



INDIANA PESTICIDE REVIEW BOARD

161st Meeting Minutes
July 9, 2020; 9:07 am – 1:12 pm
Beck Agricultural Center
4550 US-52
West Lafayette, IN 47906

Members Present:

Megan Abraham
Bob Andrews
Rick Foster
Bruce Bordelon
Ron Hellenthal (Chair)
Scott Robbins
Julia Tipton-Hogan
Mike Titus
Stuart Orr
Jim Hawbaker
Kevin Underwood

Members Present Virtually:

John Bacone
Lee Green
Tim Gibb
Jamey Thomas
Martha Clark-Mettler

Ex officio

David Scott
State Chemist - Vacant
Fred Whitford

Members Absent:

(none)

Introductory Comments: Introduction of Electronic Participation Policy

David Scott: Dave introduced policy to allow electronic participation of board and public or future meetings.

- Encourages physical presence
 - not intended to discourage robust debate
 - facilitate communication as much as possible
- In compliance with open door policy
- Board members must attend 1 meeting annually

MOTION... to approve by Ron Hellenthal and Bruce Bordelon; **VOTE...** was unanimous

- 1. Approval of the meeting agenda...****MOTION...** to approve by Ron Hellenthal and Bob Andrews; **VOTE...** was unanimous
- 2. Approval of the previous meeting minutes...****MOTION...** to accept by Ron Hellenthal and Mike Titus; **VOTE...** was unanimous
- 3. Review of cases involving civil penalties since the last meeting...**
Ron: Summary and full disposition of cases available online. Board, any questions about these actions?

Bruce: Several drift cases and as you read through them, there are comments that the wind is that from the east, vs some blowing towards the east. We need to appropriately describe the wind so that it is uniform across reports.

Wind direction should be as FROM – not the direction it is going towards

Ron: George, can we change this for future reports?

George: Part of the problem we face is the report of the applicator is incorrect-- we give them the opportunity to correct the record if they misunderstand how wind direction is interpreted. That said, we can make an effort to be more consistent in future reports

Ron: Any additional questions? ... No; we'll move on..

4. Vote on appeal hearing in Case # PS19-0235

Ron Hellenthal: the respondents were Joe Frey and Shelby Frey, Julia Hogan and Ron H as judges June 11th, complaint that Frey was storing pesticides inappropriately

Investigator found that there were a number of mini-bulk pesticides stored inappropriately 45 – 60 days (30 day grace period, which was exceeded in all cases)

36 counts of violation of storage

\$9,000 civil penalty fee – this fine could not be mitigated without board approval

Shelby claims the fine is very unfair, OISC proposed reduced fine of \$1,800

Mr. Frey refused, claimed the cost is still too high

At the hearing, Mr. Frey did not dispute claims, asked for a warning as he was unaware of the regulation and that this was his first offense

OISC illustrated that Mr. Frey had been instructed of the regulation during a course for licensure and that the improper storage could have resulted in significant environmental harm

Panel held the mitigated amount \$1,800 was appropriate to the violation

Megan Abraham: move to accept the panel's recommendation

Bruce Bordelon: seconded

Mike Titus: Has he paid the fine at this point?

Ron: No, the fine was not finalized until this meeting

Martha: I didn't see in the write up if they had secondary containment and just weren't using it?

Ron: Mr. Frey found someone that allowed him to use their facility

Jim H: Is \$1,800 a financial burden?

Ron: We discussed it, it didn't make the minutes-- the concern is that, if an infraction like that only results in a warning... proper storage of pesticides can be costly, the concern is that, if we don't generate a fine, then people may be incentivized to simply wait until fine is issued before addressing. We felt the fine was consistent with individuals and companies that have committed this violation before.

Julia: We asked if Mr. Frey if he was up to date on his continuing education, he was aware that he was out of compliance. Mr. Frey was very understanding of why we recommended the mitigated fine. No, I don't think that the mitigated fine will put him out of business.

Ron: We did discuss our findings and we did offer him the opportunity to come and address the entire board-- he chose not to be here today – Mr. Frey understood the basis of the ruling, he may not have liked it, but he was understanding of it.

Dave: Vote on the motion?

Ron: Motion--

Sarah: (roll call)

Ron: Motion carries

Fred: Ron, the last public review board, you asked us to develop an extension publication, we need an editor to get to it, but we will have it sent out to at least the industry people-- we hope to take that publication and take it to farmers to help clarify what this means. Mike Titus, Joe Becovitz-- this is looking at handling mini bulks, what is containment, when does the 30 days start, etc. We hope to develop a PowerPoint, other resources to help address some of the issues we are seeing. **MOTION...** to approve by Megan Abraham and Bruce Bordelon; **VOTE...** was unanimous

5. Operations during the COVID-19 pandemic period

Dave: We're going to ask our program managers to say a few words about how our operations have been impacted by the pandemic, ask them to touch on whether services have been impacted or eliminated, to give public a better sense of what the environment has been and how we've had to adopt.

Sarah: (PowerPoint, Pesticide Registrations) Normally at mid-year we see a downward trend after March until renewal season-- this year we have seen a spike. We have an increase of applications, increase in time it takes to process an application, we have had a correlating increase in need to communicate with registrant and on

We have already had the same number of TOTAL incomplete applications for 2020 as we had in 2019 (and we are only mid-year)

Total products registered by month have, in general, been much slower to process

In past years, we have been able use these months to address devices and 25b applications-- we have not had the time to dedicate to those because we have received so many more section 3 applications and because so many of them have required more additional work than they typically do

Seeing an increase in disinfectant products, a huge increase of new companies

123 new registrants in 2019 total, 134 new registrants in 2020 (only mid-year)

Increase of distributor products

Seeing a lot of UV devices with disinfectant claims

Common violations – formatting issues, distributor products, kits/co-packs, False or misleading claims (on label, on website), barrier/preventative claims for COVID-19

Adaptive policy for registrants to take COVID-19 into account

Correlation of our products to EPA List N, the Indiana List N

Indiana's list includes distributor products and marketplace (brand) names to facilitate understanding of public

Leo, (Certification and Licensing): Martha Clark inquires how Dr. Bob's retirement is going, how the search for a replacement is going-- I saw a photo of him, he's got a full beard.

For Cert and Licensing, we have relaxed requirement for registered technicians, usually must take exam and have credentials

MUST still require supervision, but exam and credentials given a pass for the time being

Testing has been shut down since March, just now opening 3 sites, Columbus, Bloomington,

Hope to have the rest open by August

We have started looking at remote testing as a possibility-- we are being very protective of the integrity of our exams. A one to one ratio of proctor to applicant

Only available when brick and mortar sites are not available. 4 pm to midnight. Metro Institute.

Proctor has the ability to shut down testing on command. If they witness violation of rules, they can and will end testing immediately. No one in or out of room, no scratch paper, no recording information (flicker screen technology). Keeping rules as parallel to brick and mortar sites as possible.

Relaxing the requirement this year has facilitated farmers and golf courses, able to process and mail licenses, process CCHs, have been able to meet our obligations thanks to this

Experience requirements-- termite and commercial 3 b – relaxed that requirement, still licensing applicants with the understanding that they are to take course as soon as available

Commercial 3b 2 day course available online

Titus: Thank you for relaxing those requirements, it's meant a lot to my industry-- it was huge for us to have that happen. Second, I'm a little concerned with the training, we didn't have the conference Purdue usually offers? I am concerned about getting enough training

Leo: Plenty of online courses and conferences, there is going to be a “drive in” CCH class, MRTF has gone virtual... if anyone wants to put on CCH courses, all of those are going to be virtual, we've worked with Dr. Foster to provide those.

We're hoping to make as many available as possible

Ron: Individuals exempted... will they eventually need to take those certifications?

Leo: Exemption ends in December, all are going to need to take the exams after that date

Dave: Under the current plan, the exemption ends in December, we may have to remain flexible depending on the situation. Fred, say anything based on training / licensing

Fred: We are still paying 3 salaries out of the funds we have-- long and short, we have a meeting next week with Leo and Dave, to make the decision to hold meetings or hold them virtually-- colleagues across the company are trying to do all training online. The holdup is the test-- no test, no license. We are down right now but hoping to have answers next week.

Required face masks may be coming, we are trying to balance all of those needs and come up with answers. We will send a letter to the industry people to let them know what's available

Dave: Your frustrations are a microcosm of the greater issue-- there's not Federal mandate, not state ruling, no university ruling. Hoping we can make some progress, this is a moving target, for example, Purdue's guidance changed two days ago, this meeting would have been in violation of that if we'd filled every seat.

We were pushing the envelope, in advance of Purdue-- their pace has not been swift enough for us either... this is drastically different than the historic model, which has been face-to-face, big crowd.

Fred: We have to be able to charge for the license / exam, to fund the program.

If someone had COVID here... would everyone have to be quarantined for two weeks?

I like the live, talking to people, it's my preference, but we're going to have to adapt to make sure that everyone is taking care of.

Bob Andrews: I kind of get it... our industry has not missed a day of work. We are the definition of remote. Customers come into our building, we've done digital invoicing, we have a lot of people in the industry, but none of them have missed a paycheck. Aug 22 annual field day, we're following the Hendricks County board of health regulations.

500 people live event, no more than 200 people per room, hand sanitizer, food served instead of buffet.

There's no rhyme or reason to these regulations.

Do not allow the abnormal to become normal. This needs to be over at some point.

Dave's right, this is a moving target.

We cannot dumb down our testing to the point of simply sitting in front a computer. It will lose its seriousness, it will lose its impact.

Not a single registered technician hired after March that have taken a test, running around, making applications.

Masks should not be considered the “normal” we can't let this set a precedent.

Ron: Lee, can you comment on the changes?

Lee: There are 4 different counties that have mask requirements... each county has the power to make those determinations. We probably will have different rules for different counties even as we progress.

Megan: Indiana's nursery industry has been booming-- have the applicators been out? Were they considered essential?

Bob: We were not shut down. A couple counties temporarily halted lawn and landscape / golf courses, but that was temporary. Now there is a feeling that the outdoor activities are okay. We've had a very good year.

Megan: I meant OISC investigators?

Leo: There have been quite a few registered technicians apply for license

Literally 3 times take the test than the course through remote vendor. Vast majority are not taking the exam prep

Titus: We should have a younger mike transport next time... Is there a percentage of failure for these? I agree with Bob that the videos may not be as effective as in-person training? Are you happy with things are going?

Leo: I couldn't be happier, I'm much more confident in the one on one proctor than the seventy people in a room with one proctor. I'm very confident in the process we're developing to make this exam more available. I think it's added value for service. There's no state in the nation that puts more time and money into their exam--

Pass fail rate? Pretty close to the same for category, training or no

For the Core, there's a 5% greater after training (93% vs 98%)

Bob: Don't mistake passing a test for knowledge. We have to make sure applicants have the real-world knowledge.

Fred: Minimum standard is passing the test-- we hope that there's value in face-to-face training.

My opinion is that the people we see face-to-face are the ones that don't have a lot of confidence in themselves, we spend a lot of time building that confidence. It's a lot more than just taking the test.

George: We made a decision a few years ago to make a friendly visit whenever a new pesticide site came online. About 3 years ago, we had to stop those visits when drift cases exploded.

Since the pandemic, we have started making those introductions by telephone and our productivity has actually increased

We give complainants the “COVID-19 warning” to tell them what we're going to implement on a visit (mask, distancing, etc).

Our documents now include a COVID-19 adaptation where we offer a couple different options to make payments in light of the the pandemic

Carrie: Safety Officer, COVID-19 kind of hijacked my job when it started, I've been taking

What happens if someone gets it? The reason we have these masks and social distancing and monitor symptoms is to help prevent the need to self-quarantine. These are precautions we take to help make sure business doesn't grind to a halt in the advent of one positive case

Ron: If someone tests positive, do you want them to notify you?

Carrie: That is an option, but if you have a positive result, someone from the contact tracing will contact you, and it is there job to follow up on your contacts.

Ron: Yes or no?

Dave: We will be a facilitator for you. So, you may contact us and we will help facilitate.

Fred: But every level has different regulations, so we won't know until certainties unless it happens.

Carrie: Update for search committee for Indiana State Chemist. Next week we will start talking about the interview process. It'll probably be a day-long process, board members and certain industry people are invited. Hoping to fill the vacancy by June, Dr. Bob acting on retainer in the interim.

6. Review & Implementation of 2020 Senate Enrolled Acts #438

Legislation passed last year, provisions added to pesticide law, registration law / use and application law, most of the changes made were technical, administrative changes that probably won't impact the user communities, they were added for consistency, substance, structure, clarity to processes we've been following for a number of years. They were administrative that probably don't impact the regulator community.

- Board was charged with adapting Civil Penalties (haven't been updated since 1990)

- Board was appointed to establish a work group from the board to make a recommendation to the board and then to legislature, the thought being that legislature could pick up the recommendation to bring to law in 2021

- Struck the per day part of the law-- no longer part of the Civil Penalty assessment process.

Fred: A company hires an employee who is not a registered technician... in the past, you'd be able to fine them the first day, second day-- that would only be one offense?

Dave: We'll cover that shortly, we're addressing whether an offense is an ongoing act versus what is a singular act (and decision). We want to be very clear on that.

Titus: Containment law-- in same situation, will that be one offense or multiple?

Dave: Usually, containment is a continuing offense-- it will be one of the things that has gone away due to the legislation.

7. IPRB Civil Penalty Work Group recommendations to the Indiana Legislature

Ron: My praise to the working group for finding a common ground and success in developing this proposal on a topic that was highly divisive.

Dave: (PowerPoint) Sitting working group members, we attempted to get representation from a broad group of interested parties. My thanks to Bruce, you were great to work with.

Virtual meetings, 4 meetings, every other week or so, first meeting May 8th

First meeting was confined to group itself for organizational purposes

After that first meeting, meetings opened up to public.

Meeting recordings and minutes available online

Working group asked to openly and actively ask for opinions from their industries, businesses, peers, etc.

Hope to address any issues before moving to legislation

Hoping to encourage support when proposal moves forward

Sort of questions-- should rates go up? Down? Stay the same? Should escalating penalties remain...should mitigating circumstances impact fine? Should there be a cap to penalty fine?

Law can become effective immediately-- rule would take 1-3 years to go into effect

Changing violator behavior is our motivator.

Not all violations are created equal (technical vs. hazardous)

Penalty levels should be increased
Separate violations into 3 to 5 categories of severity
Make penalties the same for all class of applicator/violators (private, business)
Make penalty assessment more transparent and consistent
Make the law flexible enough to accommodate evolving rules and violations
Avoid the need for implementation rulemaking, if possible
Incorporate the concept of knowing vs. unknowing, where possible (intent matters)

Fred: When you use “penalty,” how is that defined?

Dave: It's all a civil penalty, a fee

Summary:

Added definition of “adverse effect” based on definition of “harm”

Deletes IPRB rule for implementation

Deletes provision for civil penalty escalation for cumulative violations

Kept OISC “may” assess civil penalty

Three groupings

1. Max \$250, requires warning for same violation first in 5 year time frame
2. Max \$500, potential for harm, adverse effects
3. Max \$1000, most serious, potential for harm, adverse effect, knowing, intent

Some violations occupy two groups

Violations in group 1 and 2 are eligible for mitigation

- Cooperation during investigation (20%)
- Corrective action to prevent future similar violations (20%)
- Remedial action to compensate victim(s) (20%)

Ron: The Board can still mitigate a penalty?

Dave: Yes, the Board can do whatever they want with the assessment from OISC. Offenders still have the right to appeal, nothing changes.

Megan: So, with the Shelby case?

Dave: That's an excellent example, you'll see it in two different categories. Whether it's a mini bulk vs. a larger bulk, penalty addresses seriousness of the offense.

Label misuse violations:

- off label, general use pesticide, but no adverse effects = warning / \$250
- off label, general use pesticide, adverse effects = \$500
- off label, restricted use pesticide, adverse effects = \$1000

Sarah: Restricted use, without adverse effects?

Dave: It is rarer, but I recognize that we have not clearly addressed that

Ron: What about Atrazine, using it too close to a body of water

Dave: We almost never draw the conclusion without a doubt, in this case, the “adverse effect” means we need to be able to determine that cause / effect definitively

Fred: What happens if I have an off-label, RUP, without adverse effects? Is that missing?

Dave: Yes, that was just asked, we may be missing that

Megan: Example with the Shelby case?

Dave: You have to draw the counts somewhere-- Titus's plants may have 200 mini bulks on site at any time.

2 or 3 different delivery dates for Shelby case--

Ron: 2 dates would be two incursions?

Dave: Yes, those would be the two or three separate acts

Bruce: All of these are already codified – we're sorting them into different lists by seriousness of offense / damages, etc.

Megan: Without the days, that means your penalties will be far lower

Ron: Yes, that's correct. These cases are fairly rare, and we've found that the associated costs are generally excessive.

Martha: Trying to understand mitigation factors-- is that UP to 20% or is it flat?

Dave: We try to eliminate as much subjectivity as we can. For simplicity's sake, it's going to be a flat rate for each category of possible mitigation.

Martha: Are they stack-able?

Dave: You bet.

Ron: I have watched the videos of the meetings, and I think they're very informative. The justifications for the final verdicts have been very well represented. They are a great resource to see how this all came to be.

Dave (reviewing proposal) : Adverse effect is not a new idea, it is just clearly defined “harm”

Reminder that there is some overlap in the chapters

Bruce: You still have the authority to suspend, deny, revoke licenses?

Dave: Great comment, as it states here-- you can have an enforcement action that can address licenses independently or in tandem with a civil penalty

In a nutshell, if you don't see it spelled out in Categories 2 or 3, it is to be assumed that it's a category 1 violation.

Ron's question, if you unknowingly create/distribute a pest product, that's \$500

Julia: Do we have that language that clarifies that IF not spelled out, is assumed to be \$250?

Scott Robbins: Bottom of page 1, Dave

Bruce: Yes, these are already codified in 11 pages-- complicated if you don't already know existing civil penalty rule.

Dave: That's our intent; to simplify

Julia: #4, there's a bee kill, does that mean I would be in Cat 3?

Dave: It depends on if it's a use or a storage-- it could definitely fall into that category.

[Online Participant] Do companion animals fall into number 4?

Dave: As written... I'd say no.

[Online Participant] Should we?

Dave: If change this, we also have to adjust 67, 68

Martha: Bees, kind of a general animal? Would that help with companion animals?

Dave: It's usually use that generates these kinds of adverse effects

Martha: These are just the penalties that they pay to state chemist, they may still have to make payments for killing hives / companion animals

Amy: I think if you return to code, you'll see that it's already covered

Bruce: We need to adjust the wording

Amy: Correct.

Dave: I'm happy to correct the wording if it's already included, I am hesitant to offer protection for something that isn't already provided for.

Money still goes to Fred, provisions for appeal still exists

Julia: Have you done a projection on collected fines and what impact this change may have on Purdue's extension services?

Dave: We have not, but I can tell you, the big checks, they won't be getting anymore. This, what we're doing today, is not going to impact that. The legislature already struck those down before when they eliminated the daily (cumulative) fee

Bruce: Do we need to do an economic impact before we can pass this?

Amy: The legislative services agency will do a fiscal impact survey, I sense that there is angst about certain violations and the repeal of the daily violation fee-- if the board agrees where taking into those days is important, the general assembly would consider again (maybe not accept) but if there's concern from the board and support from the industry. It was not the centerpiece of the senate bill

Julia: When LSA does fiscal impact, what all do they take into consideration?

Amy: Their analysis is more centered on what money will come into the state, the cost of enforcement-- different than regulatory rule where they look at impact to industry.

Amy: One drafting consideration is reworking language of "adverse effect" to incorporate "sufficient harm" – if you aren't changing the concept, you may be able to get it further along

I appreciate everything done to parse through the existing code

Encourage get into statute

Not clear to me-- survey indicated that not every civil penalty should be increased, in fact some things should be lowered. Has anything been lowered? You should be prepared to answer for why that is.

Fred: OISC normally assesses \$65,000 in fines a year--

Expect to see more fees from farmers, but shouldn't see the large fines

We NEVER use those funds for salary. It goes to publications and so forth. Will that hurt us?

Probably not. We may be more selective in our outreach.

Julia: You won't be able to do the next level of outreach-- that's my concern

Fred: Yes, that's the way it goes-- but we will take out special projects before taking out the training.

Ron: General consensus fees were too low... most fees going up modestly, what truly changed was the major reduction in the fees high enough to risk the solvency of the offender. The fees are more fair-- more reflective of the seriousness of the violations. This is the point that we will want to emphasize.

Megan: The Shelby case would be \$1000 here, and further reduced by mitigating factors? What is their incentive NOT to violate?

Dave: Yes, penalty is smaller, are you still not better off waiting to get caught? That's a real possibility. Amy pointed out, if there are certain items that we want to work daily fee back in, then it may not be off the table. /

Biggest chunk of violations comes from RUP-- the per Diem violations are being recuperated by the altered fees from other categories. We may have the need to work on economic incentive on a couple of violations (just not across the board).

Scott: We love Fred, but if we're doing this correctly, we're hopefully reducing the need for fines to be implemented

Ron: Eliminating the huge per Diem helped ease legislation

Titus: This particular document is accomplishing several different goals. Adverse Effect and the Containment issue trouble me-- containment has been a loss for my sector

Saying all that, I think this rule is a very good rule and will be useful

Bob: I said that more applicators need to be involved, and we have a good consensus and it deserves the support of the board.

Martha: The value added of this rule should make enforcement simpler, less debate. I think there's a net benefit.

Megan: Do we need to clarify that an offender is eligible for all mitigations?

Julia: We could say "any and all" of the following

Dave: We can incorporate that thought, maybe use "each"

Ron: Return to working group, address issues that have been brought forth. Have a final draft brought to us by the next IPRB meeting. Needs to be submitted by September, Amy?

Amy: In general, early fall is the time you want to reach out to sponsors and legislators. Please understand (since this is different than the rule making process), you take it to a legislator who puts his or her name on the bill, and can add or subtract different verbiage

Your submitted work is not necessarily the word-for-word that will be passed on by the legislator I'm not suggesting that any penalties need to be lower, just to have a prepared answer, which you have.

Ron: We need to have a meeting no later than mid-September, can be mainly virtual, 3 members physically present. Working group re-work proposal, meet mid-September, then move forward to legislation

Bob: You feel that there are enough points that it needs to go back to the group?

Ron: Our experience has been that trying to word smith through the board is not very efficient, working group may decide not to change anything, but this allows the opportunity for improvement.

Dave: We are willing to facilitate looking for the sponsor for this rule

Fred: We need to assemble the meeting more quickly

Dave: We can form an official meeting with only this on the agenda

Bob: I don't think we should wait.

Ron: Is the board ready to vote on the final language today?

Scott: This meeting is being recorded (yes), I think the working group needs some amount of time (4-6 weeks) but then should be able to address and re-work accordingly

Ron: Meeting in early August?

Bruce: Minimum time to official meeting?

Ron: 48 hours-- early August?

Bruce: We, the working group, should be able to accomplish this in the next few weeks then have a version and schedule the virtual board meeting at that point.

Megan: Are you happy with the lowered fees?

Bruce: Personally, no? But I think it's an overall more fair, clear, system. It makes sense.

Ron: Even if people ignore the fines, we still have the ability to revoke license-- there is still motivation to act within regulation – We are trying to strike a balance between the needs of the industry and what rule is likely to get approval by legislation

8. Review of historic OISC drift investigation data plus early 2020

This topic was deferred to the next meeting in the interest of meeting length.

9. Next Meeting... Scheduled for Aug 6, 2020 at the Office of Indiana State Chemist, 175 S University St, West Lafayette, IN 47907