

Idaho State Department of Agriculture

02.03.03 Rules Governing Pesticide and Chemigation Use and Application

August 4, 2020, 10:00 a.m.

Victor Mason, Facilitator

Present: Katie Baker; Ann Bates, Idaho Pest Management Association; Roger Batt, Association Management Group; Elizabeth Criner, Idaho Food Producers; Breland Draper, Idaho Organization of Resource Councils; Nicole Foy, Idaho Statesman; Brad Griff, Idaho Sugarbeet Growers Association; Tom Gritzmacher, Pesticide Advisory Committee; Samantha Guerrero, Idaho Organization of Resource Councils; Ronda Hirnyck, Pesticide Advisory Committee; Braden Jensen, Idaho Farm Bureau; Elaine Kazakoff, Idaho Organization of Resource Councils; Patxi Larrocea-Phillips, Idaho Noxious Weed Control Association; David Lehman, Primus Policy Group; Bob Naerebout, Idaho Dairymen's Association; Rick Naerebout, Idaho Dairymen's Association; Jonathan Oppenheimer, Idaho Conservation League; Doug Paddock, Idaho Organization of Resource Councils; Stacy Satterlee, Idaho Grain Producers Association; Adam Schroeder, Pesticide Advisory Committee; Kali Sherrill, Idaho Association of Weed Control Superintendents; Sue Skinner; Rachel Spacek, Idaho Press; Christina Stucker-Gassi, NW Center for Alternatives to Pesticides; Sally Toone, Idaho House of Representatives; Rick Waitley, Association Management Group; Rob Wasia, Pesticide Advisory Committee; Dallas Burkhalter, Office of Attorney General – ISDA; Katy DeVries, Office of Attorney General – ISDA; Sherman Takatori, ISDA; Brian Slabaugh, ISDA; Ryan Ward, ISDA; Luis Urias, ISDA; Westy Jones, ISDA; Brian Oakey, ISDA; Chanel Tewalt, ISDA; Victor Mason, ISDA; and Janis Perry, ISDA.

AGENDA ITEMS

WELCOME

Victor Mason, Administrator for the Division of Agricultural Resources, convened the meeting at 10:00 a.m. by teleconference. He welcomed everyone to the second negotiated rulemaking for IDAPA 02.03.03 and explained the procedures for the WebEx meeting. He asked that participants keep their lines muted and to use the chat box for comments or questions. He explained that Luis Urias, the WPS specialist is also with us, and will be able to assist if there are questions in Spanish. He stated that the meeting was being recorded.

Vic explained that the ISDA distributed a second strawman prior to the meeting as well as a response summary of questions received related to the various license categories included in this rulemaking. This document was intended to provide a more in-depth explanation of the license categories and answer the questions raised about them. He indicated that he did not plan to go through this document today, but is willing to answer additional questions regarding license categories. Additionally, the ISDA distributed a comparison between the previous IDAPA sections regulating aerial application of pesticides with comparable FAA regulations which will not be reviewed but comments or questions about this topic are welcome.

Vic stated that over 90 different comments and questions from stakeholders were received by ISDA with the majority involving the removal of wind speed, low flying and hazard areas from the strawman or the

addition of the commercial apprentice category. Written comments will again be accepted until August 11th.

Vic started a Powerpoint presentation of the new proposed changes noting that the sections highlighted in green are changes that have been made since the first negotiated rulemaking. These changes include:

1. Added language to help clarify and enforce pesticide drift;
2. Added clarification of certain licensing category descriptions;
3. Reinstated a modified windspeed section;
4. Added clarification of language on licensing periods;
5. Added clarification of language for limited and on-site supervision.

Vic delineated specific changes on the strawman. On page 1, the first Incorporation by Reference citing was shortened and now mirrors the second and third IBRs. On page 3, the EPA definition of “Pesticide Drift” has been added. On page 6, “text-based format” was added to the exam testing procedures.

Vic stated that two of the categories descriptions have been clarified: Space Area Fumigation (AF) now includes sewer line root control, and Commercial Apprentice (CA) changes “foliar” to “surface” and identifies when it may be renewed one time.

On page 10, language has been added to give professional applicators a better understanding of when the license expires based on the first letter of their last name. Also, recertification credits have been clarified for the initial licensing period. On page 13, the renewal date for dealer licenses has been added.

Under Subchapter B Fees, the cost for an apprentice license has been removed since this strawman uses the same fee for all professional licenses. Vic reminded the group that the apprentice license can be renewed only one time.

In Subchapter C on page 15, subsection 400.01 Application of Restricted Use Pesticides by Noncertified Applicators has been redefined to make it easier to understand and be more precise. A prohibition for aerial application was added. Subsection 400.02 Application of General Use pesticides by Noncertified Applicators has been added to define the license categories that the apprentice category can work under, what testing category needs to be passed prior to any pesticide applications being made, and that immediate communication between the applicator and supervising applicator must exist during the pesticide application. It also explains pesticide applications that are prohibited under this category.

Vic explained that the wind velocity restrictions on page 16 have been added back to the strawman based on comments and concerns received from stakeholders. The Chemigation wind speed section was modified to reflect pesticide label requirements.

Finally, a Pesticide Drift Prohibition has been added to the strawman as subsection 400.10 on page 18. This will help with enforcement of pesticide drift when pesticide labels have weak drift language.

Vic asked that participants with questions or comments use the chat box or raise their hand. Elaine Kazakoff asked if the FAA was invited to the meeting to which Vic responded that they were, but were unable to attend because it would require the legal department to give interpretations. Jonathan

Oppenheimer asked for an explanation of "immediate communication" requirement for the CA category and whether that included cell phone contact. Vic indicated it did include cell phone or two-way radio communication to help supervise the applicator. In response to Elaine's follow up question, Vic explained that on site supervision is required for Restricted Use Pesticides and apprentice category applicators can only apply General Use Pesticides.

Ann Bates inquired whether current applicators will be grandfathered in or do they need to take the applicator core competency law and safety exam. Sherm Takatori responded that current applicators will be grandfathered, although there will be changes to the exam. Vic added that if an applicator's license expires, taking the exam would be required.

Sue Skinner said thank you for the drift changes and asked how ISDA will work with FAA on drift and low flight gray areas and whether the agency would have an MOU with FAA. Vic responded that there would be no MOU and that the agency would work with the FAA on referrals. If a drift issue arises the agency would handle it. Elaine Kazakoff commented that application near hazard area wasn't covered in the ISDA analysis of low flying and asked for reference to the FAA rule that addresses hazard area. Brian Oakey responded that the interpretation or application of FAA regulations should be addressed by the FAA and is a question for them to answer.

In response to a question from Ann Bates, Sherm Takatori stated that the OI category is for turf and ornamental shrubs and is not meant for structure. Spider barrier is more applicable to the General Pest category.

Christina Stucker-Gassi appreciated all the work the agency has done to address stakeholder's concerns. She asked for more feedback on the three regional FAA offices that regulate Idaho and the coordination that will require. Sue Skinner asked if the FAA office in Boise have jurisdiction for all of Idaho and if there is one call in number for complaints. Brian Oakey stated that the goal in presenting these changes was to draw a clearer jurisdictional line with the FAA. He stated that complaints with low flying or hazard area will be referred to the FAA who will need to get information to the public on how those complaints are handled. David Lehman pointed out that the FAA has been regulating air traffic since 1965. He continued that Idaho is the only state where a state agency regulates agricultural flights in addition to the FAA. Elaine Kazakoff asked if the FAA will point the citizens back to ISDA for the drift. Vic stated that the agency will definitely handle all drift issues. Doug Paddock questioned whether under low flying prohibitions there will be individuals who were previously required to be notified under section 400.06 but will not receive notification under the FAA's definition of congested area. Brian Oakey referred participants to the resource document comparing FAA regulation to the ISDA rule. He did not want to go further in interpreting FAA regulation than what has been presented in the resource document. Doug stated that it would be great if we could get FAA to address this before the draft rule is finalized. Elaine asked how do we get the FAA involved. Brian responded that the agency can work on that.

In response to a question from Ann Bates, Sherm Takatori explained that changing foliar to surface in the CA category means that ground applications can be made but not total vegetation control. Ann also asked if for Urban Professional applicators, General pest will allow for the treatment for mosquitoes.

Sherm stated yes if near structure, such as under eaves, but to foliage and outdoor shrubs, OI would be more applicable.

Elaine Kazakoff stated her concern with FAA rules for application over non-congested area where the application can be closer than 500 feet but they don't say how close; in addition, her concern that FAA rules don't mention notification in Spanish. Brian Oakey responded that the best way to approach the cross jurisdictional issues is to remember that the agency regulates all pesticide applications, whether or not they are from the air. David Lehman commented that that is the bright line – states do not regulate air flight. He continued that there is enough case law granting FAA primacy.

Jonathan Oppenheimer commented that recognizing that the FAA does have regulations on low-flying, the removal of the Hazard Area Restriction from ISDA rule does not have any comparable protection from FAA. In particular, he is concerned about schools, hospitals or other sensitive areas that are located outside of areas that would meet the definition of "congested area" per FAA regs. Doug Paddock commented that he is referring to how people are notified when they live near application sites. David Lehman responded that he can share case law and federal ruling on this issue. Both Doug and Jonathan appreciated David's offer.

Sue Skinner stated that it is her understanding that some labels are bilingual. Then she asked what restrictions ISDA has for requiring bilingual labeling of warning signs at pesticide storage areas and chemigation tanks. Vic responded that the current rule requires posting for pesticide storage in two languages. Luis Urias explained that within 300 feet bilingual signs are required.

Ann Bates asked if the agency had discussed the proposed changes with reciprocating states since some of the category descriptions are different. Sherm Takatori responded that the agency was in discussion with Oregon, Washington, and Montana and all of these states are making changes to comply with FIFRA. He indicated that the agency will strive to maintain reciprocal relationships, although it cannot be fully answered until the other states' changes are complete.

Jonathan Oppenheimer noted that the FAA link for "low flying complaints" on the document that was distributed entitled "Idaho's Low-Flying Rules Compared to Federal Aviation Administration Regulations" is non-functional. Katy DeVries apologized and supplied the missing link:

https://www.faa.gov/about/office_org/field_offices/fsdo/lgb/local_more/media/FAA_Guide_to_Low-Flying_Aircraft.pdf. David Lehman provided the CFR to minimum altitude:

<https://www.govinfo.gov/content/pkg/CFR-2013-title14-vol2/pdf/CFR-2013-title14-vol2-sec91-119.pdf> and the link related to congested areas:

<http://www.aerolegalservices.com/Articles/Congested%20Areas%20Under%20FAR%2091-119%202008-08-28.shtml>

Jonathan asked if ISDA has any insight into how and whether FAA monitors notification requirements and if ISDA is talking with folks with the Boise FSDO, Salt Lake City FSDO or Spokane FSDO or is there a regional oversight office. Vic stated that he had been talking with the Boise office. Brian Oakey responded that the agency would reach out to FAA for a response and will post it on the website. Elaine Kazakoff commented that would be great and asked if it would be available before the comment period ends or could the comment period be extended. Brian indicated that the timeframe is tight. After the

comment period ends on August 11, the agency has until August 21 to analyze all comments and propose a rule to submit to the governor's office for publication in the October Bulletin. He stated that reaching out to FAA quickly, so hopefully we can get a timely response. He also explained that there will be another opportunity to comment after the proposed rule is published and, if requested, a hearing could be considered. The final step will be preparation of a pending rule that is submitted to the agriculture committees. He promised to keep all stakeholders notified by email.

Vic stated that written comments should be emailed to brian.oakey@isda.idaho.gov, mailed or faxed to by August 11. He appreciates participant input because that is what makes a good rule. Brian Oakey also expressed his appreciation for the interest and participation in this rulemaking. Doug Paddock thanked the ISDA staff for holding these stakeholder meetings, and David and the others for asking and answering good questions. Adam Schroeder thanked ISDA and others for all of the hard work and cooperation with stakeholders, and for a productive rulemaking process.

Vic Mason adjourned the meeting at 11:03 am.

Respectfully submitted by Janis Perry