department is now working on the Hearing Officer's Report.
- State Restricted Use Termiticides: The Subcommittee is moving forward to take up this issue and consider a revision of the current Subcommittee policy. The DPH is looking to survey other health agencies for information related to subsurface termiticides and the Department is conducting a survey of other State Pesticide Regulatory Agencies to assess how they regulate such products. This matter will be taken up again at the July Pesticide Board Subcommittee Meeting.

D. Minutes

Discussion

The minutes from the Monday, March 10, 2014 Meeting were presented for consideration.

Voted: To accept the minutes of the Monday, March 10, 2014 Meeting.

Moved: Richard Berman
Second: Richard Bonanno

Approved: **6** – 0 – 2
Abstentions: Michael Moore and Brian Magee (Not present at 03/10/2014 Meeting)

E. Meeting Adjournment

Voted: To adjourn the Pesticide Board Meeting.

Moved: Richard Berman
Second: Richard Bonanno

Approved: 8 - 0

The Meeting was adjourned at approximately 11:09 A.M.