

Idaho State Department of Agriculture
02.04.14 Rules Governing Dairy Byproduct
June 16, 2020, 10:00 a.m.
Dr. Scott Leibsle, Facilitator

Present: Russ Hendricks, Idaho Farm Bureau Federation; Rick Naerebout, Idaho Dairymen's Association; Bob Naerebout, Idaho Dairymen's Association; Marv Patton, Milk Producers of Idaho; Austin Watkins, Idaho Conservation League; Jonathan Oppenheimer, Idaho Conservation League; David Claiborne, Sawtooth Law; April Leytem, USDA-ARS; Katy DeVries, Office of Attorney General – ISDA; Dallas Burkhalter, Office of Attorney General – ISDA; Mitch Vermeer, ISDA; Brian Oakey, ISDA; Dr. Scott Leibsle, ISDA; Dr. Bill Barton, ISDA; and Janis Perry, ISDA.

AGENDA ITEMS

WELCOME

Dr. Scott Leibsle convened the meeting at 10:02 a.m. by teleconference. Dr. Leibsle explained that this is a continuation of a public negotiated rulemaking meeting for IDAPA 02.04.14 Rules Governing Dairy Byproduct. He summarized the background of the rulemaking from the Rule Update document. The rulemaking started in 2018 with a petition to remove the sunset clause for Phosphorus threshold and a second petition to develop a margin of error for soil testing. A new Idaho Nutrient Management Standard (NMS) was developed as part of the negotiated rulemaking process. In 2019 ISDA conducted an experiment to investigate the variability and repeatability of soil testing. By the end of the rulemaking season, two issues were still unresolved: the level of Phosphorus in soil testing where a producer must switch from threshold to indexing (aka “trigger point”) and the feasibility of establishing a margin of error in soil testing that would be taken into consideration in enforcement actions.

Dr. Leibsle indicated that the Department had received new proposed rule text along with a modified proposed NMS from Idaho Dairymen, Milk Producers of Idaho, and the Idaho Farm Bureau. He questioned those that made the proposal on certain changes. Section 031. Phosphorus Management allows a Nutrient Management Plan (NMP) to handle different fields differently with respect to threshold or indexing. Rick Naerebout responded that the logic was that this provided producers more flexibility in deciding which to use. It would also necessitate eliminating “on all fields” in the Nutrient Management Standard page two. He admitted the complexity of one field on threshold and the others on indexing, but he anticipates that most producers would have all of one type. Dr. Leibsle stated that each time a field hit the trigger point it would be mandatory for the producer to switch that field to indexing and would necessitate a revision of the NMP and resubmission to the Department for approval. In the same Section 031, Dr. Leibsle asked about the “subsequent regulatory soil test.” Rick Naerebout explained that what was meant is the current annual test, so “regulatory” should be replaced by “annual.”

Dr. Leibsle asked if the trigger point were set at 100 ppm requiring the producers to transfer to indexing, what best available science is available to support that position. Rick Naerebout responded that with the significant variability of samples and lab testing, he suggested flexibility for dairymen and give them the benefit of the doubt. Dr. Leibsle then asked at what point would the Department begin enforcement

proceedings if a 'margin of error' was attached and that having "vague" regulatory standards is both problematic for the Department and the dairy producers. Rick Naerebout explained that the grace period would be up to 115 ppm before forcing to indexing. Marv Patton suggested that to be fair, the tests are not true so the trend of two out of three be considered. Dr. Leibslle suggested that for clarity to the industry, the group pick a number and live with that. Rick Naerebout stated that the industry's perspective was for additional grace if the trend over three years is increasing in single digits. Dr. Leibslle proposed that it would be more feasible if both the "trigger point" (100 ppm) and the phosphorus threshold (40 ppm) would be a hard number with no margin of error, but the 15ppm leeway be implemented for comparing fields between 40 and 100 ppm in two out of three years. This would create leeway for the producers to avoid receiving an enforcement action for "single digit" increases in soil phosphorus and would only generate a regulatory action if the field increased 'more than' 15 ppm on two out of three consecutive years.

Austin Watkins expressed concern with the threshold trigger point set at 100ppm. He cited the 2011 publication from the University of Idaho Extension "*Phosphorus in the Calcareous Soils of Southern Idaho*" that suggested phosphorus leaching into surface water at 40 ppm which is a far cry from the proposed number. He stated that the report is suggesting that 40 ppm should be the bare minimum. April Leytem, one of the authors of the report, commented that soil phosphorus in excess of 20 to 30 ppm can result in significant phosphorus run-off. Dr. Leibslle suggested that a compliance schedule could be considered in the period from 40 to 100 ppm.

Bob Naerebout suggested that the way the statute is written, surface water is only a concern if there is a discharge off the property. Brian Oakey quoted Title 37, Chapter 6: "The dairy nutrient management plan shall be implemented by the dairy farm and enforced by the department 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." Marv Patton commented that a discharge violation would be a release that can't be sent out or down.

Dr. Leibslle displayed the proposed rule text explaining that Red Tape Reduction was not included in this rule since it was proposed as temporary. He suggested that additional words in Section 031 of the submitted proposal are repetitive from the NMS and should be removed. He reiterated to the group that the proposed language from IDFB, MPI and IDA was to establish a "trigger point" of 100 ppm with no margin of error and retain the current phosphorus threshold of 40 ppm, also with no margin of error, with any fields trending up between 40 and 100 ppm being subject to upward trend enforcement only if the fields increased more than 15 ppm from the previous year. Dr. Leibslle also reiterated that ICL proposed 40 ppm as the trigger point. Dr. Leibslle agreed to send out the summary of the soil test experiment and the publication that ICL referenced. He reminded the group that written comments are due by June 30 and can be sent to him or to Brian Oakey. He suggested that stakeholder comments should further expand on the following issues: where to set the trigger point, establishing the option for a hybrid NMP (i.e. – some fields on indexing and some fields on threshold within the same NMP), and how to handle the margin of error on soil testing trending up, and to include any scientific data to support the positions.

Dr. Leibslle responded to a question from Marv Patton that there is no enforcement if producer is using indexing and soil test is trending up. Marv indicated his constituents are concerned about Nitrogen

regulation. Dr. Leibsle stated that Idaho is not a Nitrogen regulatory state. The Nitrogen balance worksheet is part of the NMS, so if a producer does not complete it the producer could be non-compliant on the NMP. Marv then commented that since there is a margin or error for manure samples, could book value be used instead of actual tests which is a cheaper solution for those who are compliant. Dr. Leibsle indicated that the department is trying to move away from book values since they provide only estimates rather than scientific data generated by a lab. Marv noted that he would like producers to have the option of book value.

Dr. Leibsle asked if there were additional comments. Jonathan Oppenheimer remarked that he felt the need to use best available science. Dr. Leibsle stated that he would review all of the comments.

Dr. Leibsle adjourned the meeting at 11:07 am.

Respectfully submitted by Janis Perry