



December 5, 2011

Lee Corte-Real, Director
Division of Crop & Pest Services
Mass Department of Agricultural Resources
251 Causeway Street – Suite 500
Boston, MA 02114

Dear Lee,

I write on behalf of the National Pest Management Association (NPMA) and its Massachusetts members to express concern with the draft “Under Direct Supervision” Policy Statement developed by Department of Agricultural Resources’ staff.

NPMA is particularly concerned that the draft Policy Statement conflicts with Massachusetts Pesticide Regulations, especially 333 CMR 10.07(2). Before examining 333 CMR 10.07(2), however, it is important to review the Massachusetts Pesticide Control Act’s definition of the term “under the direct supervision of a certified applicator.”

Contained in Section 2, Chapter 132B, the definition reads “unless otherwise prescribed by its labeling, a pesticide shall be considered to be applied under the direct supervision of a certified applicator if it is applied by a competent person acting under the instructions and control of a certified applicator who is available if and when needed, and who is responsible for the pesticide applications made by that person, even though such certified applicator is not physically present at the time and place the pesticide is applied.” The definition is identical to the Federal Insecticide, Fungicide, and Rodenticide Act’s definition of “under the direct supervision of a certified applicator.” In fact, Massachusetts is the only New England state that has adopted verbatim the FIFRA definition of “under the direct supervision of a certified applicator.”

The federal definition is elaborated upon in the Code of Federal Regulations, specifically 40 CFR 171.6, which appears below.

§ 171.6 Standards for supervision of noncertified applicators by certified private and commercial applicators.

Certified applicators whose activities indicate a supervisory role must demonstrate a practical knowledge of Federal and State supervisory requirements, including labeling, regarding the application of restricted use pesticides by noncertified applicators. The availability of the certified applicator must be directly related to the hazard of the situation. In many situations, where the certified applicator is not required to be physically present, “direct supervision” shall include verifiable instruction

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to the competent person, as follows: (1) Detailed guidance for applying the pesticide properly, and (2) provisions for contacting the certified applicator in the event he is needed. In other situations, and as required by the label, the actual physical presence of a certified applicator may be required when application is made by a noncertified applicator.

This language is almost identical to that of 333 CMR 10.07, which reads as follows:

10.07: Standards for Supervision of Non-Certified Applicators

(1) Certified applicators whose activities indicate a supervisory role must demonstrate a practical knowledge of federal and state supervisory requirements, including those specified in pesticide labeling regarding application by non-certified applicators.

(2) The availability of the certified applicator must be directly related to the hazards of the situation:

(a) In situations where the certified applicator is not required to be physically present, "direct supervision" shall include verifiable instruction to the competent person, as follows:

1. Detailed guidance for applying the pesticide properly, and;
2. Provisions for contacting the certified applicator in the event he is needed.

(b) In situations where labeling or state restrictions on use require it, physical presence of a certified applicator shall be required when application is made by a non-certified applicator.

The first sentence of the draft Policy Statement reads: "In the past, the interpretation has allowed that telephone contact would be adequate to meet the intent of "direct supervision". In fact, a certified applicator instructing a competent person about how to contact the certified applicator by telephone easily complies with and satisfies 333 CMR 10.07(2)(a). Such a circumstance may not, however, be permissible under the draft Policy Statement, which renders 10.07(2)(a)(2) somewhat meaningless by establishing time thresholds in which a certified applicator must be able to reach the application site. NPMA questions whether MDAR has the authority to adopt a Policy Statement so clearly at odds with a provision of Massachusetts Pesticide Regulations that was authorized by the Massachusetts Pesticide Control Act and adopted in accordance with the Massachusetts Administrative Procedures Act. Adding the presite inspection as additional criteria to the definition of "direct supervision" through a Policy Statement also seems highly questionable.

Moreover, in reviewing the legislative and administrative history of the Massachusetts definition of "under the direct supervision of a certified applicator" it is apparent that both the General Court and the Massachusetts Department of Agricultural Resources (and earlier variations of the Department) deliberately decided to use the federal statutory definition of "under the supervision of a certified applicator" and the federal administrative provision clarifying the meaning of the term.

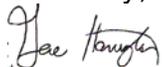
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With that in mind, it is important to note that the U.S. Environmental Protection Agency stated in the most recent unified federal agenda that it intends to file a Notice of Proposed Rulemaking to revise the federal regulations governing the certification of pesticide applicators in spring 2012. As part of the revisions, EPA is proposing to further clarify the definition of "direct supervision."

Therefore, based on the Department's seeming lack of authority to adopt the Policy Statement and the fact USEPA is addressing the "under the direct supervision" issue, NPMA urges the Department to withdraw the draft Policy Statement, wait until USEPA finalizes its rulemaking, and then move forward under appropriate legislative or administrative process. This avoids the possibility of revising the term "direct supervision" twice within a relatively short period of time, which, of course, would greatly confuse the regulated community.

NPMA appreciates your consideration of our comments and I encourage you to contact me at gharrington@pestworld.org or 703-352-6762 if you have questions.

Sincerely,



Gene Harrington
Director, Government Affairs