

From: Mark Lanza [mjlanza@comcast.net]  
Sent: Friday, July 27, 2012 12:18 AM  
To: Turkington, Frederic  
Subject: Re: Legal issues related to NStar

Fred,

In Massachusetts, the Massachusetts Pesticide Control Act (MPCA), M.G.L. c. 132B, designates the Pesticide Bureau of the Massachusetts Department of Agricultural Resources (MDAR) as the agency in control of pesticide regulation. In Section 2 of the MPCA, "pesticide" is defined as (among other things) "a substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, and any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant.." Chapter 333 of the Code of Massachusetts Regulations (CMAR) pertains to state experimental use permits, registration of pesticide products, licensing of pesticide dealers, certification and licensing of pesticide applicators, implementation of integrated pest management techniques and utility company rights of way maintenance plans, prevention of non-point source contamination of drinking water supplies, and procedures for pesticide application. The MPCA also includes the recently enacted Act Protecting Children and Their Families from Harmful Pesticides, which restricts the use of pesticides on property used by school children and requires parental notification for school outdoor pesticide use.

Under Ch. 333 of the CMR, DEP is required to annually compile and publish a groundwater protection list of pesticide products which: (1) contain a potential groundwater contaminant(s); (2) have been registered as restricted use by the U.S. EPA due to groundwater concerns, or; (3) have been registered as state restricted use for groundwater concerns by the Mass. Pesticide Board Subcommittee. No person, including a utility company, may apply any product on the groundwater protection list within a primary recharge area (i.e., land area determined to be a Zone II as defined in 310 CMR 22.02 or, in such cases where a Zone II area has not been approved by DEP, it shall be designated as the interim area of special protection of a one-half mile radius from any public drinking water supply well) unless that person has obtained a pesticide management plan approved by DEP pursuant to 333 CMR 12.04. Once such a plan is approved, no person shall apply any product on the groundwater protection list within a primary recharge area inconsistent with the conditions of a pesticide management plan or the integrated pest management program which combines several different techniques including biological, mechanical, cultural and chemical controls to maintain pests below damaging levels. If the capture zones around the Town's wells, as articulated in the wellhead protection plan approved by DEP, are within the primary recharge area (as they likely are) then NSTAR (and any other entity or person) may only apply pesticides on the groundwater protection list in the capture zones pursuant to and consistent with a DEP approved pesticide management plan or integrated pest management program.

I recommend that NSTAR be asked to produce a detailed list of the pesticides used in Wayland within primary recharge areas and a copy of its DEP approved pesticide management plan and/or integrated pest management program, if any. With this information, the Town can determine whether or not NSTAR is applying pesticides in accordance with M.G.L. c. 132B and Ch. 333 of the CMR.

Separate and apart from the issue of NSTAR's compliance with M.G.L.

c. 132B and Ch. 333, a question has arisen about the Town's recourse if water in the Town's wells has been contaminated by NSTAR's use of pesticides. If any such contamination has occurred, the Town would have the option of pursuing litigation against NSTAR for damages. The claims made in such a suit would be similar to those made in the MTBE litigation against several major petroleum companies the Town was involved in when MTBE was detected in Town wells. Special counsel would be required for such litigation.

The MPCA places the exclusive authority for regulating the labeling, distribution, sale, storage, transportation, use and application, and disposal of pesticides in the Commonwealth with the Pesticide Board (Chapter 132B, Section 1). State law, therefore, preempts municipal regulation of pesticides. The Commonwealth's preemption of municipal regulation of pesticides was upheld by the SJC in the case of *Town Wendell v. Attorney General*, 394 Mass. 518 (1985). Under the current Massachusetts law, municipalities have little authority to regulate pesticide use. They cannot regulate pesticide use by utility companies, private homeowners or by landscape professionals on private land. Municipalities cannot restrict pesticide use through their zoning bylaws, general bylaws or board of health regulations nor can they enforce regulations adopted at the State level. However, as proprietors of municipally-owned land, municipalities may adopt policies governing pesticide use on municipally-owned land.

In my opinion, a bylaw which requires earlier notice of vegetation management plans than the 45 day, 21 day notice codified in state law or regulation would be disapproved by the Att'y Gen'l as inconsistent with state law.

Please contact me if additional clarification is needed.

Thanks.

Mark

----- Original Message -----

From: "Turkington, Frederic" <fturkington@wayland.ma.us>

To: <mjlanza@comcast.net>

Sent: Friday, July 20, 2012 7:36 AM

Subject: Legal issues related to NStar

Mark,

Can you respond to these questions and issues raised at Wednesday evening's meeting? If special counsel is needed, please advise.

1. Please review pesticide regulations approved by the BoH in 1980's and related correspondence provided by separate email. Can Wayland regulate application of pesticides and herbicides? If so, can our standards be more stringent and more restrictive than state law (see. MGL ch. 132B)?
2. Can the Town adopt and will the AG approve a bylaw which requires earlier notice of vegetation management plans than the 45 day, 21 day notice codified in state law or regulation (see documents attached to separate email from NStar)?

3. Does the delineation of a capture zone around the town wells as articulated in the wellhead protection plan approved by DEP allow the town to prohibit application of pesticides and herbicides within that area if it exceeds the 400' zone 1 restricted area? If so, what steps must be taken?

Thanks,  
Fred=