

From: Jennings, Henry
Sent: Tuesday, May 09, 2017 11:24 AM
To: Dyer, Ron
Subject: History and Intent of CMR 01-026, Chapter 29, Section 6

Hello Ron:

Questions have arisen recently relative to the meaning of Chapter 29, Section 6 of the Board of Pesticides Control rules (partial excerpt copied below—emphasis added). Per our conversation this morning, I thought it might be helpful if I share my clear and distinct memory about the history and intent of the Board's buffer zones around surface water bodies, since I wrote that section, and because I'm one of the few people around who has the institutional knowledge about the subject matter.

Section 6. Buffer Requirement

- A. No person shall make an outdoor terrestrial broadcast application of pesticides, except for applications made to control arthropod vectors of human disease or stinging insects, within twenty-five (25) feet from the mean high water mark of:
 - I. Any lake or pond, except ponds that are confined and retained completely upon the property of one person and do not drain into or have a surficial connection with any other waters of the State;
 - II. Rivers
 - III. Any stream depicted as a solid or broken blue line on the most recent edition of the U.S. Geological 7.5-minute series topographic map or, if not available, a 15-minute series topographic map;
 - IV. Estuarine and marine waters as defined under 38 M.R.S.A. §361-A (5); or
 - V. Wetlands, except man-made wetlands that are designed and managed for agricultural purposes, which are:
 - a. connected to great ponds at any time of the year; or
 - b. characterized by visible surface water; or
 - c. dominated by emergent or aquatic plants.

The current questions revolve around the interpretation of the Section 6 (A) (V) which relates to wetlands. In 2007, the Board was interested in requiring minimal buffers around water bodies. As you can see by the rest of the Section 6A, the intent was to protect obvious and significant water bodies, and not depressions that may be intermittently wet. See 6 (A) (III) as an example of the Board interest in limiting the applicability of the buffers. When we got to wetlands, we faced a challenge inasmuch as wetlands can—depending on the context—be both very broadly defined and difficult for the lay person to positively identify. The Board was not interested in requiring buffers around forested wetlands and/or areas with hydric soils. Therefore, the Board sought to limit the applicability of Section 6 to the most obvious wetlands that lay people would easily recognize. Consequently, Section 6 (A) (V) was written in way that

was intended to identify a subset of what otherwise might be considered wetlands, primarily for the purpose of excluding forested wetlands and areas with hydric soils. I am firm in my recollection that the Board never intended to impose buffer zone requirements about small depressions in the landscape that might, 1) contain visible surface water periodically, and/or 2) provide suitable habitat for plants that may be considered “emergent aquatic plants.”

A literal read of Section 6 (A) (V) reveals that the buffer zones are to apply to certain types of wetlands only. Wetlands are not defined in Board rule, but a search of common dictionary definitions indicates that wetlands are generally thought of as swamps, marshes or areas with saturated soils. Since the Board endeavored to exclude the hydric soil piece of the common definitions of wetlands, it leaves swamps and marshes. To further assist the regulated community in easily determining when the buffer zones should apply, the Board—with the help of the Department’s Soil Scientist—added the qualifiers contained in Section V, a through c, to help to simplify the identification of which areas to apply the buffer to.

In summary, the Board’s intent in adopting Section 6 (A) (V) was to require buffer zones around significant and obvious wetlands such as swamps and marshes, but not for forested wetlands and areas of hydric soils. There was never an intent to require buffers around small depressions which might errantly be construed as covered under Section 6 (A) (V) with the benefit of the rulemaking context.

I hope this is helpful. Let me know if you have questions.

Sincerely,

Henry Jennings