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Rules Governing Pesticide and Chemigation Analysis

Informal Negotiated Rulemaking

The Rules Governing Pesticide and Chemigation Use and Application (“Rules”) are necessary to continue as the lead regulatory agency for pesticides in Idaho. Idaho has been granted delegated status under federal law for pesticide licensing, registration and enforcement, commonly called “primacy.” To maintain primacy of the pesticide program from EPA, the ISDA must develop and maintain rules. These Rules are then evaluated by EPA to ensure that the legal requirements for Idaho are at least as stringent as those at the federal level. The Rules also provide additional clarification and requirements related to the implementation of the Pesticides and Chemigation Act, Idaho Code § 22-3401 *et seq.*

The informal negotiated rulemaking focused on (1) updating the certification and training requirements to meet federal standards and clarifying other license category definitions; (2) introducing a commercial apprentice license category to allow for a new pesticide applicator to get on the job training for a limited period; (3) evaluating the option of permanent deletion of certain sections of the Rules related to the aerial application of pesticides; and (4) evaluating the option for permanent deletion of the wind restriction for application of pesticides in winds that exceed 10 miles per hour.

Informal negotiated rulemaking meetings were held on June 30, 2020, and August 4, 2020. The ISDA received 140 written comments from stakeholders through August 13, 2020. Some comments were presented as questions. The ISDA’s process for responding to stakeholder questions was to aggregate questions and respond with updates related to these topics. This process was used primarily because of the large number of rulemaking participants and the time constraints of the informal negotiated rulemaking. However, this process was also utilized to preserve the neutrality of the ISDA as a rulemaking facilitator and to avoid having “side bar” question and answer sessions with only one or a few stakeholders.

Current Rules Governing Pesticide and Chemigation Use and Application

The Rules currently in place are temporary. This is a result of 2020 legislative action rejecting all administrative fee rules. Following the 2020 legislative session, the ISDA promulgated the current temporary rule but deleted certain sections containing wind velocity restrictions, low-flying prohibitions for aerial applicators and aerial applications within a hazard area. The decision to not include these rule sections in the temporary rule was consistent with the action the legislature took with respect to these sections during the 2020 legislative session. Following informal negotiated rulemaking, the next step is to proceed with formal negotiated rulemaking once the ISDA submits a proposed rule for publication in the administrative bulletin. The proposed rule will be available for review and stakeholder comment.

Negotiated Rulemaking Issues

- I. **Updating the Certification and Training Requirements:** Subchapter A of the Rules ensures that the ISDA maintains the standards for certification of commercial (professional) applicators found in 40 CFR, Part 171.103. The ISDA must establish licensing standards to ensure that applicators are competent to apply pesticides, and that examination standards are as high, or higher than what is required by EPA. The Certification and Training subsection of the Rules also amended certain license category definitions to clarify what types of pesticide applications are allowed under certain categories.

Following guidance from EPA and stakeholders, ISDA is proposing to rename and redefine several of the applicator license categories to better describe the type of pesticide applications performed by persons licensed in those particular categories and to conform to the federal requirements for pesticide licensing.

- The Applicator Core Competency (“CO”) category will replace the Law and Safety (“LS”) category. By making this change, the ISDA will be consistent with the new certification and training requirements developed by EPA. The CO category exam will be a requirement for all licensing categories of professional applicators moving forward.
- The Space Area Fumigation (“AF”) category is proposed in order to differentiate the certification requirements of the existing Soil Fumigation category (“SF”) and AF applications. These two categories were split into two separate categories because of the difference in the pesticide application process.
- The Aerial Pest Control (“AA”) category is a new license category for Idaho where pesticides are aerially applied. This category is required as a result of the changes to 40 CFR pt. 171.
- The Ornamental Herbicide (“OH”) category description in the prior versions of this Rule needed to be clarified. The proposed category description limits applicators specifically to turfs and ornamental weed control and restricts the use of soil applied, residual total vegetation control herbicides that are more applicable to the Right-of-Way or Agricultural Herbicide category.
- Ornamental/ Insecticide/ Fungicide (“OI”) category description in the prior versions of this Rule also required clarification. This category does not allow for applications to buildings, structures, building foundations, or other applications that are more applicable to a person holding an appropriate indoor or structure application category like General Pest Control (“GP”) or Structural Pest Control (“SP”).

- II. **Introducing a New Commercial Apprentice License Category:** The proposed Rules will include a new professional pesticide applicator category. The Commercial Apprentice (“CA”) category will allow an applicator to work under limited supervision for the application of general use pesticides only, for a period of no more than twelve months. This category is intended to allow new applicators the opportunity to gain on-the-job training in the use of pesticides, after passing the core competency pesticide exam. This license category requires that the applicator be supervised by a professional applicator licensed in the categories the CA is working. Supervision is accomplished by having contact with the CA by voice, phone or radio. Persons with this category cannot make any soil active total vegetation control pesticide applications or injectable applications to soil or plants. Applicators with this category cannot supervise other pesticide applicators.

The ISDA received several comments objecting to the supervisory requirements for the CA license category. Most commenters suggested requiring on-site application. However, the current Rules already allow an unlicensed employee to apply pesticides while under the direct supervision of a licensed supervisor. Because the CA license will only be issued after an applicant has successfully passed the CO exam, limited supervision is sufficient. To successfully pass the CO exam, an

applicant must be able to demonstrate basic applicator related knowledge for safe pesticide use and handling, understanding pesticide labels, environmental stewardship and general laws and rules for pesticides.

III. **Permanent Removal of Certain Rule Sections Related to Aerial Application of Pesticides:**

During the 2020 Legislative session, the Idaho Aerial Applicators Association (“IAAA”) requested that certain sections of the Rules be removed. Those sections included applying pesticides in sustained wind speeds above 10 mph (discussed separately); low flying prohibitions and certain pesticide applications in hazard areas.

- Low-flying prohibitions during spray operations restricted turning or low-flying over cities, towns, schools, hospitals and densely populated areas or occupied structures without prior notification. If this section is removed, ISDA will no longer have regulatory authority over low-flying restrictions. Rather, that regulatory oversight will now be with the Federal Aviation Administration (“FAA”). Federal regulations restricting low flying have been in place concurrently with the previous Rules restrictions. FAA regulations are consistent with and, in certain instances, more stringent than the restrictions previously contained in the Rules.
- The FAA regulations consider “congested areas” to be cities, towns, or settlements, or over any open air assembly of persons.” “Congested area” is similar to Idaho’s delineation of “cities, towns, schools, hospitals and densely populated areas.” Although Idaho’s Rules included schools and hospitals, these places are not excluded from coverage by the federal regulations. In order to operate over “congested areas,” applicators must still obtain “prior written approval” from the “appropriate official or governing body of the political subdivision over which the operations are conducted” in order to make pesticide applications. Further, the federal regulations are more stringent than Idaho’s restriction on flying directly over occupied structures. Idaho’s Rules prohibit flying “[d]irectly over an occupied structure without prior notification by some effective means such as daily newspapers, radio, television, telephone, or door-to-door notice.” The federal regulations require “Notice of the intended operation must be given to the public by some effective means, such as daily newspapers, radio, television, or door-to-door notice” if the area is congested, regardless of whether structures are, in fact, occupied. Thus, aerial application of pesticides will still be subject to the federal regulations regarding pesticide applications, meaning that Idaho citizens will be entitled to the same environmental and human health protections as before.
- Hazard area restrictions previously prohibited aircraft pilots from applying any pesticide within one-half (1/2) mile of a hazard area unless there is air movement away from the hazard area. The proposed Rule seeks to eliminate this hazard area restriction.

ISDA has received many comments concerning human health and environmental safety related to the removal of this restriction. To address those concerns, ISDA has added proposed rule language prohibiting off-target pesticide drift under any circumstances. This proposed rule language offers broad protections for human health and the environment. First, previous versions of the Rules applied phenoxy restrictions only to aircraft pilots. The proposed Rules regarding pesticide drift prohibition applies to *all* pesticide applicators. Second, the ISDA proposes to expand the definition of hazard area. Hazard areas were previously defined as, “Cities, towns, subdivisions, or densely populated areas.” The proposed Rule language now defines hazard area as, “Cities, towns, subdivisions, schools, hospitals, or densely populated areas.” These proposed changes will strengthen and clarify the prohibition of pesticide drift outside of the pesticide application target area and specifically cover areas of stakeholder concern.

- IV. **Wind Velocity Restrictions:** Previously, the Rules contained a wind velocity restriction that read as follows: “No person shall apply any pesticide in sustained wind conditions exceeding ten (10) miles per hour or in wind conditions exceeding product label directions” The first rule strawman suggested this section be deleted. However, based on feedback from stakeholders this section of the Rules is proposed to be retained with some modification. The proposed Rules reads as follows:

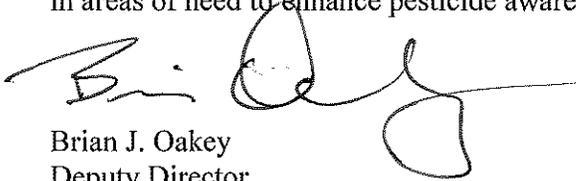
WIND VELOCITY RESTRICTIONS. No person will apply pesticides in sustained wind speeds that exceed the product label directions. If a pesticide label does not state a specific wind speed limitation, pesticides will not be applied in sustained wind conditions exceeding ten (10) miles per hour.

- a. Exceptions. Application of pesticides by injection into application site or by impregnated granules shall be made according to label directions.
- b. Approval for Use of Other Application Techniques. Other pesticide application techniques or methods may be approved by the Director or his agent on a case-by-case basis.
- c. Chemigation Wind Speed Precautions. Chemicals shall not be applied when wind speed favors drift beyond the area intended for treatment or when chemical-label restricts the use of a pesticide for wind speed.

Conclusion

The ISDA has carefully and completely reviewed the extensive rulemaking record. This negotiated rulemaking has included two informal negotiated rulemaking meetings and receipt of 140 written comments from stakeholders. Participating stakeholders have differences of opinion on what a proposed rule should require and consensus was not reached on all of the rulemaking issues. After consideration of the numerous suggestions from various stakeholder groups, the ISDA has developed a proposed rule and intends to proceed with formal negotiated rulemaking. The proposed rule is available immediately for stakeholder review and will be published in a special edition of the administrative bulletin in mid-September. Instructions on how to further participate in formal negotiated rulemaking will be provided in the Notice of Proposed Rulemaking that will also be published in the September Bulletin.

Stakeholders provided many helpful insights and proposed language changes for the Rules. Additionally, many stakeholders expressed a desire to improve pesticide safety through outreach to farm worker organizations and rural communities. Stakeholders also expressed a desire to continue to work with the FAA to address regulations within their jurisdiction. Although, these specific issues cannot be codified in an administrative rule, the ISDA is open to further dialogue on these important topics and willing to expand its outreach and education in areas of need to enhance pesticide awareness and safety.



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