

MASSACHUSETTS PESTICIDE BOARD MEETING

Minutes of the Board Meeting held at the McCormack Building, 1 Ashburton PL; Conference RM 3, 21st FL; on Tuesday, June 19, 2018

The Meeting was called to order at approximately 10:00 A.M.

BOARD MEMBERS IN ATTENDANCE

Commissioner John Lebeaux (Chair)	Present
Marc Nascarella, DPH, Designee for Commissioner Bharel, M.D.	Present
Michael Moore, DPH, Food Protection Program	Present
Ken Simmons, DFG, Designee for Commissioner Amidon	Present
Kathy Romero, DEP, Designee for Commissioner Suuberg	Present
Ken Gooch, DCR, Designee for Commissioner Leo Roy	Present
Richard Berman, Commercial Applicator	Present
John Looney, Public Member	Absent
Brian Magee, Toxicologist	Absent
Laurell Farinon, Conservation	Present
R. Christopher Brittain, Public Member	Absent
Steven Bird, M.D., Physician	Absent
Steven Ward, Farmer	Present

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

OTHER INDIVIDUALS PRESENT:

Bob Mann, NALP; Laura Kelly, POCCA; Bill Siegel, Orkin; Robert Leon, General Environmental Services/NEPMA; Ted Brayton, Griggs & Browne; Bruce Taub, Esq. Counsel for Town of Brewster; Daniel Pessar, HLS; Jessica Burgess, Esq. Counsel for MDAR; Nicole Keleher, DCR; Hotze Wijnja, Ph.D., MDAR; Taryn Lascola, MDAR; Steven Antunes-Kenyon, MDAR

DOCUMENT(S) PRESENTED

- Pesticide Board Agenda for June 19, 2018
- Pesticide Board Minutes from the April 4, 2018 Meeting
- Public Comment Submission to MDAR from the Town of Brewster, et. al. by Attorney Bruce Taube, Esq.
- Letters to the Board on behalf of The Whiting Group by C. Whiting Rice

A. Approval of the Wednesday, April 4, 2018 Meeting Minutes

Commissioner Lebeaux presented the Minutes from the Wednesday, April 4, 2018 Meeting for the Board's consideration.

Voted: To accept the minutes of the Wednesday, April 4, 2018 Meeting.

Moved: Steven Ward

Second: Laurel Farinon

Abstained: Richard Berman and Michael Moore

Approved: 7 – 0 – 2

B. Pesticide Program Updates

Taryn Lascola, Director, stated the following:

- That the ROW Advisory Panel met on May 22, 2018, to review the proposed Eversource VMP. The Panel made general comments about grammar, but also included a request to simplify terms and phrases, as well as other suggested changes. Eversource is now working on the draft VMP to implement the suggested changes. Once the changes have been made and the updated VMP submitted for review again, the ROW Advisory Panel will meet again to go over the revised plan.
- That Pesticide Licensing has sent out the annual audits to selected pesticide applicators for review of their compliance of the Department's retraining or recertification requirements. The signed audit letters and related training certificates or credits are due in August. With respect to Enforcement, the inspectors are off to another busy season—performing various inspections and responding to any complaints.
- That the Department has decided to conduct a water monitoring study in response to concerns from public water suppliers for impacts from ROW pesticide applications. The study will sample public water suppliers and where there is none we will look into the use of monitoring wells. MDAR Environmental Chemists, Hotze Wijnja, Ph.D. and Chief Inspector Michael McClean are working with the Cape Cod Commission in the selection of municipalities. Participation in the study is voluntary and the focus will be on active ingredients found in herbicide products used in approved ROW programs. These chemicals include such chemicals as glyphosate, imazapyr, metsulfuron-methyl, sulfometuron-methyl, and others.

C. Pesticide Board Advisory Council

Robert (Bob) Leon, Member of the Advisory Council and Representing General Environmental Services stated that the Council had its first Meeting on May 4, 2018. The meeting focused on informing all participants of the Open Meeting Law requirements and the administrative procedures necessary for conducting such public meetings. Business topics briefly touched upon included the concepts of business registration, (7:39), and permitting for the treatment of catch basins. Licensing requirements, the concept of an apprenticeship program, and licensing as it relates to the mosquito control sector. The next meeting will be on September 26, 2018, at the Division of Fish and Wildlife Headquarters in Westboro, MA.

D. A Discussion of Materials Provided by The Whiting Group, Represented by C. Whiting Rice

C. Whiting Rice, of The Whiting Group, handed out copies of an informational packet and described the packet, as essentially consisting of two letters. What follows are the main points or issues that he presented.

- The genesis of the first letter came about in June of 2017 when a question was raised about the required setbacks from municipal public and private water supplies. The State's regulations do not refer, to any vertical depths, but discuss horizontal distances as they relate to those resources. Questions were raised by Attorney Bruce Taube as to whether vertical distances should be considered.
- The geology and hydrology of Cape Cod is much like a giant sand pond. The soils there are much different from that of the Berkshires, Pioneer Valley, Blue Hills or in and around Boston. Groundwater is found at a depth as shallow as close as 6-feet from grade. The entirety of Cape Cod consists of one sole source aquifer that is then broken up into six (6) lenses where municipal public wells and private wells obtain their water. Our concern is how quickly pesticides can reach these resources vertically. Due to the nature of the soils on Cape Cod, concerns are minimal for horizontal run-off or transport; therefore, the request is to work with MDAR staff to amend the language in regulations as it relate set-backs. The problem with the current regulations is that they do not distinguish between the different geologies found through the Commonwealth.
- C. Whiting Rice is interested to know how much power the Department has in terms of attaching conditions when approving a VMP or YOP. He states that one of the purposes of the ROW program is to reduce the amount of products or chemical used over time.
- The public was once able to obtain data on the total amounts of chemicals used in approved ROW programs; however, that is no longer available. When Eversource indicates in their plans that their applicators will maintain accurate daily logs of materials used, that data resides with Eversource and is not made available to the public. There should be a reporting requirement that the Department imposes on the ROW proponent, but that does not currently exist.
- Some years ago, the Town of Wendell put forward a by-law looking to regulate pesticides at the local level. The Attorney General's (AG) Office struck these down during the bylaw review. The AGs' decision was appealed and courts researched the intent of MGL c. 132B. The courts did find that the bylaws seeking to regulate pesticides usurped the authority of the Department. Their opinion also provided another interesting observation, that the Massachusetts Pesticides Control Act does not preclude the municipalities from being involved. For example, the law requires that municipalities receive notice when ROW activities are proposed within their boundaries. We're looking to see if Department staff and others can be a little more cooperative with municipalities.
- Every municipality took time to write comments on the Eversource VMP. During the meeting of the ROW Advisory Panel, those comments were simply dismissed. He stressed that those comments should carry some amount of weight because municipalities listened to the citizens and those comments include those concerns.
- Lastly, the Whiting Group and associated parties would like the Board to give some consideration to conducting an updated State review of the herbicides used in ROW. According to him, It has been some time since the harmful effects of these herbicides have been examined

by the Board. He and associated parties would like to see if the Board would be willing to conduct an updated review.

- In the past, the Massachusetts Pesticide Board chose to ban Alar, a plant growth regulator used in the production of apples. Even though the EPA had stated that Alar was approved for use, Massachusetts and other northeast apple-growing states made the decision to ban the use of this product. The Board can do these things and the act to protect the people. Whiting Group would like to see you do it again in the future.
- C. Whiting Rice attended a pole hearing conducted by a party identified as NSTAR d.b.a. Eversource. All the related pole hearing documents also referred to NSTAR, yet when he reviewed the VMP, he did not see the word NSTAR listed. He asks the Board as to what corporate name the Department is going to use if it approves the VMP. To whom should all of these matters be addressed? Is it NSTAR d.b.a. Eversource or Eversource with no mention of NSTAR?

Commissioner John Lebeaux Suggested that the Board review the materials provided by C. Whiting Rice of The Whiting Group and discuss these at a future meeting. He then inquired if the Board had any questions it would like to raise.

Board Member Laurell Farinon asked if the Department would be able to expand on proposed water quality study now under development which concerns public water suppliers and seeks to assess any potential impacts from ROW pesticide applications.

In response to the desire for more information, the Department's Environmental Chemist, Hotze Wijnja, Ph.D. provided the following:

- That the proposed study is a follow-up to an earlier effort that began in 2011. At that point, the Department was working to determine testing locations and secure funding for monitoring wells. Currently, the MDAR is working with the Cape Cod Commission to obtain mapping information and further develop a water monitoring study. This effort is also part a response to concerns expressed in 2017 that the Department did not have any actual data for use in risk assessments. The Department is working to contact Cape Cod municipal water departments and obtain their participation. This study targets ROW areas and focuses on herbicides used in ROW programs.
- That the Department does have risk assessments based on modeling data and that these risk assessments focus on worst case scenarios. This modeling data indicates the levels that could occur would not reach concentrations approaching EPA levels of concern (LOC).
- That with limited resources the Department has decided to look toward public water suppliers and work to obtain actual monitoring data. The idea is to look for well locations relative to the treated ROW and select such wells that are downstream from those application areas in hopes to detect and measure pesticide levels if such leaching does occur. The chemical analysis will look for ROW pesticides that are not typically part of a routine municipal water testing protocol.
- That groundwater reports and related data are available from other sources; such as the U.S.G.S., and this data is publicly available and found online. The Silent Spring Institute also has conducted some studies of pesticide residue analysis from public drinking water and private wells.

Commissioner John Lebeaux turned the discussion back to the packet of materials handed out by Attorney Bruce Taube, Esq., at the April Board Meeting. He indicated that, as outlined in the April Board Minutes, hard copies of the materials were not available to all members of the Board. At that time, Dr. Looney indicated that he wanted time to review the information in the packets before the Board took any action and that he would like to know what MDAR thinks of the materials provided.

The Commissioner also stated that during the April Board Meeting, the Department gave an overview of the VMP process and explained that VMPs do not come before the Board for review and approval. The Department also responded to a public information request made at that Meeting.

Commissioner Lebeaux asked if there were any reactions or comments from other Board relative to the packet of information provided by Attorney Bruce Taube, Esq. or if the Board would prefer to wait until the next Meeting. He then asked if the Department staff would also discuss their observations made from their review of these materials.

On behalf of the Department Director Taryn Lascola stated the following:

- That relative to comments in the materials that the Advisory Council was not meant to be a body geared explicitly towards addressing ROW issues.
- That relative to comments about pesticide use data, the Department collects applicator annual use reporting data. While the VMP does mention that applicators are to have a daily log (vegetation management record) of pesticide use data, the VMP does not require the data submitted to the Department. The MDAR can indeed request daily individual applications records; however, such requests must be reasonable. These requests happen during a Pesticide Enforcement investigation into complaints or when the Department needs such specific records.
- That with respect to referenced Integrated Pest Management (IPM) annual reports, the language describing such reports was taken from Ch. 85 of the Acts of 2000, which includes a number of unfunded mandates. She added that while the Department does work consistently to promote IPM, to the best of her knowledge these reports have never been written.
- That relative to the discussion of proposed legislation, one such proposal is that utilities offer a “no spray” option to municipalities. In this bill, if the municipality wants to take the “no spray” option, then they would be responsible for the vegetation management. If the municipality and the utility cannot agree, then arbitration would be pursued. She estimates, that were such legislation to go into effect, it could delay needed ROW management some five months and if an agreement is not reached or if vegetation management is not made in a timely fashion, the utility still retains the right to make the needed ROW herbicide applications.

Commissioner Lebeaux then turned the floor over to Attorney Bruce Taube, Esq.

Attorney Taube outlined some points and expressed some opinions that are summarized as follows:

- That he observes the Board and all present to be learning something from the various packets of information and related Board discussions. He believes one such lesson is that all can see that the ROW rules and processes are seriously flawed.
- That while working with the Town of Brewster to comment on the proposed VMP, he found one avenue was to challenge the content of the VMP, but another was to challenge the VMP as a whole—making a case that it’s fundamentally defective. He suggests that the Town may not

even be able to get through the review stage in a meaningful way and that by this representation the Town does have the authority to make its case.

- That the Town's comments were forwarded to the ROW Advisory Panel and while it was observed that Eversource staff left the Advisory Panel Meeting with a long list of editorial changes, there were no substantive changes.
- That the single source aquifer on Cape Cod is at risk and that that the Department, while seeking not to appear arbitrary and capricious, is failing to permit the presumption of being in favor of the public rather than being in the favor of the corporation. As such he comes before the Board making his case and asks that the Board express to Eversource that the proposed VMP is wholly inadequate.

Commissioner Lebeaux then turned the floor over to Laura Kelly, President of Protect Our Cape Cod Aquifer (POCCA)

Ms. Kelly stated that 17-towns and a few on Martha's Vineyard had written comments on the VMP and all state that they do not want herbicides used in their communities as part of the Eversource VMP. She States that it's now in the hands of the Board and asks the Members to do the right thing and support these communities.

Attorney Bruce Taube, Esq., then asked Commissioner Lebeaux if might ask a question before the close of the meeting. He then asked if when the revised VMP comes out, will there be a new comment period that opens up.

The attorney for the Department, Jessica Burgess, Esq., then explained that there is no requirement for such a new comment period under regulations. She added, that when the ROW Advisory Panel last met, they indicated, that in addition to reviewing the revised VMP, the Panel wanted to review and discuss the public comments received. She also stated that the next meeting of the ROW Advisory Panel has yet to be scheduled and that the revised VMP has yet to be received. The meetings of the Panel are indeed public and the next meeting will be posted in accord with the Open Meeting Law (OML). The location of the Panel meetings is chosen to help ensure that a Panel quorum is achieved and that while the Panel may be discussing the comments received—the Public Comment period is closed. The purpose of the meeting is to discuss the Panel's business.

Then Commissioner John Lebeaux, after asking the Board for any other issues or comments, inquired if there was a motion to adjourn the Meeting.

E. Meeting Adjournment

Voted: To adjourn Tuesday, June 19, 2018 Meeting.

Moved: Kathy Romero
Second: Richard Berman
Approved: 9 – 0

The Meeting was adjourned at approximately 10:44 a.m.