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Proposed Rules Governing Pesticide and Chemigation Analysis

Formal Negotiated Rulemaking

On September 16, 2020 the Idaho State Department of Agriculture (“ISDA”) published a proposed rule in the Idaho Administrative Bulletin and solicited written comments from the public through October 7, 2020. The proposed rule puts forward certain amendments to the previously codified Rules Governing Pesticide and Chemigation Use and Application (“Rules”). The substance of the changes in the proposed rules were a result of informal negotiated rulemaking conducted from June through August of this year. During informal negotiated rulemaking, the ISDA received 140 written comments and considered additional suggestions offered from various stakeholders at meetings held on June 30, 2020, and August 04, 2020.

The Idaho Administrative Procedures Act (“APA”) guarantees the public has the opportunity to participate in the formal rulemaking process either through participation in meetings, written comments, or public hearings. See Idaho Code § 67-5222(1). The APA requires that the ISDA accept written comments for a minimum of twenty-one (21) days for all proposed rules. The ISDA met this requirement by accepting written comments from September 16, 2020 to October 7, 2020. Written comments submitted by the public are made part of the rulemaking record. All written comments must be considered by the agency prior to the adoption of a pending rule. Consideration of a written comment does not mean that the comment will necessarily cause further amendment to the proposed rule, nor must it be incorporated into the text of the pending rule unless warranted.

The ISDA received an additional forty-five written comments regarding the proposed rule published on September 16, 2020. Written comments received focused primarily on expanding the scope of the “hazard area” rule, IDAPA 02.03.03.400.08 to include other pesticides of concern in addition to phenoxy prohibitions. Commentors also suggested ISDA “create opportunities for farm workers and labor advocates to have a seat at the table and be consulted during department decision making.” One commentor requested that the rulemaking process and procedures comply with the Fair Housing Act or Title VIII of the Civil Rights Act. One comment received suggested the Commercial Apprentice applicators require on-site supervision rather than allowing remote supervision; expand the definition of hazard area to include rural residences and workplaces; add a definition of occupied structures; and restore low-flying prohibitions to the Rules. One commentor suggested that the ISDA evaluate “why phenoxy herbicides deserve buffers around hazard areas, whereas other proven toxic and lethal pesticides do not.” The rulemaking record also contains a report entitled “Assessment of Risk Factors for Health Disparities among Latina Farm Workers” from Boise State University recommending that “all workers have personal protective equipment that is appropriately sized and that all workers who handle pesticides are adequately trained.”

Consideration of Proposed Rulemaking Comments

1. Expanding the Scope of the Hazard Area Rule:

The proposed rule, if it becomes final, would prohibit the aerial application of high volatile ester pesticide formulations within five (5) miles of a susceptible crop or hazard area and within one (1) mile of a hazard area for low volatile ester pesticide formulations except where otherwise prohibited. See IDAPA 02.03.03.400.08. The proposed rule defines a hazard area as “cities, towns, subdivisions, schools, hospitals, or densely populated areas.” IDAPA 02.03.03.010.14.

Historically, Idaho has had enhanced restrictions in place related to the aerial application of high volatile and low volatile ester pesticide formulations. These enhanced rule restrictions were put in place because of the pesticide chemistry of ester formulations causing them to be more susceptible to volatilize and move away from the pesticide target. The Rules also prohibited the aerial application of any pesticide within ½ mile of a hazard area unless there is air movement away from the hazard area. Subsequent to the enactment of the Rules in 1997, the Environmental Protection Agency (“EPA”) worked with states and other federal agencies to evaluate risk of exposure from semi-volatile pesticides. An EPA advisory panel submitted a final report that resulted in EPA adopting a volatilization screening tool. EPA intends to use this volatilization screening tool during a pesticide’s registration review. See <https://www.epa.gov/reducing-pesticide-drift/pesticide-volatilization>. As EPA reevaluates pesticide registrations, it will modify label restrictions when indicated by its evaluation process. Any new label requirements instituted as part of a pesticide registration review will be enforced by ISDA as part of its overall regulatory program. Because EPA is actively evaluating volatilization risk of pesticides and engaging its scientific advisory panel, the ISDA does not believe that further changes to the proposed rules for hazard area is warranted.

2. Create opportunities for farm workers and labor advocates to have a seat at the table and be consulted during department decision making:

To the extent this comment is related to the ISDA rulemaking process, rulemaking procedures are governed by the Idaho APA. Idaho APA requirements are reviewed and implemented with each rulemaking conducted by the ISDA. All Idaho citizens are provided with the opportunity to access and participate in the rulemaking process. Language assistance is available if needed.

3. Rulemaking process and procedures complies with the Fair Housing Act or Title VIII of the Civil Rights Act:

The ISDA has reviewed and considered the information provided related to the federal Fair Housing Act and Title VIII of the Civil Rights Act. The ISDA believes that its rulemaking procedures governed by Idaho Code §§ 67-5201 *et seq.* comply with federal law related to fair housing.

4. Require Commercial Apprentice applicators to have on-site supervision:

This suggestion was previously considered as part of informal negotiated rulemaking. As previously analyzed, the current rule allows an unlicensed applicator to commercially apply general use pesticides with “on-site supervision.” The introduction of the Commercial Apprentice license category will allow a CA license holder to apply general use pesticides with remote or off-site supervision but only after the licensed applicator has demonstrated a basic understanding of the laws and safety requirements that relate to pesticide use and application in Idaho. Competency for the law and safety requirements is achieved by passing the ISDA exam on these topics. No additional changes to the propose rule are warranted.

5. *Expand the definition of hazard area to include rural residences and workplaces:*

Please see the ISDA discussion of comment #1 above.

6. *Add a definition of occupied structures:*

Please see the ISDA discussion of comment #1 and #7.

7. *Restore low-flying prohibitions to the Rules:*

This suggestion was previously considered as part of informal negotiated rulemaking. Federal regulations restricting low flying during pesticide spray operations are currently in place. FAA regulations are consistent with and, in certain instances, more stringent than the restrictions previously contained in the Rules. The ISDA believes that the proposed rules have adequate safeguards to protect the public considering FAA has regulations in place and the expertise to regulate low flying aircraft. No additional changes to the propose rule are warranted.

Conclusion

The ISDA has considered the comments received as part of the formal rulemaking process and concluded that no further changes to the proposed rule are warranted. The ISDA intends to publish the proposed rule, as written, in an upcoming administrative bulletin pending legislative review. Any interested citizen will have the opportunity to further participate in this rulemaking as part of the legislative review process during the upcoming legislative session. The pending rules do not become final until reviewed and approved by both bodies of the Idaho legislature.

A handwritten signature in black ink, appearing to read "Brian J. Oakey", with a long horizontal flourish extending to the right.

Brian J. Oakey
Deputy Director