



INDIANA PESTICIDE REVIEW BOARD

160th Meeting Minutes
February 20, 2020; 9:10 am – 12:45 pm
John S Wright Conference Center
1007 N 725 W
West Lafayette, IN 47906

Members Present:

Megan Abraham
Bob Andrews
John Bacone
Bruce Bordelon
Martha Clark-Mettler
Rick Foster
Tim Gibb
Lee Green
Ron Hellenthal (Chair)
Scott Robbins
Jamey Thomas
Julia Tipton Hogan
Mike Titus

Ex officio

David Scott
Bob Waltz
Fred Whitford

Members Absent

Steve Dlugosz
Jim Hawbaker
Stuart Orr
Kevin Underwood

- 1. Approval of the meeting agenda...MOTION...** to approve by Bruce Bordelon and Bob Andrews; **VOTE...** was unanimous
- 2. Approval of the previous meeting minutes...MOTION...** to accept by Bob Andrews and Megan Abraham; **VOTE...** was unanimous
- 3. Review of cases involving civil penalties since the last meeting...**
Julia Tipton-Hogan – I noticed there looks like there need to be some education with the orchards. I thought it was great to see it all bundled and see the trend. They know the rules but they are not abiding by the rules.
Joe Becovitz - Fred Whitford and I have attempted to do outreach to this group at the annual meeting of the Horticultural Congress at least three times in recent years. We even advised them that they were at the top of our priority inspection list for WPS.
Bruce Bordelon- I recently gave a similar WPS talk to the wine grape growers.. I think it is the third time I have given talks about it in the last 2 years.
Julia Tipton-Hogan – There is one chemical that keeps showing up, Imidan?

Bruce Bordelon – Now that chemical requires a respirator and in the past, it did not. But they are not going thru the trouble of training their employees. They are having trouble with labor. Not taking the 30 minutes to train.

Julia Tipton-Hogan– It is not a safe place for families.

Bruce Bordelon – It is not a toxic waste place. Just like walking thru an agricultural field. This is for the employees and not the public

Fred Whitford- If they are unwilling to come to programs we cannot do anything about the training. The last program we had only four people showed up. When the state chemist office goes out and issues citations, the group will organize and do the training, but until then it is hard to get a reaction. Seems to be the cycle that happens every few years.

Bruce Bordelon – Right now it is not a high priority for them. They did not get a warning. They got a fine. We are many big vegetable growers that fall under the same rules and regulation.

Mike Titus- Why do we have the fines and not the warnings for the first timers?

Joe Becovitz – The regulations have been around since 1992. The orchards are very high on our list for WPS inspections. We gave a WPS seminar in 2017 and told them we would be checking these items.

Dave Scott – We have not targeted orchards for the last three years. We freed up a couple of people this year to check the orchards.

Rick Foster - The \$250 fine will not break them of their noncompliance, but it will get their attention.

Ron Hellenthal - The proper use of PPE is critical. Some training really is required.

4. Standard & procedures for administrative review hearings conducted by the IPRB...

a. Preponderance of the evidence vs Proof beyond

Dave Scott - We asked the Attorney General, Philip Gordon, to come and help us out today regarding what standards we use for investigations in our office. Our staff listens to the Pesticide Review Board talk about penalties and they talk about reasonable doubt. Is the Board applying, in your mind, something different from what is used in a criminal case? Another issue is many of the investigations we do today rely heavily on weather data. So it is important for us and this board, when we start presenting evidence of this nature, that the board might know which information might be the most important. Today we are trying to give the board information to make an informed opinion and make sure you have the best foundation.

Philip Gordon – Attorney General’s Office – From an administrative review standpoint, these are not criminal issues. The burden of proof is more toward the preponderance of the evidence. Beyond a reasonable doubt is setting the bar at higher standards for criminal cases. Evidence will come out during a review, as it is free flowing. Advice to the panel during these hearings is to think about what the burden is. Is it more likely than not that it is truthful than not. Does the evidence and information tip the scales towards one side or another, is generally how you should make a decision.

Ron Hellenthal - Often times the state chemist office does a very good job at presenting these cases. The case is usually very clear. There was in fact a violation, but who did it is usually the primary issue. The credibility of the witness is sometimes an issue. How does that fit into the judgements?

Phillip Gordon – You are the factfinder and the person who considers the credibility of the witness. You can judge the credibility of each witness and balance what type of weight you want to put into the issue. That is appropriate of the board to consider.

Julia Tipton-Hogan - Why are we talking about this right now? Is it that you don't think we are finding in your favor enough?

Dave Scott - What we are interested in is what the truth is. Our job is to go in and evaluate what has occurred. We do not have a side. We are going to use this same information to make a determination just as the board does. Did they apply chemical within the requirements? If you would respond to us and let us know if we are not doing something that should be done to take out the doubt. We want to make sure that if we have weather data, off target residues, the information could be from four likely sources and we have narrowed it down to two. We just want to make sure the proper standards are being applied.

Phillip Gordon – It sounds like the panel may have had some struggles with this in the past with someone planting a seed of doubt in their mind. The concern is not about the outcomes, more about the procedures.

Dave Scott – We do not want to come to you with a weak case. Anytime anyone appeals anything, we scrutinize everything to make sure it is a well prepared or supported case with the preponderance of the evidence. Critical feedback is very valuable to us.

Tim Gibb – When you say we are on 50%, there is a stake in it and those sitting on the hearing do feel that.

Bob Andrews – I do not agree with the statement that OISC does not have a stake in the issue. OISC conducted the investigation and assessed the penalty. So they do have a stake in it. I was on the hearing board and in 3 of the 4 cases, I voted to not support the state chemist office. I think it is reasonable to go back and see if your investigations were thorough enough. Do not know why we are talking about this.

Dave Scott – If you are sitting in judgement, and you feel we are presenting inadequate evidence, it would be helpful to us to learn where the case is weak, so that we can fine tune our investigations. What are we doing wrong? Maybe we did not present the case properly. We may have thought the case was a slam-dunk and we are concerned that didn't the review board saw the evidence differently. We do want to know what kind of standards you are going to apply. We are looking to get better and fill in those gaps.

Megan Abraham– You are trying to maintain consistency. I can see how it can be frustrating as a regulator.

Ron Hellenthal– The panel of the three judges only makes a recommendation back to the full board. And it is the full board that makes the final determination. The board hears a summary of the case. Sometimes the board does ask questions and the hearing panel can only talk about the evidence that has been provided at the hearing.

Tim Gibb – If a person who sat on the panel goes back to the person presenting their case, is that person coaching the department?

Phillip Gordon - If it is after the fact and then the person on the panel provides information to OISC, then that is ok. That is not affecting the outcome of the case. The panel is being asked how to present a more convincing case next time.

Martha Clark-Mettler – You could maybe have other observers that are not on the panel review the case from the outside, maybe that will give you a good look at the cases.

Phillip Gordon – The board should be considering if the evidence was sufficient and not contrary to law or statute.

Martha Clark-Mettler - Evidence is evidence. You are asking if we are presenting it in the way that gives you the information you need to make a good decision

Julia Tipton Hogan – They have appealed the penalty. Sometimes the defendant’s presentation and information makes sense and that is why sometimes we go with their information.

Dave Scott– Part of our frustration is that when someone appeals, we have to give all of our information to the defendant and then miraculously on the day of the hearing, they present something that we have never heard.

Fred Whitford – I am glad that we have these hearings. People have the right to appeal what they feel is not right. I tend to lean toward proof beyond a reasonable doubt. Boards should be impartial.

Philip Gordon– Proof beyond a reasonable doubt is used in a criminal case. But it is appropriate as we want to discredit evidence that we do not weight as credible.

John Bacone – Is the person charged now presenting different information than what they said during the investigation?

George Saxton– Once we get to a level of what we consider a preponderance of the evidence we make a decision on that standard. In the past, proof beyond a reasonable doubt has been mentioned several times during public IPRB panel deliberations. That is a higher criminal statue standard, which concerns us. We need to have everyone using the same standards.

Bob Andrews - The State Chemist issues many cases that are never appealed. We have maybe three or four a year.

Ron Hellenthal – We are talking about a fraction of 1% of cases that are appealed. It is clear that the individual that is appealing is spending more money in the appeal then the actual fine. The low number of appeals says more about the thoroughness that the state chemist office does in making their cases.

George Saxton – If the board sets the standard of preponderance of the evidence then we have to change how we do our investigations.

b. Credible weather data used for enforcement purposes

George Saxton – We are faced with some labels, even when nothing bad happens and you did not follow the label, then that is a violation. The applicator says wind came from SE but when we looked at three other weather station data points, it says wind from the NE. The question becomes how reliable is this information?

Lee Green – When the applicator says it was blowing from the NE, do they have screen shots or is it just their word?

George Saxton-Usually just their word with no real documentation to support it.

Beth Hall – You have to look at things like what was the speed of the wind. Extremely low wind speeds, below 5 mph can result in situations that give you less confidence in your recorded wind directions from miles away. Higher wind speeds will usually result in more reliable wind direction data from calibrated weather stations like those at AWOS/ASOS stations, even those some distance from the actual site of application. If you use triangulation and the wind speed presented by the applicator is completely different, then the applicator’s information is usually not correct. Most AWOS/ASOS weather stations take readings at 10 meters. Other stations are set at 3 meters. So there are 3 meter or 10 meter reading for most quality reliable weather stations. If someone is using their home data station, it is completely appropriate to ask was it installed correctly? Is that station at

the same height, as the reliable weather stations are located, 3 meters or 10 meters? When was the last time you had your instrument was calibrated? Is there maintenance program for your bearings or sensors? NOAA stations bearings or sensors are replaced every 2 to 3 years. The faster the wind speed is, the more reliable the information is across space. If you get below 5 mph, the calmer the winds, the more variable it can be because of buildings, surface, obstructions, etc. All of those give off heat that can alter the calmer winds. Do the users have information of where they can get the weather data? Maybe put that site on the label, so everyone is using the same information. Maybe we can communicate where people can get this data.

5. 2020 state pesticide law revisions under consideration (HB 1119 & SB 438)...

Dave Scott – Both bills are regarding regulation of pesticides. The primary purpose was to look at the potential of raising civil penalty amounts that are established by law. The same penalties have been on the books since 1990. These bills look at raising the maximum penalty that can be assessed. The existing penalties are not changing the behavior of applicators. The legislature is the only agency that can raise the penalties.

Don Lehe - The update on HB1119 and SB438. Got out of their respected chambers and went to other chamber. The senate bill mirrors the house bill mostly now. It is likely that will change again. It will now go to the Conference Committee and they will try to hammer out the issues. When they come to an agreement, then both chambers will vote on them. This issue came to us from the corn industry the soy industry, Farm Bureau, the Agri Business Council and the Department of Ag.

Amy Cornell – The Agri Business Council members started talking about how the penalties are not high enough. They feel this new system is more beneficial and is more transparent. They wanted to respond to the one, two three OISC revocation response policy.

Ron Hellenthal– This has been an expressed need of the board. Thank you for putting all of the effort in trying to fix the problem and bringing these improvements. This is something we could not achieve ourselves.

Bruce Bordelon– This is getting us back to the 1990 fine structure. How do we keep this current?

Martha Clark-Mettler – Do we feel that with the way the matrix that pollinators are protected?

Dave Scott– Pollinators would fall under animal exposure.

John Bacone - Does this address license revocation?

Dave Scott – Yes.

Julia Tipton-Hogan – Having a point system is an objective way to get to where we have been talking about.

Bob Andrews – My industry is opposed to this bill in its entirety. The objections are to the process to which this occurred and what the problem is. A lot of people have been left out of this discussion. We are offended by this. This bill was promulgated by a trade association. Everything that started this discussion is an AG issue. Many other industries do not know about this and they will be affected by this bill. This an excellent bill for Category 1 but not good for the rest of the industries. We are being included in something we have had no input into. We are actively opposing it.

Ron Hellenthal– Every time we have looked at the fine schedule that there has been general agreement by the Board that the fine structure has been too low and that goes back many years. Is there something else that you find aggressive?

Bob Andrews– The fact that we were not involved in any of the input. We are being pulled into it and we are not part of the issue. Feel being penalized for something we are not a part of.

Julia Tipton-Hogan –A lot of times you are going to get a warning by looking at the point system.

Dave Scott – This bill is only in effect for a use violation and the maximums. This board has control of the rule. If it is not a use violation, then we use the current system.

Don Lehe – It was not the intention to leave industries out. We were looking where the violations and the problem is the largest.

Scott Robbins – IPMA got everything we were concerned about in HB1119. IPMS is in support of the bills.

Steve Smith– Red Gold – We appreciate the work that has gone into this bill. The deterrence is critical to our crops and we are definitely in support of this.

Jeff Cummins- Indiana Farm Bureau – Our members use and rely on these products. They want to be good neighbors. Thanks for all the work that has gone in.

Audience Member – Lawn Care - The civil penalties rules does need to be updated. It upsets us that we have had no input. Lawn care does not have the issues with drift. This is an AG problem and I don't want to be a part of the AG problem. If you have an AG person that has seven violations, you should take their license away.

Audience Member – Lawn Care – It is well documented that no one wants to use these products. These discussions were brought on because of an AG problem. If that is the problem, why is everyone else being lumped into it. There are a lot of other categories that will be affected. The fine structure did need to be revisited.

6. 2020 state pesticide rule revisions & overhaul prompted by recent federal applicator certification & training rule revisions...

Dave Scott – There are 3 Pesticide Articles that are being discussed; Rule 355 Article 4, Rule 355 Article 5 and Title 357 Article 1. Rule 355 means the legislature gave The Office of Indiana State Chemist (OISC) the authority to write this rule. This Board and OISC have the regulatory authority. With Title 357, on the board can promulgate this rule and make the decision. Compliance with federal regulations changes and impacts a lot of our rules. We are forced to amend so many of the rules that have been on the books for fifteen to twenty years. Some things have outlived their usefulness or did not work. During the first draft, we are trying to decide where things go and how to simplify the rules. This is by no means a final draft. It is a first opportunity to see how we are looking to approach these changes. Some record keeping regulations have been around since 1976. Storage and containment rules are being adjusted significantly. We have not even started the rulemaking process. We are open to hearing any comments.

Martha Clark-Mettler – Did you provide us with the federal rules?

Dave Scott - There is a presentation from two meetings ago that will highlight the changes. Does the board prefer work groups to approach these changes?

Bruce Bordelon – Can we have subcommittees and they will bring the into to the board?

Ron Hellenthal – If everyone could go thru the fundamental changes and if there are any clarifications need, then we can take those sections on.

- 7. Next Meeting...** Scheduled for May 19, 2020 at the Beck Agricultural Center, 4550 US 52 West, West Lafayette, IN 47906

DRAFT