

MASSACHUSETTS PESTICIDE BOARD MEETING

Minutes of the Board Meeting held at the Charles F. Hurley Building, 6th FL, Conference RM C/D on Friday, March 24, 2017

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

BOARD MEMBERS IN ATTENDANCE

Steven Antunes-Kenyon, MDAR, Designee for Commissioner Lebeaux (Chair)	Present
Marc Nascarella, DPH, Designee for Commissioner Bharel, M.D.	Present
Michael Moore, DPH, Food Protection Program	Absent
Ken Simmons, DFG, Designee for Commissioner Peterson	Present
Kathy Romero, DEP, Designee for Commissioner Suuberg	Present
Ken Gooch, DCR, Designee for Commissioner Leo Roy	Present
Richard Berman, Commercial Applicator	Absent
John Looney, Public Member	Absent
Brian Magee, Toxicologist	Present
Laurell Farinon, Conservation	Absent
Chris Brittain, Public Member	Absent
Steven Bradley Bird, M.D., Physician	Present
Steve 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, MALCP; Aileen L'Etoile; Bruce Taub, Esq., Town of Brewster; Jessica Burgess, Esq., MDAR; Michael McClean, MDAR; Clayton Edwards, MDAR; and Steven Antunes-Kenyon, MDAR

DOCUMENT(S) PRESENTED

- Legal Summary Packet
 - Letter from Town of Brewster requesting adjudicatory hearing;
 - Letter from Town of Dennis requesting adjudicatory hearing;
 - Letter from Town of Orleans requesting adjudicatory hearing;
 - Letter from Town of Eastham requesting adjudicatory hearing;
 - MDAR, Motion to Dismiss, Jessica Burgess, Esq.
 - Eversource, Motion to Dismiss, Nancy Kaplan, Esq.
 - Towns' Opposition to Respondents' Motion to Dismiss, Bruce Taub, Esq.
 - Recommended Final Decision of the Division of Administrative Law Appeals, Hon. James P. Rooney, First Administrative Magistrate

A. Presentation of the DALA Recommended Final Decision by Attorney Jessica Burgess, Esq., MDAR Legal Counsel

Attorney Jessica Burgess, Esq. presented to the Board the recommended decision by the Honorable James P. Rooney, First Administrative Magistrate, Division of Administrative Law Appeals (DALA), that the towns did not plead specifically or sufficiently to demonstrate standing and recommending that the matter be dismissed. Jessica stated that it's now up to the Pesticide Board to determine if it should adopt the decision by DALA and dismiss the matter or if it should proceed differently in a manner that the Board would like to see.

Attorney Burgess explained that under MGL c. 132B section 13, the Massachusetts Pesticide Board appoints a hearing officer to hear the appeals brought forward. The decision rendered is then brought before the Board for their review and final adjudication. She also clarified that it's not an opportunity for new evidence or materials to be presented. The review of the official record and the recommended decision is to be the heart of the matter decided upon by the Board. She also announced that the counsel for the appealing towns was present wanted an opportunity to speak with the Board regarding the 2017 ROW matters that have been raised.

By letters dated July 28 and August 3rd four towns from Cape Cod appealed the MDAR approved Eversource Yearly Operational Plan (YOP). These towns are Eastham, Orleans, Brewster and Dennis; which, filed their appeals within the time frame required and by virtue of the vote by the Pesticide Board the matter was referred to DALA.

Attorney Burgess indicated that opposing counsels had a prehearing conference. At that time magistrate Rooney issued a motion schedule and the parties adhered to it. The MDAR submitted everything to DALA by the end of 2016 and early 2017. The motions that were presented to DALA were motions to dismiss on behalf of the MDAR and motions to dismiss by Eversource. There was opposition filed on behalf of the towns. Both motions to dismiss argued that the towns lacked standing, that they were not considered persons aggrieved, and that they had not alleged specific injuries that could be demonstrated through the pleadings submitted thus far. Arguments included that the towns could not demonstrate that they would be harmed or were harmed by the actions taken by the MDAR. Both MDAR and Eversource argued the same position.

The towns submitted a collective brief and opposed the Department's motions to dismiss. Alleging that they did in fact present harm that could be justified particularly the aquifer water source on Cape Cod and that the Department's actions would in fact harm those parties and that they did have standing and that the case should go forward.

Magistrate Rooney reviewed all the motions submitted and rendered a decision February 23, 2017. In his decision, the Magistrate found that the towns did not plead sufficiently to prove that the towns had standing. The towns did not allege actual harm, they did not demonstrate specific indications as to what applications or spraying by Eversource would in fact harm the residents of the Cape vs. the public in general. There is a requirement to make a case for "standing" in the regulation, that they demonstrate harms that are different than the general public. The magistrate also indicated that, had he not made a decision on standing, that it was likely the case would be dismissed as moot, since the approvals for yearly operations plans are only good for one-year. In other words, Eversource cannot do anything under that 2016 approval anyways. As the Board may recall that was the decision rendered by the Pesticide Board in an earlier appeal a few years ago.

To be a person aggrieved one has to allege specific facts or specific injury in sufficient facts to allow the Department to determine that they were in fact a person aggrieved. One has to show that he or she has suffered specific harm or specific injury. It cannot be hypothetical or so far off—that the alleged harm or

injury is by inference. It has to be actual harm or probable enough that it was directly related or caused by the Department. The DALA Magistrate determined that the towns did not do that. Based on documentation submitted, the four initial letters or pleadings, it was not sufficient enough.

In explaining the timeline of events, Attorney Burgess indicated that the towns promptly filed their appeal in late July and early August—there was no delay on their part. She explained that it's the nature of appeals, they are not always resolved quickly but may take some time for certain complicated matters. In this case the appeal process started in late July for a Department approval that expired in December. It's a very tight window of time and one alternative may be to appeal the 5-year Vegetation Management Plan (VMP) as opposed to the Yearly Operational Plan (YOP). This issue was recognized by the DALA Magistrate in the recommended decision to the Board.

Had the Department's approval not expired in December 2016, the normal course of action would be for the appellant to re plead to address the concerns of the DALA Magistrate. Given that it did expire, this was not the recommendation decision by the magistrate.

The Board is currently tasked with looking at the current facts of the case and the recommended decision by the DALA magistrate.

Voted: Motion to accept the Magistrate's recommended decision.

Moved: Brian Magee
Second: Michael Moore
Approved: 9 – 0

The Board then made a motion to have the Steven Antunes-Kenyon, Acting Chair sign the decision of the Pesticide Board.

Voted: Motion to have the Acting Chair sign the decision by the Board.

Moved: Michael Moore
Second: Brian Magee
Approved: 9 – 0

B. Presentation by Attorney Bruce Taub, Esq., on Behalf of Towns of Brewster, Dennis, Orleans and Eastham, Seeking an Advisory Ruling from the Pesticide Board

Attorney Bruce Taub, Esq. presented to the Board a request for relief from the State Pesticide Laws which he believes creates a catch-22 for those seeking to appeal a Department approved YOP. He explained that after the YOP is submitted for consideration, the MDAR then provides a 45-day comment period. After that period, the MDAR must then make a decision to approve or not approve the YOP. Then there is a 21-day period to assert adjudicators hearing rights. At that point, the MDAR needs it's time to respond, and by that time the spraying has happened, and the appeal is moot. For this reason he requests an advisory ruling with regard to the statute and asks to have the MDAR expedite its decision making process to help prevent the appeal from being found mute.

According to Attorney Taub, every time the Towns follow the current process, the spraying has already taken place and their appeal is found to be moot. Magistrate Rooney's ruling cites that they are persons

that might be aggrieved, that could have standing, and that have alleged harm but he finds the harms not specific enough. If there was ample opportunity the Towns could come back with more specific harms.

Attorney Taub believes they do have such information, but they have no opportunity to present them given the processes creating a catch-22. He explained how the current process will play out again in calendars 2017 unless the Board issues a ruling telling the Department that it needs to expedite the process. He asks the Board to use its powers to tell the Department that it does not want the Towns appeal to be found moot due to the poorly crafted statute that leaves the towns with little time to make their appeal. The time-frame he has outlined would have the Department move forward so expeditiously that the Magistrate will be able to render a decision before the spraying actually starts. He describes the current right of appeal as a right that is not a right—but rather a charade.

The Board inquired about their powers to issue advisory rulings and how such a process is carried out. Attorney Burgess explained that any person may petition the Board for an advisory ruling on the applicability of any statute or regulation enforced by the Board. Upon receipt of such a request for an advisory ruling, the Board has 90-days to act. The Board is given fairly wide latitude in its decision making process and it may rescind the decision made today or issue an advisory ruling. Given the wide latitude of the Board to make such advisory rulings—including recommended regulatory changes, Attorney Burgess asks that the Board not make an advisory ruling that runs counter to State Pesticide Laws and Regulations and that the Board bear in mind that the Department is tasked with enforcing such current laws and regulations.

The Board is limited where the laws and regulations are explicitly stated. For example, Attorney Burgess pointed out that current rules provide a 21-day appeal time-frame. Here the Board could not make an advisory ruling says it wants to change the appeal time from 21-days to 30-days. In this particular case, the appellate is seeking a more succinct appeal process and the time-line for this process is not defined anywhere in State Pesticide Laws and Regulations.

Attorney Burgess explained that the Department does not have a specified time when the ROW YOP is submitted by the applicant. This variability plays a critical role in the time constraints effecting the appellate and being discussed here today. She added that the pesticides being used under the ROW program are first registered by the U.S. EPA prior to registration by the Pesticide Board Subcommittee and that such approved ROW pesticide uses are certainly not in violation of any current federal or state law.

Attorney Burgess explained that the Department is charged with the responsibility of making sure that each approved ROW VMP and YOP is consistent with the State Pesticide Laws and Regulations and that that some of the issues expressed by Attorney Taub may be outside the jurisdiction of the Department.

Attorney Taub pointed out that the clock for the current (2017) Eversource YOP is running and that the Department's 45-comment period expires on Monday, March 27, 2017. There is no reason that the Department cannot promptly rule that it affirms the YOP to initiate the 21-day appeal period. Once this 21-day period has expired, if the Department were to rule on the YOP by the end of April and be prepared to respond to a new improved request for an adjudicatory hearing following the roadmap outlined by the magistrate, the matter could be argued in front of a magistrate by mid-August and the magistrate could render a ruling by mid September and that would be presumably before the actual spraying and this would make this a real process rather than a catch-22.

Attorney Burgess explained that what the towns are asking for is outside the scope of the VMP and YOP process, but that the Department does understand that they have concerns about what is being used. She added that all of the materials and methods being used are approved and within both Federal and State law. The issue of whether pesticides should be used on ROW is outside the scope of the process under review by the Department. The Department may indeed deny the approval of a YOP and may also ask for

modifications or clarifications to any submitted YOP. The Department may not however deny an approval of a YOP for reasons outside its authority. As a government agency the Department respects the party's right to appeal; however, the Department cannot act beyond its authority as Eversource also has rights under the law to carry out these activities and they may legally challenge the MDAR on the opposite side.

When asked by the Board about the specific harms he would present on behalf of the Towns, Attorney Taub indicated that following the guidance provided by the magistrate, it was his intention to have the municipal water boards and boards of health provide some of this information.

Attorney Burgess indicated that such data should not be held back by the towns during the public comment period, but presented for the Department's consideration; such that, it may adequately review the VMP or YOP. She added that the comments typically received during the open comment period tend to be very general and very vague with respect the specificity of harms.

Attorney Taub stated that they had submitted an affidavit from a pesticide expert Professor John Stalk, Ph.D. who indicated that there were species impacted by these applications and that these species were protected under Federal and State laws and that there were concerns for the toxicity of pesticide mixtures that had not been tested by the U.S. EPA. Attorney Taub added that the Towns could indeed provide more specific information in due course but that he does not presently have data on levels of the ROW pesticides that are found in groundwater or public drinking water supplies. What he does have are concerns expressed by the water boards and the health departments. Attorney Taub indicated that he does not presently have this data, but that he would have it 21-days after the Department makes its ruling.

The Board clarified that the public comment period is the best time for the towns to share any information they have about harms from ROW activities within their communities. Such comments are then shared with the Vegetation Management Panel or VMP for their review prior to the approval of the 5-year Vegetation Management Plan or 1-year Yearly Operational Plan.

In response to the discussion, Attorney Taub stated that by 5 p.m. on Monday, March 27, 2017 he would present as much specificity of harms from the ROW pesticide application as he is able to obtain. He also mentioned that his clients did contemplate an approach whereby they might focus their efforts on the 5-year VMP and forego responding to the current YOP now open for public comment. The Boards of Selectmen whom he represents have indicated that they are indeed seeking a hearing on the matter and it's his intention to go through all the comments submitted to find those that contain the information need to satisfy the Magistrate's ruling.

Attorney Burgess clarified that the Eversource 5-year VMP for areas on the Cape expires at the end Calendar Year 2017 and Michael McClean, Chief Inspector provided an overview of the YOP process—from the initial submission to approval by the Department. He also provided a brief overview of the more generic VMP submission. Both Michael and Attorney Burgess further explained that the 45-day extension to the public comment period is typically provided when there appears to be an increase in public interest for a given YOP. The decision to extend the public comment period is made by the MDAR Commissioner when there appears to be an increase in public interest for a given YOP and the Department believes additional time is needed to ensure adequate collection of public comments.

The Board then engaged in a general discussion of the various aspects of the Department's YOP approval process, how this processes typically play out, and how they impact the ability for appeal before a Magistrate.

C. Pesticide Program Updates

Steven Antunes-Kenyon explained that the effective date for the new Federal Regulations for the Certification of Pesticide Applicators, 40 CFR Part 171, has been delayed until May 22, 2017 for further review by the new Whitehouse Administration.

The Department is in its busy season with respect to examination and licensing. There is an exam, if not two exams, every week through the end of May. Approximately 100 to 130 people are taking the Department's exams every week.

The Department is also sending out its Recertification Audit Letters next week and looks to audit approximately 1,300 pesticide applicators for their compliance with State retraining requirements. Work on the new e-Licensing system known as EIPAS is moving along well; however, the anticipated release date has been pushed back from April to sometime mid-summer.

D. Legal Updates

Exclusions from Applications

Attorney Burgees indicated that the Department's revised regulations Exclusions from Applications are now in effect and all exclusion requests are now submitted to the Department. The Department has a new webpage dedicated to facilitate such requests from the public and is working to create an online submittal form to make the process even more efficient. The MDAR continues to work with municipalities and mosquito control districts to disseminate information on the new process and obtain all requests submitted directly to the city/town clerks following the old regulations.

F. Other Business

Next Board Meeting Date

As the Pesticide Board typically meets in June a Wednesday, June 7, 2017 date was suggested as the next Meeting date. This date also allows the Board to be within the 90-day time period to issue an advisory ruling.

Waste Pesticide Collection Event

Michael McClean explained that the Pesticide Program had received a grant from the DEP through the U.S. EPA for pesticide waste disposal. Some \$32,000 is available for this disposal event targeting materials from pesticide applicators. Registration information was mailed out to companies that apply pesticides, licensed pesticide dealers, as well as Privately Certified Applicators.

G. Meeting Adjournment

Voted: To adjourn the Friday, March 24, 2017 Meeting.

Moved: Michael Moore
Second: Steve Bird, M.D.
Approved: 9 – 0

Meeting adjourned at approximately 11:50 a.m.