IN THE MATTER OF:

Petition by Iowa Farmers Union for the Amendment of Rules and Adoption of Rules Relating to Pesticides

DENIAL OF PETITION FOR RULEMAKING

TO: Iowa Farmers Union
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    521 E. Locust Street, Suite 220
    Des Moines, Iowa 50309-1939

On December 19, 2014, Iowa Farmers Union (“IFU”), hereafter referred to as “Petitioner”, filed with the Iowa Department of Agriculture and Land Stewardship (“IDALS”) a Petition for Rulemaking (“Petition”) proposing that IDALS adopt rules relating to pesticides, including: certification and licensure of commercial pesticide applicators; evidence of financial responsibility by commercial pesticide applicators; reporting and record keeping by commercial applicators; notification requirements for sensitive crop and apiary registries; penalties for rule violations by commercial pesticide applicators; and resources for individuals impacted by pesticide spray drift.

IDALS, having given fair consideration to the Petition, responds to each rulemaking request contained within the Petition as set forth below:

1. Certification and Licensure of Commercial Pesticide Applicators

Petitioners have requested that IDALS adopt rules to require “commercial applicator training [to] include information on the potential impacts of pesticide spray drift on non-GMO
commodities, sensitive crops, and bee apiaries.” (Petition, p. 2 § 1). IDALS hereby denies the adoption of the requested rule because IDALS does not believe rulemaking is the appropriate mechanism to provide the requested information in training for pesticide applicators.

In order to be in the business of applying pesticides in the State of Iowa, an applicator must be certified. Iowa Code § 206.5(1) and 21 Iowa Admin. Code 45.22. To be initially certified as a commercial, noncommercial or public applicator, a person shall demonstrate a fundamental knowledge of the minimum state and federal standards of competency for commercial applicators by passing an examination administered by IDALS, and the examination may cover subjects relating to the safe application of pesticides, among others. Iowa Code §§ 206.6(3) and 21 Iowa Admin. Code 45.22(2)(a).

In addition to passing the general applicator certification examination, applicators must also pass separate examinations for each classification or category in which the commercial, noncommercial or public applicator intends to become certified. 21 Iowa Admin. Code 45.22(2)(c). There are approximately 22 categories (e.g. agricultural weed, fruit and vegetable pest control, turf pest control, aerial application…) for which commercial, noncommercial or public applicators can be certified. 21 Iowa Admin. Code 45.22(2)(c). All certified applicators must also participate in a program of continuing education. Iowa Code § 206.5(2)(b). IDALS has sought the cooperation and assistance of Iowa State University Extension (“ISUE”) in providing a program of continuing education, and ISUE is the primary provider for continuing instruction courses (“CIC”) for both private and commercial applicators in the State of Iowa.

Currently, IDALS, in cooperation with ISUE and the Environmental Protection Agency (“EPA”), conducts the pesticide applicator certification program. See Iowa Code § 206.9(4) (allows IDALS to cooperate, receive grants-in-aid and enter into agreements with any agency of
the federal government or of this state or its subdivisions, to “[p]repare and submit state plans to meet federal certification standards.”). The coordination is necessary to ensure the program meets the federal standards of certification, which enables state certified applicators to use restricted use pesticides. See Iowa Code § 206.7(2). The EPA has approved Iowa’s State Plan for Certification as meeting the federal standards and has entered into a cooperative agreement with IDALS. Iowa: Approval of State Plan for Certification of Pesticide Applicators, 42 Fed. Reg. 65264 (Dec. 16, 1977). The Iowa State Plan for Certification outlines the minimum general standards for certification and continuing education for all categories of certified applicators, including private, commercial (including aerial), noncommercial and public, and specific standards for each category/subcategory. 21 Iowa Admin. Code 45.22 and 45.52. These standards also meet the minimum federal standards for private and commercial pesticide applicators. 40 C.F.R. §§ 171.4(a) and (b) and 171.5(b).

Changes to the commercial pesticide applicator certification program, which could impact 14,000+ applicators in the state, including the addition of the information sought by Petitioners, would require extensive consideration and coordination with ISUE and EPA. Changes or modifications to Iowa’s State Plan for Certification must be submitted to the EPA Region VII Office for approval. 40 C.F.R. § 171.8(b). The changes would also require consideration and cooperation with the IDALS Pesticide Advisory Committee, which meets at least once annually to review pesticide applicator certification instructional courses and examinations to discuss topics of current concern that may be incorporated in pesticide applicator instructional courses and appropriate examinations. 21 Iowa Admin. Code 48.7. The Committee also reviews and evaluates the various instructional programs recently conducted and recommends options to increase overall effectiveness. Id.
In addition, the proposed “information on the potential financial impacts of pesticide spray drift on non-GMO commodities, sensitive crops and bee apiaries” would not equally apply to all Iowa pesticide applicator certification categories. As previously indicated, there are approximately 22 categories for which commercial, noncommercial or public applicators can be certified, and some of the certain pesticide application topics will not be as relevant in certain categories. 21 Iowa Admin. Code 45.22(2)(e). For example, Category 7E, Wood Preservatives, are less likely to encounter pesticide drift as compared to Category 1a-1e Agricultural applicators.

IDALS does not believe rulemaking is the appropriate mechanism to address the inclusion of specific topics into commercial pesticide applicators’ training. IDALS does believe information on the potential financial impacts of pesticide spray drift on non-GMO commodities, sensitive crops and bee apiaries may be helpful as a potential specific standard or priority area for select commercial applicator categories, but consideration and coordination must be made with ISUE, the Pesticide Advisory Committee, and EPA. Some of the information sought to be presented in the proposed rule is already included on the agenda for presentation to applicators in future CICs, including the topics “Pesticide drift reduction” and “Recognition of sensitive areas, including groundwater and other non-target sites and organisms (pollinators) as potentially impacted by pesticide applications, drift and runoff.” Iowa Commercial Applicator Certification Continuing Instructional Course (CIC) Program Agency (2015, 2016, 2017), http://www.iowaagriculture.gov/Pesticide/pdf/2014/CICStandardsFinalComm20151617.pdf (last visited January 23, 2015). IDALS is willing to work with Petitioners to provide them the ability to present a request to include their requested information in commercial pesticide applicator training to the Pesticide Advisory Committee.
2. **Evidence of Financial Responsibility by Commercial Pesticide Applicators**

Petitioners have requested that IDALS adopt rules to "expressly require all commercial applicators to furnish the Department with evidence of financial responsibility as a pre-condition for certification and licensure" and that such financial responsibility "be made publicly available by the Department." (Petition, p. 2 § 2). IDALS hereby denies the adoption of the requested rule because existing law covers Petitioner's requests and IDALS lacks the necessary resources and funding.

A rule proscribing the certification or licensure of an applicator until such applicator has submitted evidence of financial responsibility is unnecessary because IDALS is already prohibited from issuing a license or certification until an applicator has "furnished evidence of financial responsibility with the department." Iowa Code § 206.13(1). Iowa Code section 206.13 further provides for the types of documentation and amounts that will be sufficient to satisfy the requirements that an applicator must meet in order to obtain a license or certification from IDALS.

The evidence of financial responsibility is already publicly available pursuant to an open records request under Iowa Code chapter 22. Adoption of a rule that required IDALS to enter all the financial responsibility documentation into a publicly available database would necessitate the designation of resources and funding, and without additional legislatively appropriated funding, IDALS is unable to develop and administer the type of database anticipated by the Petition.

3. **Reporting and Record Keeping by Commercial Pesticide Applicators**

Petitioners have requested that IDALS adopt rules that require certain commercial pesticide applicator application records be "provided to the Department on a monthly basis,
rather than only as requested by the Department” and that “where a reported incident of pesticide spray drift has impacted a human, a sensitive crop or a bee apiary, information pertaining to that incident should be made publicly available by the Department.” (Petition, p. 2 § 3). IDALS hereby denies the adoption of the requested rule because existing law covers Petitioner’s requests and IDALS lacks the necessary resources and funding.

Iowa law requires commercial pesticide applicators to keep certain application records for three years from the date of application and that such records must be available to IDALS upon request. Iowa Code § 206.15; 21 Iowa Admin. 45.26(3). Currently, whenever there is an alleged incident of spray drift, IDALS requests the requisite application records as part of the investigative process, and the applicator is required to provide them. Information pertaining to an incident of pesticide spray drift that has impacted a human, a sensitive crop or a bee apiary, including the aforementioned application records, is already publicly available pursuant to an open records request under Iowa Code chapter 22.

Petitioner’s desired goal for this rule is to make application records more widely available, thereby allowing “all parties concerned to more accurately and easily assess whether and where spray drift and related adverse impacts have occurred.” (Petition, p. 2 § 3). It is not clear that requiring monthly submission of all application records will further that goal. Not all pesticide applications result in “spray drift”, and when an alleged incident of spray drift is reported and investigated, the records are requested by IDALS and, as previously mentioned, are publicly available through an open records request.

In addition, as previously indicated, there are 14,000+ commercial applicators certified to apply pesticides in Iowa; requiring all of them to submit their records to IDALS on a monthly basis would necessitate the designation of significant resources and funding. Without additional
legislatively appropriated funding, IDALS would not be able to receive, review, and/or maintain
the aforementioned records.

4. **Notification Requirements for Sensitive Crop and Apiary Registries**

Petitioners have requested that IDALS adopt rules that require commercial pesticide
applicators and applicator consultants “provide at least forty-eight (48) hours advance notice to
all individuals on the sensitive crop registry and bee registry who are located within a five (5)
mile radius of the proposed pesticide application site.” (Petition, p. 2 § 4). IDALS hereby denies
the adoption of the requested rule because the proposed rule would result in an increased
regulatory burden in terms of personnel and cost to both IDALS and commercial applicators and
applicator consultants.

On January 22, 2009, IDALS adopted the current “pesticide/bee rule”, which provides
that an applicator shall not apply pesticides, between 8:00 a.m. and 6:00 p.m., within one mile of
an apiary that is registered on Iowa’s Sensitive Crop Registry. *See 21 Iowa Admin. Code
45.31(1) and (2).* Previously, the bee rule had only required 24-72 hours’ notice to an apiary
within a 2 mile radius of a pesticide application, not a prohibition on application. *21 Iowa
Admin. Code 45.31 (Jan. 14, 2009).* The new bee rule developed from meetings between
IDALS, the Iowa Honey Producers Association, pesticide applicators, Iowa State University
experts, and beekeepers. *The new rule was the result of a compromise:*

When there is good forage for bees (April through August), studies have shown
the average foraging distance of adult bees is between 1/2 and 3/4 of a mile. This
average expands to 1 1/3 miles in times of dearth. In order to halt application of
insecticides labeled as toxic to bees between 8AM and 6PM, a compromise was
made to the 1 mile radius in the proposal.

*The Buzz: Newsletter of the Iowa Honey Producers Association, Changes to Iowa’s Bee
Rule: Frequently Asked Questions, p. 8,*
http://www.abuzzaboutbees.com/IHPA/TheBuzz/April09/Page8.html. (last visited January 23, 2015). IDALS does not currently see a need to revisit the compromise at this time.

In addition, the 5 mile radius would be unworkable. IDALS has previously conducted an assessment of the number of fields a pesticide investigator, on average, would have to examine under a one mile radius versus a half mile radius non-application zone. IDALS took a map that was representative of a typical Iowa countryside, with a number of farms being owned by a number of different individuals. Under the half mile radius, IDALS found 11 fields that would have to be inspected; under the one mile radius, IDALS found that 31 fields would have to be inspected. A simple multiplication of 5 miles X 31 fields/one mile radius=155 fields/five mile radius. A five mile radius would be extraordinarily burdensome for IDALS investigators. Without additional legislatively appropriated funding, IDALS would not be able to inspect all fields within a 5 mile radius of an application to adequately investigate an incident of overspray.

5. **Penalties for Rule Violations by Commercial Pesticide Applications**

Petitioners have requested that IDALS adopt rules that “provide for maximizing fines where multiple violations have occurred as part of a single incident, where the damages are particularly costly or of a nature not covered by the violator’s business liability insurance, or where the offender has a history of repeated violations” and “provide for referrals for criminal prosecution.” (Petition, p. 3 § 5). IDALS hereby denies the adoption of the requested rule because the Iowa Code and IDALS’ administrative rules already include the requested considerations.

IDALS’ imposition of administrative penalties is limited to a maximum of five hundred dollars ($500.00) for each offense. Iowa Code § 206.19(5)(b). When evaluating whether to
impose administrative penalties for a violation, and if so, how much, IDALS is required to consider the following factors:

1) The willfulness of the violation;

2) The actual or potential danger of injury to the public health or safety, or damage to the environment caused by the violation;

3) The actual or potential cost of the injury or damage caused by the violation to the public health or safety, or to the environment;

4) The actual or potential cost incurred by the department in enforcing this chapter and rules adopted pursuant to this chapter against the violator;

5) The remedial action required of the violator; and

6) The violator's previous history of complying with orders or decisions of the department.

Iowa Code §§ 206.19(5)(a)(1)-(6); 21 Iowa Admin. Code 45.102(1)(a)-(f). The Iowa Code also allows for the referral of violations for criminal enforcement. See Iowa Code § 206.22. Since Iowa law already provides for Petitioner’s considerations with respect to the imposition of administrative penalties and criminal referrals, IDALS does not currently see the need to adopt the requested rules.

6. Resources for Individuals Impacted by Pesticide Spray Drift

Petitioners have requested that IDALS adopt rules that include the following:

1) Set forth a clearly defined investigative procedure through the Department when there is a reported incident of pesticide spray drift;

2) Require that impacted parties receive information regarding their practical and legal remedies and the steps that can be taken to mitigate or otherwise address losses from spray drift; and

3) Require that information for impacted parties be provided in writing by the Department, as well as included in a clear, easily accessible format on the Department website.
IDALS hereby denies the adoption of the requested rule because: IDALS does not think rulemaking is the appropriate mechanism to set forth a “defined investigative procedure”; IDALS cannot advise impacted parties on what their legal rights and responsibilities are; and IDALS does not believe that rulemaking is the appropriate mechanism to determine what information shall be provided to impacted parties or included on IDALS’ website, nor does IDALS have the necessary resources and funding to include all the requested information on its website.


While IDALS can direct members of the public and those impacted by pesticide overspray to the provisions in the Iowa Code and IDALS’ rules that govern pesticide application, IDALS cannot advise impacted parties on their “practical and legal remedies.” IDALS cannot

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1 Petitioners also request that IDALS improve its website by ensuring the site contains “clear and concise information directing those potentially impacted by pesticide spray drift to the proper location within the site” and “information relating to incident-reporting protocol, a description of the role of the Pesticide Bureau in recovering compensation for spray drift damages, and information on risks related to pesticide exposure.” (Petition, p. 3 § 6). IDALS is not going to specifically respond to that request in this document as it is not a specific request for rulemaking. Nonetheless, IDALS is willing to work with Petitioners to include some of the requested information on its website.
act as an impacted party's legal counsel. Moreover, IDALS does not believe rulemaking is the appropriate mechanism to direct IDALS on what information it should provide to both members of the public and victims of overspray.

IDALS believes that rulemaking does not provide the agency the flexibility that it believes is necessary to determine what information it will provide, and in what format it will be provided, to victims of pesticide overspray or placed upon IDALS' website. In addition, without additional legislatively appropriated funding, IDALS would not have the necessary resources and funding to include all the requested information on its website.

STEPHEN MOLINE, Division Director
Food Safety and Animal Health
Iowa Department of Agriculture and
Land Stewardship

Dated this 17th Day of
February, 2015.