

Scott, David E

From: Bennett, Aaron (GOV) <AarBennett@gov.IN.gov>
Sent: Thursday, January 12, 2017 2:21 PM
To: Scott, David E
Subject: RE: State Budget Agency Rule Promulgation Submission Form (LSA#16-533)

Good Afternoon,

I just received clarification that you do need to withdraw you Notice of Internet. OMB is currently reviewing your request and will provide a determination. No other documentation is needed at this time. Once OMB has issued a moratorium exception, you may refile your NOI. Let me know if you have any questions.

From: Bennett, Aaron (GOV)
Sent: Friday, December 16, 2016 10:57 AM
To: 'Scott, David E' <scottde@purdue.edu>
Subject: RE: State Budget Agency Rule Promulgation Submission Form (LSA#16-533)

Good Morning,

The documentation you have already provided is sufficient. There is no need to withdraw your current Notice of Intent. Let me know if you have any other questions.

Thank you,

Aaron Bennett
Executive Assistant to Micah Vincent and Brian Bailey
Office of Management and Budget
AarBennett@gov.IN.gov
Phone: (317) 234-4411
Mobile: (317) 650-6407

From: Scott, David E [<mailto:scottde@purdue.edu>]
Sent: Thursday, December 15, 2016 2:25 PM
To: Bennett, Aaron (GOV)
Cc: Waltz, Robert D
Subject: RE: State Budget Agency Rule Promulgation Submission Form (LSA#16-533)

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Mr. Bennett,

Thank you for your assistance. Now that I have reviewed the Circular I do have a couple of additional questions.

1. Will the information already provided be adequate to allow the OMB to make a determination of applicability of an exception?
2. If so, do we need to withdraw our current Notice of Intent to Adopt a Rule and resubmit another notice?



INDIANA PESTICIDE REVIEW BOARD

Purdue University - 175 S. University Street
West Lafayette, IN 47907-2063
(765) 494-1492 - Fax (765) 494-4331

Dave Scott, Secretary

December 12, 2016

Brian E. Bailey
Indiana State Budget Agency
200 West Washington St.
Room 212
Indianapolis, IN 46204

Dear Mr. Bailey:

Enclosed for your review and approval are the following documents submitted for the draft rule amending 357 IAC 1-17 (**LSA #16-533**).

- ❖ SBA Rule Promulgation Submission Form
- ❖ Draft Proposed Rule
- ❖ Fiscal Impact Analysis on State and Local Government
- ❖ Cost Benefit Analysis (IC 4-3-22-13, IC 4-22-2-28)
- ❖ Notice of Intent to Adopt a Rule (IC 4-22-2-23)
- ❖ Economic Impact Statement (IC 4-22-2.1-1)

We greatly appreciate your assistance in expediting our request. If you have any questions about this material please feel free to contact me at scottde@purdue.edu or (765) 494-1593.

Sincerely,

A handwritten signature in black ink, appearing to read "David E. Scott".

David E. Scott
Secretary
Indiana Pesticide Review Board

Enclosures

State Budget Agency Rule Promulgation Submission Form

1. Notice of Intent File Date:

2. LSA Document Number:

3. Primary Point of Contact:

Name:

Agency:

Phone:

Email:

4. Statutory Authority for Rule Promulgation:

IC 15-16-4-50

5. Agency requests an expedited review of the proposed rule. See page 5 of FMC 2010-4 for more information regarding the expedited review process.

Yes No

Explain reason(s) an expedited review is necessary, including any relevant dates associated with external deadlines:

The Indiana Pesticide Review Board (IC 15-16-4-42) meets quarterly.
The IPRB is scheduled to meet next on March 2, 2017.
The board must vote on final adoption of the rule.
Expedited review will allow the rule making process schedule and the quarterly meeting schedule to proceed as planned without waiting an additional quarter.

6. Submit to SBA/OMB via SBARules@sba.in.gov. Please include supporting materials listed below

Submission Checklist:

- SBA Rule Promulgation Submission Form (this form)
- Cover letter
- Proposed or Draft Rule
- Fiscal Impact Analysis on State and Local Government (FMC 2010-4)
- Cost Benefit Analysis (IC 4-3-22-13, IC 4-22-2-28, FMC 2010-4)
- The Notice of Intent (IC 4-22-2-23) or, if applicable, the relevant notice from IC 13-14
- Small Business Economic Impact Statement (IC 4-22-2.1-1)

TITLE 357 INDIANA PESTICIDE REVIEW BOARD

Proposed Rule LSA Document # 16-533

Amends 357 IAC 1-17 to expand the list of state restricted use pesticide products to include certain herbicides containing the active ingredient dicamba. Effective 30 days after filing with the Publisher.

IC 4-22-2.1-5 Statement Concerning Rules Affecting Small Businesses

357 IAC 1-17

SECTION 1. 357 IAC 1-17 IS AMENDED TO READ AS FOLLOWS:

Rule 17. State Restricted Use Pesticide Products

357 IAC 1-17-1 State restricted use pesticide products

Authority: IC 15-16-4-50

Affected: IC 15-16-4; IC 15-16-5

Sec. 1. Pesticide products defined by the following categories or active ingredients are designated and classified as restricted use pesticides in the state of Indiana:

- (1) Any pesticide classified by the U.S. Environmental Protection Agency as a restricted use pesticide.
- (2) All formulations containing methomyl (Chemical Abstracts Service Reg. No. 16752-77-5).
- (3) **Any dicamba containing pesticide product bearing a label indicating the herbicide:**
 - (A) **contains a dicamba active ingredient concentration greater than or equal to 6.5 percent; and**
 - (B) **is intended for agricultural production uses but:**
 - (i) **does not also contain 2,4-D as an active ingredient; or**
 - (ii) **is not labeled solely for use on turf or other non-agricultural use sites.**

(Indiana Pesticide Review Board; 357 IAC 1-17-1)

TITLE 357 INDIANA PESTICIDE REVIEW BOARD

Fiscal Impact Analysis on State and Local Government

LSA Document #16-533

The proposed rule will have **no fiscal impact** on state and local government. This rule will simply restrict the distribution and use of agricultural herbicides containing dicamba to pesticide users certified and licensed by the State Chemist. There are currently numerous alternative herbicides that could be used in place of dicamba containing products. In addition, state and local governments that may currently use dicamba in their weed maintenance operations have already have certified applicators on staff or are contracting with certified and licensed application businesses.

In addition, dicamba containing herbicides that are intended for use on turf and other non-agricultural use sites will not be impacted by this rule. Most dicamba herbicide use by state and local government agencies is with the turf and non-agricultural use products, not higher concentration agricultural use products such as those being impacted by this proposed rule.

Likewise, state and local units of government are not in the business of serving as herbicide vendors or dealers, so any minimal additional regulatory compliance requirements experienced by distributors of these products will have no impacts on government.

The State Chemist of the State of Indiana is the agency charged with the administration and enforcement of the regulatory restrictions on the distribution and use of pesticides, including restricted use pesticides, as is being proposed. Because the necessary infrastructure and regulatory programs for administering and enforcing the proposed restrictions are already well established, incorporating these products into that scheme will not require additional resources.

TITLE 357 INDIANA PESTICIDE REVIEW BOARD

Cost Benefit Analysis LSA Document #16-533

Estimated Number of Businesses Subject to this Rule:

The Indiana Pesticide Review Board (IPRB) estimates that 550 registered Restricted Use Pesticide (RUP) dealers, 680 commercial licensed agricultural pesticide application businesses, and 12,000 licensed agricultural pesticide applicators (soybean growers) could be subject to this rule. In addition, another estimated 50 farm center retail outlets that are currently not registered as RUP dealers but may sell or distribute dicamba containing herbicides may be impacted by this rule to some degree.

The higher concentration dicamba herbicide containing products impacted by this rule are typically sold by farm store retailers or registered Restricted Use Pesticide (RUP) dealers. The registered pesticide dealers are already in compliance with the restricted use pesticide sales requirements, so they would incur no additional regulatory burden if they choose to continue to handle these products. Some farm store retailers are currently not registered restricted use pesticide dealers, but they can avoid regulatory impact by simply offering for sale any of the other many currently registered and similarly priced herbicides intended to control the same weeds.

All commercial licensed pesticide application businesses and the applicators they employ are already required by state law to be certified and licensed to handle and apply dicamba containing herbicides. Therefore, the reclassification of these herbicides from non-restricted to restricted should result in no additional regulatory burden for these businesses.

Likewise, most if not all soybean growers that apply their own pesticides are already in compliance with the state certification and licensing requirements to purchase and apply these herbicides. Specifically, most of these applicators currently handle and apply other RUPs in their farming operations, so no additional certification would be required. Therefore, these applicators should not realize any new regulatory burden from this rule revision.

Estimated Average Annual Administrative Costs:

Administrative costs for mainstream dicamba herbicide distributing dealers should be very minimal. Dealers of RUPs are required to keep records of sales and distribution to certified end users (applicators), but those are recordkeeping mechanisms that are already in place. In addition, most dealers currently keep records of their non-restricted pesticide sales for their own purposes, so this administrative requirement should be absorbed into the existing system without discernable cost.

For any dealers who are not already registered as RUP dealers, the cost of an annual permit to sell RUPs to end users is \$45.00. Based on the experience of the Office of Indiana State Chemist (OISC), the state pesticide regulatory agency, it is estimated that fewer than fifty farm stores may choose to become registered RUP dealers. Fifty dealers at \$45.00 per year would total \$2250.

Relative to the administrative regulatory costs for implementation, OISC does not anticipate incurring any new measureable administrative burden as the result of this rule

revision. There are adequate OISC staff and resources available to absorb any routine costs associated with the additional estimated fifty or fewer regulated dealers. Inspections needed to insure compliance with the rule will be conducted by existing field staff through a reprioritization of inspection activities. By contrast, however, it is projected that failure to implement adequate regulatory measures to address expanded dicamba use scenarios could very well result in a significant increase in the need for off-target drift investigation response resources from OISC. It is estimated that the current costs of conducting off-target drift investigations range from \$2,500 to \$3,000 per investigation, if the investigation findings are accepted by all parties and not contested. If OISC were required to conduct an additional 200 drift investigations just for dicamba misuse, as has been the case in at least one other state, the additional regulatory price tag could total \$500,000 to \$600,000. And that figure does not include the cost of off-target property damage to Indiana consumers.

Estimated Total Annual Economic Impact:

It is estimated that total annual economic impact of implementing this rule would be less than \$100,000 because the use and distribution of these herbicides would be conducted by individuals and businesses that are already in compliance with the proposed regulatory requirements and the regulatory program and resources needed for oversight are already in place for this proactive strategy. As described elsewhere in this document, the cost of not acting proactively is projected to result in damages and economic losses to agricultural growers and other consumers that could be hundreds of times greater.

Supporting Data, Studies, and Analyses:

The Board examined and considered the following data sets and heard the following testimony in determining the need for this rule:

- 1) The IPRB has been discussing the possibility of the new uses of dicamba herbicides that have prompted this rule revision since 2007, when dicamba tolerant soybean technology development first came to their attention. Discussions, updates, and presentations have occurred continuously at over half of the IPRB quarterly public meetings since that time. Testimony has been provided by commercial Indiana tomato growers, commercial Indiana grape growers, university scientists, dicamba herbicide manufacturers, commercial pesticide applicators, private pesticide applicators (growers), public representatives, and state pesticide regulators.
- 2) Dicamba tolerant soybean seed technology has been approved for planting by the USDA and will become widely available to Indiana growers in 2017.
- 3) Red Gold, a Midwestern commercial tomato grower operating in Indiana, reported on the economic losses suffered to over 8,000 acres of non-target Indiana tomatoes during 2007 when a similar herbicide tolerant seed technology was introduced. The herbicide causing the 2007 off-target damage is one that is considerably less active on sensitive crops, like tomatoes, than dicamba will be.
- 4) University researchers and soybean growers testified on the growing need for effective weed control options to address the rapid emergence of economically devastating weeds that have grown resistant to other conventional herbicides.

- 5) U.S. EPA approved a dicamba-containing herbicide for use on tolerant soybeans in November, 2016. However, non-tolerant soybeans are still quite sensitive to off-target movement of dicamba. It is unclear the extent to which tolerant and non-tolerant varieties of soybeans will be planted in close proximity to one another, putting the non-tolerant varieties at risk.
- 6) The label directions and restrictions for the recently EPA-approved dicamba soybean herbicide products are quite complex and different from most existing herbicide product labels, making safe and legal use by non-trained and non-certified applicators unlikely.
- 7) U.S. EPA issued a Compliance Advisory in August 2016 regarding the extremely high number of reports of off-target crop damage resulting from the use and misuse of dicamba herbicides applied on dicamba tolerant soybeans.
- 8) Numerous surveyed states reported incidents of dicamba misuse on tolerant soybeans and resulting off-target damage during 2016, the first year of the limited commercial release of the tolerant seed technology. The most extensive misuse and damage complaints for 2016 came from Missouri, which provided preliminary reports of 226 complaint investigations by the state pesticide regulatory agency, involving 62 different herbicide applicators, over 300 environmental residue samples, and non-target damage to 39,000 acres of soybeans, 575 tomato plants, 990 acres of cotton, 650 acres of peaches, 400 acres of peas, 200 acres of peanuts, 10 acres of watermelons, 9 acres of cantaloupes, 6 acres of alfalfa, and numerous residential gardens and ornamental plantings.
- 9) OISC testified to the IPRB that with no regulatory controls to monitor who may be distributing and applying dicamba herbicides, effective investigation of consumer complaints and claims of off-target damage, and realistically assigning responsibility for that damage may not be possible.

Regulatory Flexibility Analysis of Alternative Methods:

The IPRB has studied other potential remedies and methods to address the issue of dicamba herbicide misuse and off-target damage, including the following:

- 1) Deny the application for registration of this new dicamba use on tolerant soybeans in Indiana, regardless of the potential benefits of this herbicide to some soybean growers. It was thought that this might place Indiana soybean growers at a competitive disadvantage with other U.S. soybean growers who would have access to this weed control tool. In addition, as demonstrated in other states in 2016, not having a dicamba product registered for use on soybeans has not prevented some growers from intentionally misusing other dicamba products on the tolerant soybeans that are already in channels of trade.
- 2) Encourage voluntary attendance by potential dicamba users at training and educational sessions designed to explain the potential hazards and the complex label restrictions of this new dicamba use. With no mechanism to identify users and insure and track their participation in the training, it was felt that this option

would probably reach only those applicators who are already the more conscientious and progressive segments of the industry. Those applicators that should be targeted for training may not be part of the current regulated community, so would not benefit from this non-documentable voluntary approach.

- 3) Develop dicamba risk mitigation rules for application above and beyond those already on the overly complex label approved by U.S. EPA. Such measures could include geographic restrictions, extended buffer area requirements near sensitive areas, more restrictive wind speed limits during applications, and application timing and use date restrictions. Because it is unclear at this point whether the current risk mitigation restrictions on the label will be adequate or not, it is probably premature to prescribe additional unproven protective measures on top those. In addition, development of scientifically vetted and practical risk mitigation measures would require both considerable time and resources to develop.
- 4) Seek a special local need registration (FIFRA Sec. 24C) from U.S. EPA to require training for anyone who uses the new soybean use dicamba product. Researching this option with EPA has lead the IPRB to understand that such a restriction would not meet the legislative intent of section 24 of FIFRA and would be discouraged. In addition, such a requirement would be very difficult to implement if there was not a reasonable mechanism to also monitor the distribution process and identify the actual users of the product. And again, targeting only the limited number of dicamba products approved for this use would not address the intentional misuse of other dicamba herbicides not labeled for this use.

Explanation of Preliminary Determination:

The IPRB made a determination that the rule was necessary for public and environmental safety and property damage protection of agricultural growers and others. As explained throughout this document, dicamba is a very effective herbicide in controlling certain troublesome and yield reducing weeds in soybeans. However, it is also a very active herbicide that can cause considerable damage to sensitive crops and ornamental plantings when even low-levels of the herbicide drift and move off target during application or volatilize and move off target after application. The IPRB determined that failure to institute proactive regulatory controls would likely result in significant unintended negative consequences once dicamba use became widespread throughout Indiana. The IPRB also determined that some form of regulatory oversight and reassurances were necessary to preserve the continued availability of this weed control technology for years to come. Building on an existing regulatory structure that allows for tracking distribution and use only by trained and monitored pesticide users is the most responsible and cost-effective approach.

TITLE 357 INDIANA PESTICIDE REVIEW BOARD

Notice of Intent to Adopt a Rule
LSA Document #16-533

Under [IC 4-22-2-23](#), the Indiana Pesticide Review Board intends to adopt a rule concerning the following:

OVERVIEW: Amends [357 IAC 1-17](#) to expand the list of state restricted use pesticide products to include certain herbicides containing the active ingredient dicamba. Effective 30 days after filing with the Publisher. Questions may be directed to the Small Business Regulatory Coordinator for this rule. Statutory authority: [IC 15-16-4-50](#).

For purposes of [IC 4-22-2-28.1](#), the Small Business Regulatory Coordinator for this rule is:

David Scott
Secretary
Indiana Pesticide Review Board
175 South University Street
West Lafayette, IN 47907-2063
(765) 494-1593
scottde@purdue.edu

For purposes of [IC 4-22-2-28.1](#), the Small Business Ombudsman designated by [IC 4-4-35-8](#) is:

Robert Warner
Small Business Ombudsman
Indiana Economic Development Corporation
One North Capitol, Suite 600
Indianapolis, IN 46204
(317) 232-5679
rwarner@iedc.in.gov

Resources available to regulated entities through the small business ombudsman include the ombudsman's duties stated in [IC 4-4-35-8](#), specifically [IC 4-4-35-8\(9\)](#), investigating and attempting to resolve any matter regarding compliance by a small business with a law, rule, or policy administered by a state agency, either as a party to a proceeding or as a mediator.

Posted: 12/07/2016 by Legislative Services Agency
An [html](#) version of this document.

TITLE 357 INDIANA PESTICIDE REVIEW BOARD

Economic Impact Statement

LSA Document #16-533

IC 4-22-2.1-5 Statement Concerning Rules Affecting Small Businesses

The proposed rule will not impose requirements or costs on small businesses under IC 4-22-2.1-5. This rule will simply restrict the distribution and use of an estimated fewer than fifty agricultural herbicides containing dicamba to pesticide users and distributors already credentialed and regulated by the State Chemist. Because the requirements in this rule will apply only to higher concentration agricultural weed control products but not lower concentration turf weed control products, and because there are currently numerous alternative herbicides that could be used in place of dicamba-containing products, neither pesticide dealers and distributors nor pesticide applicators or application businesses will be impacted fiscally.