

MASSACHUSETTS PESTICIDE BOARD MEETING

Minutes of the Board Meeting held at the McCormack Building, 1 Ashburton PL; Conference RM 3, 21st FL; on Thursday, September 7, 2017

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.	Absent
Michael Moore, DPH, Food Protection Program	Present
Ken Simmons, DFG, Designee for Commissioner Amidon	Present
Kathy Romero, DEP, Designee for Commissioner Suuberg	Absent
Ken Gooch, DCR, Designee for Commissioner Leo Roy	Present
Richard Berman, Commercial Applicator	Present
John Looney, Public Member	Present
Brian Magee, Toxicologist	Present
Laurell Farinon, Conservation	Absent
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; Shea Paxton; C.W. Rice, The Whiting Group; Lauren Kelly, President of POCCA; Patrick Ellis, Town of Brewster; Lucy Morrison, Martha's Vineyard; Rachel Lake, POCCA; Bruce Bouck, DEP; Bill Hayes, Eversource; Sean Redding, Eversource; Paul Sellers, Eversource; Jimmy McDermott, Eversource; Anthony Johnson, Eversource; Nancy Kaplan, Eversource; Denise Bartone, Eversource; Marissa Goldberg, Eversource; Robert Leon, General Environmental Services/NEPMA; Michael McClean, MDAR; Clayton Edwards, MDAR; Bruce Taub, Esq. Counsel for Towns Petitioning for Advisory Ruling; Jessica Burgess, Esq. Counsel for MDAR; Hotze Wijnja, Ph.D., MDAR; Taryn Lascola, MDAR; Steven Antunes-Kenyon, MDAR

DOCUMENT(S) PRESENTED

- Minutes from the Wednesday, June 7, 2017 Meeting of the Pesticide Board
- POCCA Petition to Commissioner Lebeaux
 - Letter to Commissioner Lebeaux
 - Power / Transmission Line and Groundwater Map
- Letter from Senator Julian Cyr
- Legal Summary Packet

- *Petition from Attorney Taub on behalf of the Towns of Brewster, Eastham and Orleans by and with their Boards of Selectmen and Town Water and Health Department Agents: Motion to Declare a one-year Moratorium on the Spraying or in the alternative Motion to Order an Expedited Adjudicatory Hearing*
- *State Pesticide Regulations, 333 CMR 11:00 Rights of Way Management*
- *Rights-of-Ways and Pesticides: A selection of Applicable Statutes*

A. Approval of the Wednesday, June 7, 2017 Meeting Minutes

Commissioner Lebeaux presented the Minutes from the Wednesday, June 7, 2017 Meeting for the Board’s consideration.

Voted: To accept the minutes of the Wednesday, June 7, 2017 Meeting.

Moved: John Looney

Second: Michael Moore

Abstained: Richard Berman and Ken Gooch

Approved: 6 – 0 – 2

B. Pesticide Program Updates and Status Reports

Pesticide Board Advisory Councils

Taryn Lascola updated the Board with the progress being made to create a seven member Advisory Council.

Rehoboth Pesticide / Apiary Investigation

Taryn Lascola provided a summary of the Department’s findings relative to the investigation of bees found dead in an apiary located in the Town of Rehoboth. The chemical analysis of bees collected did support a finding that the insecticide fipronil was responsible for the loss of the hive. The investigation could not determine from where the pesticides came or who applied them. There were two hives in the apiary. The second hive was not harmed in the same manner, but remained active when the Department closed its investigation.

eLicensing / EIPAS and the ePLACE Portal

Taryn Lascola indicated that the new eLicensing system was indeed up and operational and that the Department was working with the EEA, its contractor, and the ePLACE Help Desk to continue to address various concerns, issues, or “bugs” found in the system. She added that ePLACE PIN / Account Link Letters were indeed mailed out to nearly 9, 400 actively licensed applicators or dealers; such that, they might create their accounts and link their existing pesticide records. The Department continues its efforts to encourage individuals to use the new system.

Robin Dooley with the EEA added that the system was still under warranty for another month to address any issues or bugs and that the EEA does have a strong team of experts who will continue to provide support and address new needs, issues, bugs or reporting requirements. She acknowledged that the process involved a lot of hard work and a lot of testing, but that overall it has been a success.

Board Member Richard Berman thanked the Department for its work on this project and commented that he believes this will help the pest control industry and related economy in Massachusetts.

Commissioner John Lebeaux thanked everyone for their hard work. He acknowledged the efforts of the MDAR Team that worked on the EIPAS Project, dedicating large amounts of time to it all the while maintaining their normal program related duties and activities. He also expressed sincere gratitude to the EEA and the DEP for all their work, cooperation and support, without which this project would not have happened.

C. Legal Updates

Motion to Dismiss

Jessica Burgess indicated that MDAR and Eversource, Inc. would file motions to dismiss the current appeal of the Department approved Eversource YOP.

D. Meeting Recess

In order to provide additional time for Attorney Bruce Taub to arrive at the Meeting and argue his case, Commissioner Lebeaux asked the Board to take a 10-minute recess and reconvene the Meeting at 10:30 a.m..

E. Motion to Declare a One Year Moratorium on the Spraying of Toxic Herbicides in Petitioner Town and/or Anywhere on Cape Cod and the Islands by Bruce Taub, Esq.

Attorney Jessica Burgess, Esq. presented an overview of how and where State Pesticide Laws required the Department to seek an advisory ruling from the Board.

Attorney Burgess explained that in response to the petition from Attorney Bruce Taub, Esq. for an Advisory Ruling, the options available to the Board include the following:

- To not respond, but to thank the petitioners for submitting the motion, but not take any formal action;
- To deny the request for a moratorium; or
- To render a ruling approving the moratorium and subsequently advising the Department to rescind its approval of the 2017 YOP.

Attorney Taub indicated that this was a serious matter and that 15 towns on the Cape and 6 on Martha's Vineyard had all voted on a non-binding agreement not to spray pesticides, but that has not worked. He explained that he would not be referencing any matter of pesticide toxicology in his arguments, but rather the following two points:

- that the current system presents a charade of the appellate process; and
- that the existing state pesticide laws prohibit the application of pesticides within 50-feet of public water supply.

Attorney Taub indicated that there is an October 13, 2017 hearing date, but that it would take place after the pesticide application have occurred and he asked the Board to stop the pesticide applications

on the grounds that the appealing parties have never been heard and never received their appeal. He emphasized that the Towns do not have a legitimate appeal process.

Attorney Taub stated that Pesticide Regulations 333 CMR 11.00 indicate a number of constraints on spraying. Most importantly for his argument, the regulations state that pesticide applications cannot be made within 50-feet of a public water supply and that the regulations do not preclude consideration of aquifers or depth to groundwater. It's his argument that the aquifers on Cape Cod, the source of water for both private and public water supplies, that are protected and that such aquifers are indeed closer than 50-feet to any Cape Code ROW pesticide applications approved by the Department. To help support this argument, he referred to maps showing drinking water supplies on Cape Cod, depths to groundwater, and the NSTAR (Eversource) ROW power / transmission lines.

According to Attorney Taub, these maps show that the ROW applications are putting the aquifers at risk and he argued that while the ROW Regulations may work for certain geographic areas of the Commonwealth; whereby, depth to groundwater is far greater than 50-feet, they do not work for Cape Cod. They create a situation where the risks outweigh the benefits. In support of his argument, he referred to a letter from the Director of Health and Natural Resources for the Town of Chatham, one of the two towns still involved in the case. In this letter, the Director states with specificity, three property locations under the power line, near the power line, or part of the power line that have a depth to the groundwater that is far less than 50-feet.

Pesticide Board Member John Looney indicated that the 50-feet being referenced in the State Pesticide Regulations, applies to the lateral distance from surface water systems and not aquifers. The depths to groundwater vary and so the risks from pesticide applications to these resources.

Attorney Taub interjected that the absence of any statutory or regulatory language that would preclude consideration of depth to groundwater or preclude consideration of aquifers does not argue against his case but rather strengthens it.

Pesticide Board Member Brian Magee clarified that the Pesticide Board took great care over several years in reviewing the currently approved Rights of Way Management Regulations (333 CMR 11.00). The Board carefully deliberated over the No Spray and Limited Spray sections. The sections of the regulations that speak to Zone I and Zone II are meant to address concerns for aquifers (water supplies). He added that the Board considered all of the issues before them, but that the specific issue of pesticide applications and depth to groundwater was not addressed, rather it was the lateral distance to resources; such as, private wells and surface waters, that was the focus of the Board's deliberations.

Pesticide Board Member Richard Berman added that the Pesticide Board Subcommittee product registration review and approval process has acted to address concerns for groundwater contamination. The MDAR Staff and Subcommittee review includes environmental fate properties and parameters for the protection of groundwater.

Pesticide Board Member Ken Simmons indicated that there was a Silent Spring Institute study from 2011 that reviewed the testing results from 20 private wells on Cape Cod. The testing looked for some 120 chemicals including 7 or 8 herbicides. The results showed that there were a lot of contaminants in the groundwater, but they did not the pesticides. Studies like this show that there is some data for review on the Cape groundwater and that data does not show the pesticides to be an issue. Ken argued that if there is a need to modify the regulations with respect to the treatment of the aquifers, than that should be addressed in the normal process, but that taking action today did to stop the applications is not

supported by the currently available science. He asked those present to look for data that addresses the environmental fate of these chemicals and specifically how they may or may not be bound in the soil as the studies suggest.

Bruce Bouk identified himself as a senior hydro geologist and Section Chief for Technical Services in the DEP Drinking Water Program with over 30-years experience. He has been working with Zones I, II, and III and Zones A, B and C throughout this time. He clarified that the Program only works on public wells and that private wells are addressed by the local boards of health. As far as public water supply well head protection areas, there are Zones I, II, and III. The Zone I is an arbitrary fixed radius around the public water supply well head. Nothing can take place in the Zone I. The Zone II is the zone of contribution and is the area considered to be contributing to the well. Zone III is the watershed. The Zone II is delineated for all wells that pump over 100,000 gallons per day; such as, the municipal water supplies. All DEP regulatory language refers to a lateral distance with respect to permitted activities and the various regulatory Zones. This is because of the great variability in the depth to groundwater.

With respect to depth to groundwater, Bruce indicated that throughout southeastern Massachusetts and in most areas of the Commonwealth, the depth to groundwater is commonly 5 to 10 feet. The average depth to groundwater is actually greater on Cape Cod vs. most other areas of the State. The Cape and Islands are considered a sole source aquifer.

With the assistance of Bruce Bouk and Michael McClean, Pesticide Board Member Michael Moore reviewed the Power / Transmission Line and Groundwater Map provided by Attorney Taub and discussed what activities are permitted in the Zone II and how utilities identify private wells prior to having pesticide applicator crews perform the work outlined in the YOP.

At the invitation of Attorney Bruce Taub, Patrick Ellis a Superintendent of Public Works for the Town of Brewster then explained that there are at least three Town wells where the depth to groundwater is less than 40 feet. He also indicated that the Town of Brewster has twice won a national award for its water quality.

Mr. Ellis indicated that there was enough uncertainty about the risk from such pesticide applications that this issue was worth looking at. He also commented that the community does not use any herbicides. He expressed concern for unregulated homeowner use where homeowners use greater amounts of pesticides as compared to industry professionals. He suggested that the uncertainty and risks of pesticide use may not be worth the benefits and he believes this is why Town of Brewster is involved in this issue. Patrick added that it was important for the public to have leadership from organizations like the Pesticide Board and other State Agencies when they support a precautionary approach and indicate that the risks are not worth the benefits.

Board Member Ken Simmons pointed out that various packets of information were previously provided to the Board and additional information was now also being presented. He asked for the record and for clarification purposes with respect to what specific documentation and/or evidence the Board was supposed to review and consider at the current Meeting in session.

Attorney Jessica Burgess indicated that Attorney Taub had submitted a motion earlier in June 2017 seeking a one-year moratorium on spraying. He subsequently submitted supplemental information that was also provided to the Board. In addition, the Department has provided information from POCCA for the Board's consideration. All of this information is part of the record and for the Board's consideration;

however, it's entirely up to the Board to determine the weight or importance of each record submitted while deliberating and rendering its decisions.

Attorney Jessica Burgess presented a detailed description of the Department's position. She emphasized that while the Department wants to continue these conversations and engage concerned citizens on these matters it also has an obligation not to act in an arbitrary and capricious manner, but to carry out its obligations under the related laws and regulations. Some of the major points expressed are outlined as follows:

- That the MA Legislature has determined that pesticide matters will be dealt with through the Department of Agricultural Resources and Chapter 132(b) as amended;
- That the Department's regulatory requirements were developed through a lengthy process involving the Board and followed the normal regulatory process for promulgation and public comment;
- That it's the Department's understanding that this petition (one-year moratorium) is being brought forth under Section 12 of Chapter 132(b) which is the imminent hazard or potential threat within a reasonable adverse effect on the environment;
- That while the Department has the authority to take action, issue an order, or take steps to address such an imminent hazard or potential threat, the Department does not have any information to support an alternative position than what is currently taken;
- That the Department has provided Attorney Taub with studies and information that the Department relies upon in making its determination;
- That the current regulations include precautions and provide specific guidance and setbacks for different zones and private wells;
- That the regulations contemplate such groundwater areas or resources using a lateral distance language and that language is also that used by the DEP;
- That such areas or resources are not found using the concept of a vertical determination but a two dimensional approach that is the consistent with the environmental community;
- That to have the Board consider the concept of a vertical distance for the interpretation of the existing regulations may be well beyond the authority of the Board and that to make such a regulatory interpretation also has far reaching consequences;
- That if the Board wanted to change the way it determines the distance to such areas, than it should go through the regulatory amendment process;
- That to issue a moratorium on pesticide applications is premature and that the Department and the Board do not have the evidence to support such action without being arbitrary and capricious;
- That what has been presented to the Board and the Department is contradicting information that actually refutes the position that is being taken;
- That the Department has regulations providing yearly operational plans for a five-year vegetation management plans and that the Department adheres strictly to this process and ensures consistent compliance;
- That the Department has provided regulatory oversight, conducted use observations and not hesitated any enforcement of its regulations with respect to Eversource;
- That the Department is not aware of anything that substantiates the targeting of ROW activities by Eversource or taking an approach that it's doing something wrong;

- That the Department takes its role very seriously and that the regulations are written in a manner recognizing how the Department must balance a number of competing interests;
- That the Cape is to be treated the same as the rest of the Commonwealth where the regulatory processes and the regulations themselves do contemplate the different areas or zones that must be protected;
- That the Department has a “sensitive area materials list” where it has determined what products may be used in areas deemed of a higher sensitive nature and that those products have undergone additional review for an added level of protection;
- That the Department has done its research and has staff who work to stay up to date on related studies and information and that through the Vegetation Management Plan (VMP) process also provides an advisory panel that convenes and reviews the five-year VMPs;
- That utility companies have an obligation to work with their municipalities and with their clients to obtain and update related ROW information and to keep such information updated;
- That while the Department appreciates the sentiment from where these municipalities and citizens are voicing their concerns, this is not something new and that these issue or concerns have been coming before the Board for a number of years;
- That the Department believes such a precautionary position as issuing a moratorium would be an overreach and that it is not something that the Board should undertake; and
- That the Department is open and willing to continue the level of communications with cities and towns and concerned citizens to gather more information but that a moratorium would have far greater implications than to simply stop the current spraying.

Commissioner John Lebeaux acknowledged that a number of interested parties were present and that while the Board Meeting was not a public hearing, he would allow for some comments and statements to be made.

Ms. Laura Kelly, President of POCCA thanked Jessica Burgess for her cooperation and communications on these matters and provided a brief description of the depth to groundwater on the Cape and Martha’s Vineyard. She also made a number of brief points as follows:

- That those concerned have not seen any flags on the ROW to indicate set-backs from private wells;
- That the MDAR might help with the flagging of private wells to help better indicate these resources along the ROW’
- That Eversource leave a hardcopy notification on the door of homes where the property overlaps the ROW and may therefore be treated but that many of those notified are seasonal residents and these notifications may not be effective;
- That the State should conduct more groundwater testing; especially, since most applications have occurred after 2011;
- That interested parties and municipalities wanting to conduct testing needed to know what labs were capable of such testing and when it was most appropriate to gather samples;
- That the Board was the body to issue the one-year moratorium and that vegetative growth during this time period along the ROW would not pose a threat to the transmission lines; and
- That Eversource applies thousands of gallons of herbicides along these ROW and that there are alternatives to these methods of vegetation management.

Attorney Jessica Burgess addressed some of the questions and concerns raised by Ms. Laura Kelly and then asked that Michael McClean, Chief Inspector address the Board.

Chief Inspector Michael McClean indicated that concerns for ROW herbicide applications on Cape Cod noticeably developed and took shape in the year 2009. Since that time, the Department has conducted countless “use observations”; whereby, it watches the how the applications are conducted.

Chief Inspector McClean collected the application records from the applicators and provided the details of his calculations for the amounts of material applied along the Cape ROW. He noted that in 2013 there were 2,026.5 gallon of pesticide mixture applied over 832.5 acres. He then went on to describe one particular ROW area identified as ROW 380 and provided details of the specific amounts of Krenite Herbicide used to treat the vegetation per acre. He also described for the Board the types of application methodology used along the ROW from foliar applications and basal treatments to cut stump treatments.

An Attorney for Eversource was then offered an opportunity to speak by Commissioner Lebeaux. The Eversource Attorney asked Attorney Taub to identify the parties that he represented before the Board. Attorney Taub identified the Town of Brewster, the Town of Chatham and a Ms. “Laou”. The Eversource Attorney then asked Attorney Taub to clarify whether he was seeking a moratorium on all pesticide applications on the Cape or just those ROW applications by Eversource. Attorney Taub responded that the focus of the current proceedings was directed only at those applications by Eversource.

Commissioner Lebeaux then asked those present from Eversource how a one-year moratorium would impact their operations or ability to conduct their business.

Bill Hayes from Eversource recalled how some years earlier the Company voluntarily stopped all spraying on the Cape. The Company did this in order to let those interested parties come to them with their concerns and examine their best management practices for vegetation management along the both transmission and distribution lines. The Company voluntarily went through this process for a few years and participated in public hearings at both the town and county level and worked with a Barnstable County Ad Hoc Vegetation Council where different groups were represented. The Company found this to be a great opportunity and required them to closely review their processes and methodologies. In the end, they concluded that they were indeed using the best management practices for vegetation management as are recognized at the national level. Taking those tools away forces the Company to more frequently access the areas where the transmission and distribution lines are located in order to use mechanical methods. The mechanical control techniques increase vegetation density and liability when accessing those areas. The use of herbicides, within their best management practices, allows the company to gradually less herbicides and smaller crews to conduct the work. There are specific areas along the Cape ROW where certain tree species; such as, Birch, Poplar, and Black Locust, may grow significantly in just one-season and require access and management.

Attorney Taub requested permission to comment. He expressed appreciation for the attention given by the Board to these issues. He characterized the Department’s regulatory approach to ROW management as a one-size fits all and expressed that Cape Cod presents a unique situation.

He then reviewed the authority or power of the Board with respect to addressing the potential for unreasonable adverse effect on the environment as outlined in MGL c. 132 B Section 12: Hazards; adverse environmental effects; departmental orders; violations.

Attorney Taub added that after the requested one-year moratorium, Eversource would need to file a new 5-year Vegetation Management Plan and that the whole review process would start anew. The requested one year moratorium does not have any applicability above and beyond this one year.

Attorney Burgess then responded and provided final comments for the Department by explaining that the Department was well aware of the powers under MGL c. 132 B Section 12, but that the information provided for the concerns raised did not rise to that level.

Commissioner Lebeaux informed the Board before it proceeded further that the Department had received some correspondence about this matter. As found in the packet of Meeting materials, the Department has worked to provide these communications to the Board. On September 5, 2017 the Department received a letter from state Senator Julian Cyr representing the Cape and Islands District. Commissioner Lebeaux explained that copies of the letter were provided to the Board and he wanted to take the time needed for the Board to acquaint itself with the Senators letter and position on the matter. While not reading the letter to the Board, Commissioner Lebeaux did explain that Senator Cyr wrote in support of a motion to declare a one year moratorium.

Commissioner Lebeaux then indicated that he believed it was now time for the Board to act, enter in a discussion or make a motion as the Board sees fit. He then briefly reviewed the options available to the Board as outlined earlier by Attorney Burgess.

Board Member Richard Berman commented that he did not believe the issues raised rise to the extent of indicating an imminent hazard or threat.

Board Member Michael Moore indicated that if the Board had evidence that the (regulatory) set-backs did not work, than he would support the motion for such a moratorium. He acknowledged the frustration over the appeals process and would be inclined to advise the Department to modify its process for collecting the VMP and/or YOP documentation; such that, the opposing parties have more time to review and successfully launch their appeal.

The Board with the assistance from Attorney Burgess and Chief Inspector McClean, then engaged in a lengthy discussion of the regulatory timelines for VMP / YOP filing, public notification, collecting public comments, and how all of this impacts the ability for parties to appeal after the Department has either approved, modified, or denied such applications filed by the utility companies.

Board Member John Looney made a motion to move the issue forward and engage the Board in further discussion:

Motion: that the Board do nothing and let the legal course proceed as provided. In this way, the legal decision (by DALA) may provide the Board with additional guidance on the matter.

Second: Steve Ward

In addition to the above motion, Board Member John Looney also expressed concern for the pesticides used and the potential mobility in the soils; however, he pointed out that if the Towns are truly concerned about this potential contamination, than they should engage in groundwater testing.

Relative to the inability of the opposing parties to complete the appeal process prior to the approved ROW spraying, Pesticide Board Member Michael Moore expressed that the issue at hand was not dissimilar to other significant municipal approval issues he had experienced. He further indicated that drawing out the review process and providing additional hearings might be helpful and he stated that he

would like amend the motion to encourage or recommend that the Department require or request that applicants of VMPs or YOPs file their applications sooner than the regulations indicate.

While acknowledging that the issues and concerns are real the Board then discussed how these issues have repeatedly come before the Board for several years now and yet the parties opposed to the Department approved ROW applications have yet to bring any new information to help support their (groundwater) contamination concerns.

The Board discussed the available options for the motion on the floor. Michael Moore withdrew his motion to amend the motion and a vote was called by Commissioner Lebeaux.

Voted: Motion: that the Board do nothing and let the legal course proceed as provided. In this way, the legal decision (by DALA) may provide the Board with additional guidance on the matter.

Moved: John Looney
Second: Steve Ward
Abstentions: John Lebeaux
Opposed: Michael Moore
Approved: 6 - 1 - 1

F. New Business

The Pesticide Board did not have any new business to discuss.

G. Meeting Adjournment

Voted: To adjourn Thursday, September 7, 2017 Meeting.

Moved: Richard Berman
Second: Steve Ward
Approved: 8 – 0

Meeting adjourned at approximately 12:20 p.m.