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August 15, 2018

Re: Rules Governing Dairy Byproduct Rulemaking Petitions

### Introduction

The Idaho State Department of Agriculture (ISDA) received two petitions to enter into negotiated rulemaking to modify IDAPA 02.04.14, Rules Governing Dairy Byproduct. The first petition was a joint submission from the Idaho Farm Bureau and the Milk Producers of Idaho, Inc. received on April 30, 2018. The petition requested a modification to the rule that would remove the phosphorus threshold "five-year sunset clause." The requested change would allow Idaho dairy farmers the option of choosing phosphorus threshold or phosphorus indexing as a regulatory standard indefinitely. Important to this rulemaking petition is the nutrient management standard (NRCS 590) that currently applies to the phosphorus threshold method of managing dairy byproducts was published in 1999. This outdated nutrient management standard must be updated in order to continue using a phosphorus threshold method. The second petition was submitted by the Idaho Dairywomen's Association on May 14, 2018, requesting regulatory standards for soil phosphorus values include a margin-of-error to account for the variability in soil collection and testing methods.

### Rulemaking Authority

The ISDA has authority to promulgate rules, implementing the provision of the Idaho Dairy Environmental Control Act (DECA). *See* Idaho Code § 37-603(1). The ISDA is directed, through DECA, to "encourage and promote performance and innovation in the design, construction, operation and maintenance of dairy environmental management systems . . ." Idaho Code § 37-602(e). Specific to dairy nutrient management plans (NMP), the ISDA is directed to enforce dairy NMPs to "prevent unauthorized discharges, unauthorized releases, violations of state water quality standards, contamination of ground water and surface water and endangerment to human health and the environment." Idaho Code § 37-606(1). Accordingly, the nutrient management standard (NMS) associated with the phosphorus threshold method of managing dairy byproducts generated on dairy farms must conform with relevant directives provided in Idaho law. In addition, soil phosphorus values obtained through soil sampling on Idaho dairies is part of the regulatory oversight the ISDA is charged with under DECA.

### Negotiated Rulemaking

The ISDA hosted negotiated rulemaking meetings on June 27, 2018, and July 11, 2018 and solicited written comments from the general public and interested stakeholders through August 3, 2018. Because stakeholders expressed interest in both petitions received by the ISDA, the negotiated rulemaking was combined and addressed during the meetings held in June and July, 2018. With respect to the petition to modify the rule to allow farmers an option to choose either phosphorus threshold or phosphorus indexing, consensus was not reached as to the timing for when the change should go into effect. The "sunset clause", as it currently exists in the Rules Governing Dairy Byproduct, prohibits the use of the phosphorus threshold method of nutrient management after June 30, 2023. Comments submitted by the Idaho Farm Bureau, Milk Producers of Idaho and Idaho Dairywomen's Association expressed the importance of maintaining the phosphorus threshold as an option for nutrient management on Idaho dairies indefinitely. This option based approach to managing nutrients

would give each producer the flexibility to decide which method is best for their individual operation, while also maintaining a defensible management standard. Each of these stakeholders identified financial uncertainty compounded by trade and economic concerns adversely affecting dairy producers, if the rule was not amended, and the phosphorus threshold was allowed to sunset in 2023. The Idaho Farm Bureau further stated that if the sunset clause is not repealed in 2019, producers will perceive that the repeal may never happen, leading to additional risk and uncertainty. The Idaho Conservation League's position supported delaying the removal of the sunset clause until the development of a new NMS was completed. All stakeholders were in agreement that an updated NMS was necessary and would require additional time and research to properly develop a new, relevant and defensible nutrient standard for Idaho dairies.

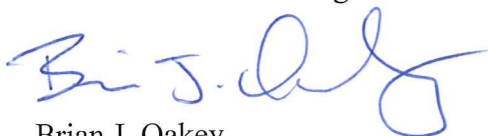
With respect to the petition to incorporate a 'margin-of-error' into the soil phosphorus regulatory standards, the stakeholders agreed that more data and information was required before proceeding with a proposed rule change. A consensus was reached that rulemaking should continue throughout 2019 to provide adequate time to gather more information before a final decision was made regarding what, if any, rule change should occur.

### Analysis

The ISDA has reviewed the position of each industry organization submitted regarding the timeline of the removal of the phosphorus threshold sunset clause from the "Rules Governing Dairy Byproduct." Each organization identified important objectives in their position statements and the ISDA has considered each point in formulating a decision. As was identified in the rulemaking authority section of this analysis, ISDA is required to maintain a defensible regulatory program that is consistent and fairly applied across the entire industry.

The ISDA, after careful review and consideration of information provided as part of this rulemaking, has determined that the best course of action is to continue the negotiated rulemaking process until a new nutrient management standard can be developed to govern the phosphorus threshold method of nutrient management. Therefore, the ISDA will not propose a rule in 2018 pursuant to the April 30, 2018 petition. ISDA will, however, continue the rulemaking process and facilitate meetings and information gathering throughout the remainder of 2018 and into 2019. The ISDA encourages all stakeholders to remind their constituents that phosphorus threshold is and will continue to be an available option to all producers throughout the rulemaking process. It is the intention of the ISDA to begin the process of developing a new NMS as soon as possible and to conclude these rulemaking proceedings well in advance of the 2023 sunset date. The ISDA will contact stakeholders to schedule additional rulemaking meetings as soon as possible.

In addition, the ISDA will not propose a rule in 2018 pursuant to the May 14, 2018 petition. The ISDA will continue to facilitate negotiated rulemaking meetings under both petitions received.



Brian J. Oakey  
Deputy Director