

Minutes from the September 6, 2013 Meeting of the Pesticide Control Board

The Pesticide Control Board met on September 6, 2013, in the Sakakawea Room of the State Capitol in Bismarck, ND. A copy of the agenda was posted next to the main entry to the meeting room in the hallway.

Agriculture Commissioner Goehring called the meeting to order at 10:00 am. Board members in attendance included Dr. Chris Boerboom and Dr. Ken Grafton. A quorum was declared.

Others present included Deputy Agriculture Commissioner Tom Bodine, NDDA employees Jim Gray and Blake Schaan, Andrew Thostenson (NDSU Pesticide Training and Certification Program), and Gary Knutson (ND Agricultural Association).

I. Approval of Minutes

Board members reviewed the minutes from their past meeting on June 14, 2012. Goehring noted that the first sentence under "Approval of Minutes" was corrected to change "May 6, 2012" to May 6, 2011". Boerboom moved to accept the corrected minutes. Seconded by Grafton. Motion carried.

II. Review of Rule-Making and 2013 Legislative Session

Goehring asked Schaan to brief the Board on the pesticide rule-making that took place in late 2012. Schaan stated that all proposed changes to the rules remained intact and were adopted into Title 60 of the Administrative Code. The most notable change was an update to the pesticide container/containment rules to make them compliant with federal requirements. In addition, the rules were changed to add a requirement for persons holding an aerial core commercial or public applicator certification to attend a Professional Aerial Applicators' Support System (PAASS) training program at least once every three years.

Gray discussed the 2013 legislative session and stated that while there were no amendments to the Century Code related to pesticides, several legislators approached him during the session to discuss their concerns with the current law. The discussions focused on three areas: 1) whether the current \$100,000 level for financial responsibility should be raised, 2) why the NDDA had taken regulatory action against individuals instead of pesticide businesses, and 3) the current requirement in the law that bars a person from seeking civil damages from pesticides unless they have notified the applicator by certified mail within 28 days of first noticing damage or before 20 percent of the crop is harvested. Gray stated that he would not be surprised if there were bills in the next legislative session addressing one or more of these three issues.

Goehring stated that several legislators have visited with him about the current level of financial responsibility, especially for aerial applicators. Goehring stated that the Board needs to study the impact to applicators if the level of financial responsibility is increased. Thostenson advised that the Board take into account the risk to small ornamental and turf businesses if the financial responsibility is raised. He stated that many of these companies are seasonal in nature and may not be able to pay a higher insurance

premium. Goehring stated that this issue will definitely come up next session and that the Board needs to be ready to offer input.

Boerboom asked if there are examples of pesticide-related damage exceeding \$100,000. Goehring stated that we do. Thostenson stated that the current law only requires a general liability policy, but many general liability policies exclude pesticide drift claims.

III. Report on Certification and Training Program

Thostenson gave a report on the NDSU Pesticide Training and Certification Program and distributed a report that included numbers of private and commercial certifications issued over the past few years. He stated that 2,268 private general certificates were issued in 2013. There are currently 11,642 people that hold private general certificates, along with 912 persons holding private fumigation certificates. The numbers for private certificates are fairly flat. Thostenson there are 8,940 commercial certificates in ND, but this only represents 5,634 persons. He stated that there is an increased demand for commercial certificates in the Rights of Way and Ornamental/Turf categories.

Thostenson stated that commercial, public, and dealer certification fees have been flat for several years, and the Board may need to consider an increase to the fees of workload continues to increase. He further explained that NDSU can set certification fees for private applicators, while the Pesticide Control Board sets the fees for commercial, public, and dealer categories.

IV. Report on Pesticide Regulatory Program

Gray briefed the Board on the risk-based regulatory strategy that the NDDA developed and launched in 2007. The strategy has three parts: 1) focusing resources on those activities posing the greatest risk to human health and the environment, 2) making risk part of all communication, and 3) using a mix of regulatory oversight and compliance assistance to drive compliance. Gray stated that the strategy has been successful. For reference, the compliance rate for pesticide entities was only 51 percent in 2007, the year before the NDDA launched its risk-based strategy. The compliance rate has been around 80 percent since 2007. Gray further explained that the NDDA has been able to drive compliance without relying on high civil penalties. The NDDA issued only \$15,700 in civil penalties to pesticide entities in 2012, although the compliance rate was 81 percent.

Gray outlined four pesticide regulatory priorities for federal fiscal year 2013: 1) pesticide use on or near surface water, 2) pesticide use in or near beehives, 3) use of grain fumigants, and 4) protecting underserved and socially vulnerable populations. He then laid out the NDDA's inspection goals and explained how they were linked to those four regulatory priorities.

Gray and Schaan then discussed some recent pesticide regulatory trends and concerns. First, there have been several cases of human endangerment this past growing season, including cases of direct pesticide applications to people. Second, Gray noted that the most common label violation identified during use inspections involved applicators failing to comply with the personal protective equipment (PPE) requirements. He advised Thostenson to focus on PPE issues during upcoming certification training sessions.

Third, Gray noted that pesticide drift remains a chronic problem, with the NDDA investigating approximately 50 drift cases each year. Fourth, Gray and Schaan discussed current requirements on many fumigant labels for the applicator to prepare and comply with a fumigation management plan. The rate of compliance with the plan requirements for private fumigant users is relatively low. Last, Gray discussed increased public concerns with pesticides over the past year or so. He stated that this may be due to an influx of people from out of state or because many North Dakota citizens are three or more generations removed from the farm. Regardless, Gray stated that the NDDA will likely deal with more issues in the future dealing with that ag/urban interface.

Grafton asked what regulatory oversight the NDDA gives to urban pesticide users. He stated that he frequently sees homeowners using pesticides without PPE. Gray responded that urban pesticide users are a tougher group of users to regulate than agricultural or commercial applicators because it is much more difficult to reach them. He further stated that while the toxicity of pesticides that homeowners may be using may be low, exposure can be relatively high. Gray stated that one of the Pesticide and Fertilizer Team goals identified for the current year is to more effectively reach pesticide users and dealers who are likely at lower levels of compliance. This includes residential pesticide users. However, he cautioned that this will require developing a comprehensive strategy to reach those users and deliver the right message. Boerboom offered that NDSU Extension may be able to assist the NDDA with such a project.

V. Discussion on Need for Business Licensing

Goehring opened the discussion on the need for licenses for certain pesticide businesses and referred Board members to an issue paper that was part of their meeting packet. He asked Gray to brief the Board on the issue.

Gray explained that the ND Century Code allows NDSU to issue four types of certifications to individuals: 1) private applicator, 2) commercial applicator, 3) public applicator, and 4) pesticide dealer. He explained when each type of certification is required. He further explained that the issue lies in the fact that the law requires the certification of individuals, not businesses. This raises several issues.

First, Gray explained that outreach to businesses is difficult since those businesses are not in a database. He gave the example of the recent changes to container/containment rules and how the NDDA tried to inform pesticide dealerships about the new requirements. Since the NDDA could not contact businesses directly, they sent out information to certified dealers (individuals). However, those individuals were often employees of dealerships and not business managers or owners. The NDDA has heard from a number of business owners who did not receive the information.

Gray also discussed emergency management issues and how the agency is often called upon to work with businesses during floods and other disasters. During the floods in 2009 and 2011, the NDDA could identify and work with fertilizer, feed, and anhydrous ammonia businesses in low-lying areas because the NDDA knew where those businesses were. However, the NDDA could not place locations of pesticide dealerships on a map and identify those at risk of flooding because individuals are certified, not

businesses. Goehring stressed that emergency management issues are becoming more and more important in the state.

Last, Gray discussed how the current system of certifying individuals instead of licensing businesses affects the NDDA's regulatory response when violations are identified. Under the current system, the NDDA is largely forced to take action against individuals, not businesses. Gray explained that the NDDA can take action against a business, but only if there is evidence that the business directed an employee to perform an illegal act or if the business has created or allowed a culture of non-compliance. Both of those are difficult to prove. Gray also explained that there are other programs in the Department that have business licenses (fertilizer distributors, anhydrous ammonia facilities, feed dealers, etc.). In those cases, the NDDA has an official business contract to which they can address an enforcement action. For pesticides, however, the NDDA does not have an official business contact, leaving a question who they would direct regulatory correspondence.

Gray asked the Board to consider whether there is a need to amend the law and create requirements for pesticide dealer licenses and commercial applicator licenses.

Boerboom asked how many instances that the NDDA wanted to send an enforcement action or letter to a pesticide business in the last year. Schaan responded that there were 35 times in the past year in which he would have preferred taking action against a business instead of an individual. He cited several examples. Goehring stated that revoking or suspending a business licenses can more effectively drive compliance than affecting an employee's certification.

Grafton asked why the NDDA simply can't raise fines to drive compliance. Gray stated that the NDDA could do that. However, those fines would still likely be levied against the individual, not the business, under the current law.

Boerboom asked if the NDDA has had any conversation with the pesticide industry on creating business licenses. Gray stated that there have been some conversations and that comments have mostly been positive. Knutson asked Gray to explain again how pesticide dealer licenses would work under the proposed system. Gray explained that a business would be licensed to sell Restricted Use Pesticides (RUPs). He explained that certifications would be used to deem individuals competent, while a business license would permit a business to engage in a certain activity.

Thostenson stated that there are approximately 1,047 certified dealers in the state, with 697 people engaged in activities as both a dealer and an applicator. He stated that he did not know how many businesses that this covered. He felt that dealers needed to show some competency as applicators. Gray argued that dealerships are simply managing inventory and maintaining sales records. He questioned why a person would need to be certified to do those things, but agreed that they would need to be certified if they were using pesticides. Goehring raised the issue of agronomists and whether they should need to be certified to make pesticide recommendations. Gray state that RUPs are used only 6 percent of the acres in the state.

Knutson asked if commercial applicators would need financial responsibility under the proposed system. Gray stated that financial responsibility would not be required for certification because certification is simply in place to show competency. Under the proposed system, the commercial application business would hold the license, not the individual, and it would be up to the business to demonstrate financial responsibility. Thostenson stated that a commercial application business will normally send him a notification that an applicator is covered under the business' financial responsibility.

Goehring asked how we can deal with emergency management without business licenses. He reiterated that there is increasing federal oversight of state management of emergencies, and that this was a big problem during the floods in 2009 and 2011.

Thostenson raised the issue of commercial business in the ornamental and turf categories. He suggested that requiring a license would be a bigger burden for them than a large agricultural business.

Goehring asked about stores like Running's that sell large volumes of general use pesticides. Gray stated that employees of those types businesses would not need to be certified under the current law if they don't sell RUPs. They presumably would not need a business license if the license is not linked to RUP sales. Goehring stated that we may want to get in contact with those sorts of businesses during emergencies. Grafton stated that terrorists could maliciously use general use pesticides just as effectively as RUPs. Boerboom stated that emergency management would likely need to include general use pesticides. Gray stated that they could design a license requirement to cover businesses selling RUPs or those selling pesticides larger than a certain size or in annual amounts greater than a certain level.

Thostenson stated that all commercial certificates have a blank for an individual to list the business where they are employed. He also stated that NDSU can furnish whatever data that the NDDA needs. Goehring reiterated that he needs to know locations of pesticide dealerships. He also stated that the Board needs to ensure that NDSU has adequate resources if dealer certifications are replaced with dealer licenses. Schaan stated that staff change businesses frequently, and that the data in an applicator business could be out of date by the time that an individual gets recertified three years later.

Grafton suggested that the Board decouple the discussion on business licenses between applicators and dealers. He stated that this might be a bigger issue for dealerships than applicators. Gray stated that there are strong arguments for a license requirement for pesticide applicator businesses, including being able to very quickly add new applicators during peak use seasons. Thostenson stated that they can already do this by adding applicators to a financial responsibility policy.

Boerboom stated that he appreciated Goehring's statement about maintaining adequate NDSU resources. Goehring suggested that the Board ponder the issue and have another meeting in late fall or early winter. Thostenson asked if this could be a topic for the

NDDA pesticide and fertilizer forum that coincides with the Northern Ag Expo. Goehring stated that it was a good idea.

Goehring came back to the issue of when to require dealer licenses. Grafton stated that he was not opposed to licensing businesses selling large volumes of general use pesticides.

Gray brought up the suggestion to focus on dealer licenses and not commercial applicator licenses. He discussed a recent example of a commercial lawn care company that had repeated examples of pesticide misuse. Gray stated that there is still a need to take action against commercial application businesses and that a commercial application license would help.

Boerboom stated that a business license requirement would address all of the issues raised by the NDDA. Goehring agreed.

Grafton stated that the Board needed to remember that a license would only apply to a business. The individual employees could presumably be certified and deemed competent, but the business would hold the license. He asked how it would work for aerial applicators. Gray stated that the license could work the same for aerial applicators. The pilot would be certified, but the business would be licensed and show proof of financial responsibility. Thostenson stated that aerial applicators are already licensed by the ND Aeronautics Commission. Gray asked if those pilots were licensed as pilots (to fly) or as applicators.

Goehring stated that a license system needed to be simple and not overly onerous. He asked Gray how it worked in other states. Gray stated that most states certify individuals to deem them competent. However, it is a license that allows a business to go into business.

VI. Other Business

Goehring raised the issue of biocide use in the hydraulic fracturing (“fracking”) industry. A couple of states are focusing on biocide use and calling attention to the issue. The NDDA has met with the Oil and Gas Division of the Industrial Commission and identified products used in fracking. There are between five and ten companies involved. Goehring stated that the NDDA will be meeting with those companies to discuss employee training and other pesticide regulatory issues. He asked how those biocide users could be certified so that they could comply with the pesticide law.

Thostenson stated that the Board could sanction the company training as long as it is adequate and equivalent to what could be offered during a certification session. He admitted that he was not prepared to offer a certification training or exam for biocide users, but would need to a means to verify who took training, what that training included, etc.

Goehring said that he will report back on the issue at the next meeting.

Goehring stated that he would like the Board to meet again in November. He adjourned the meeting at 1:03 pm.