



**Office of Indiana
State Chemist**



House Enrolled Act 1623

What It Requires & Anticipated Impacts on Pesticide Regulation

173rd IPRB Meeting

May 16, 2023

-Dave Scott-

HEA 1623...abbreviated bill actions

- **H 01/19/2023** Authored by Representative Bartels
- **H 01/19/2023** First reading: referred to Committee on [Government & Regulatory Reform](#)
- **S 02/28/2023** First reading: referred to Committee on [Judiciary](#)
- **S 04/11/2023** [Amendment #5](#) (Walker K) prevailed; voice vote
- **S 04/27/2023** Conference Committee Report 1: adopted by the Senate; [yeas 29, nays 19](#)
- **H 05/04/2023** Signed by the Governor

HEA 1623

DIGEST

- Administrative law.
- Establishes the government reform task force (task force).
- Provides for members of the task force.
- Requires the task force to submit a report.
- Prohibits the consideration of the number or amount of fines or civil penalties imposed on regulated entities by an employee in an agency's evaluation or compensation of the employee.
(Prohibits pay raises & bounties for regulatory staff members?)

HEA 1623

- Makes various procedural changes concerning the adoption of administrative rules:
 - (1) Requires budget agency and OMB review of a regulatory analysis of all proposed rules.
 - (2) Requires a state budget committee review of rules adding or increasing fees, fines, or civil penalties.
 - (3) Requires publication of the text of a proposed rule in the first public comment period and allows a proposed rule to be adopted after one public comment period if no substantive public testimony is received and the rule is not more stringent than applicable federal standards.
 - (4) Replaces various laws granting emergency rulemaking authority with a description of the circumstances when emergency rulemaking (renamed "provisional" rules and "interim" rules) may be used, increases governor and attorney general oversight of provisional or interim rules, and adds a public comment period for interim rules.
 - (5) Reduces from seven to five years the time in which rules need to be readopted to remain effective.
 - (6) Requires agencies to webcast public hearings and allow remote testimony.

HEA 1623

- Prohibits state standards for disposal of coal combustion residuals to be more stringent than federal standards. (*IDEM*)
- Allows for certain rules on certain pesticides that are more stringent than federal law. (*Prohibits certain rules for general use pesticides that are more stringent than federal or state law. Provides that a rule that is more stringent is void on July 1, 2023.*)

IC 2-5-53 Government Reform Task Force

(pages 1-3)

Sec. 7. The task force shall do the following:

- (1) Review external policies and standards of procedure implemented by agencies.
- (2) Study any other issues related to agency oversight, as determined by the task force.

Sec. 9. The task force shall:

- (1) develop recommendations in a report for the general assembly concerning the issues set forth in section 7 of this chapter; and
- (2) not later than November 1, 2023, and before November 1 of each year thereafter, submit the report to the executive director of the legislative services agency for distribution to the members of the general assembly.

AMENDED...IC 4-21.5-3-27.5

(page 5)

Sec. 27.5. In a proceeding under this chapter concerning an agency action, the administrative law judge shall order the agency to pay the reasonable attorney's fees incurred in the proceeding by the **prevailing** party challenging the agency action if:

(1) the party challenging the agency action proves, by a preponderance of the evidence, that:

~~(1)~~ (A) the agency's action was frivolous or groundless; or

~~(2)~~ (B) the agency pursued the action in bad faith;

(2) the agency action was based on an **invalid rule, as provided in IC 4-22-2-44; or**

(3) the agency has failed to demonstrate that the agency acted within its legal authority.

ADDED...IC 4-22-2.3
(page 54)

Sec. 9. (a) The Indiana pesticide review board may adopt **interim rules under IC 4-22-2-37.2 to **classify** a pesticide as a restricted use pesticide, if the Indiana pesticide review board finds that adoption of the interim rule is necessary to prevent an undue and immediate hazard to persons, animals, wildlife, lands, or water, other than the pests that the pesticide is intended to prevent, destroy, control, or mitigate.**

ADDED...IC 4-22-2.3
(page 54)

(b) The Indiana pesticide review board may adopt interim rules under IC 4-22-2-37.2 to impose a restriction or requirement on the storage, distribution, use, application, or record keeping for a restricted use pesticide that is more stringent than the restriction or requirement imposed under federal law if the Indiana pesticide review board finds that weather, soil, or other conditions in Indiana impact the effectiveness or safety of the storage, distribution, use, application, or record keeping of the restricted use pesticide in a manner that differs from federal law generally.

ADDED...IC 4-22-2.3
(page 54)

(c) The Indiana pesticide review board may adopt interim rules under IC 4-22-2-37.2 to impose a restriction or requirement on the storage, distribution, use, application, or record keeping for a restricted use or general use pesticide that is more stringent than the restriction or requirement imposed under federal law if the Indiana pesticide review board receives a written request from the registrant of the applicable pesticide.

ADDED...IC 4-22-2.3
(page 54)

(d) Unless specifically authorized by Indiana law under IC 15-16-5-72, an interim rule authorized under this section expires on adjournment sine die of the regular session of the general assembly that begins after the rule is accepted for filing by the publisher of the Indiana Register and may not be continued in another interim rule.

ADDED...IC 4-22-2.6
(pages 54-55)

**Chapter 2.6. Expiration and Readoption of
Administrative Rules**

Sec. 1. (a) Except as provided in this section and section 10 of this chapter, a rule expires January 1 of the **fifth year after the year in which the rule takes effect, unless the rule expires or is repealed on an earlier date.**

ADDED...IC 15-16-4-15.5
(page 78)

Sec. 15.5. As used in this chapter, "general use pesticide" means a pesticide that is not a restricted use pesticide.

No definition in federal law (FIFRA).

REPEALED...IC 15-16-4-31 (page 79)

~~Sec. 31. As used in this chapter, "pesticide for use by prescription only" means any pesticide that the board has found to be more hazardous than a restricted use pesticide so that any specific use and application must be determined and prescribed by a qualified pest management specialist approved by the state chemist.~~

Not utilized by OISC or IPRB since late 1970s or early 1980s.

AMENDED...IC 15-16-4-37

(page 79)

Sec. 37. As used in this chapter, "restricted use pesticide" means **the following:**

- (1) Any pesticide classified as a restricted use pesticide by the administrator of the United States Environmental Protection Agency. ✕
- (2) A pesticide designated as a restricted use pesticide in a law enacted by the general assembly.**
- ~~(2)~~ **(3) Subject to section 50 of this chapter,** a pesticide that the board has determined to be unduly hazardous to persons, animals, plants, wildlife, waters, or lands other than the pests it is intended to prevent, destroy, control, or mitigate.
- (4) All formulations containing methomyl (Chemical Abstracts Service Reg. No. 16752-77-5).**
- (5) Any dicamba containing pesticide product that: (A) contains a dicamba active ingredient concentration greater than or equal to six and one-half percent (6.5%); and (B) is intended for agricultural production uses but is not labeled**

Moves current RUP classification authority from IPRB rule to legislation. Moves current state RUP list from rule (357 IAC 1-17) to law.

AMENDED...IC 15-16-4-50 (page 79)

Sec. 50.(a) ~~The board may adopt rules under IC4-22-2 to do the following: (1) Establish a list of~~ **recommend to the general assembly the addition, deletion, or reclassification of pesticides by submitting in an electronic format under IC 5-14-6 a report of the recommendations to the legislative council.**

Only two products have been classified IPRB RUP in forty years, Methomyl fly bait & ag dicamba > 6.5%.

Not real sure what addition or deletion of a pesticide may mean.

AMENDED...IC 15-16-4-50
(page 80)

~~(b) The board may adopt by reference the restricted use classification of a pesticide that is maintained by the United States Environmental Protection Agency.~~

ADDED...IC 15-16-4-52.5

(page 81)

Sec. 52.5. (a) Neither the board nor the state chemist may **by rule or otherwise** impose a requirement or limitation on the storage, distribution, use, application, or record keeping of a **general use pesticide** by:

- (1) a certified applicator;
- (2) a commercial applicator;
- (3) a licensed applicator for hire;
- (4) a licensed applicator not for hire;
- (5) a licensed pesticide business;
- (6) a licensed public applicator; or
- (7) a private applicator;

that is **more stringent** than the requirements and limitations applicable under federal law, federal regulations, or Indiana statutory law to the general use pesticide or a pesticide product containing a general use pesticide and no restricted use pesticide.

ADDED...IC 15-16-4-52.5 (page 81)

...**more stringent** than the requirements and limitations applicable under federal law, federal regulations, or Indiana statutory law to the general use pesticide...

*What does “**more stringent**” mean?*

- *rigorously binding, exacting, strict, severe, compelling, constraining, urgent, convincing, forcible, inflexible*

*Under terms of pesticide enforcement primacy and cooperative agreements with EPA, **less stringent** state requirements are generally not recognized or credited.*

ADDED...IC 15-16-4-52.5 *(page 82)*

Sec. 52.5. ...

(b) A rule or other requirement or limitation of the board in effect on June 30, 2023, that does not comply with this section is voided on July 1, 2023, to the extent it conflicts with this section.

No GUP user requirements or limitations under FIFRA other than:

- 1. User must follow label directions, both RUPs & GUPs.*
- 2. WPS for ag product use, both RUPs & GUPs.*
- 3. Storage & containment of bulk RUPs, Tox I & Tox II products.*

ADDED...IC 15-16-4-72 *(page 83)*

Sec. 72.

(a) Except as provided in IC 4-22-2.3-9, a rule adopted under this chapter that becomes effective after June 30, 2023, may not impose a restriction or requirement concerning pesticides more stringent than a restriction or requirement imposed under federal law unless the restriction or requirement is specifically authorized by Indiana law.

Assume “pesticides” applies to both GUPs & RUPs?

What does specifically authorized mean?

ADDED...IC 15-16-4-72

(page 83-84)

(b) Restrictions or requirements specifically authorized to be more stringent than a restriction or requirement imposed under federal law include the following:

- (1) Commercial termite control applicators (category 7b) must complete a practical hands-on training program to become certified.**
- (2) Commercial applicators must have access to the pesticide label when applying pesticides.**
- (3) Commercial for hire general use pesticide application businesses are required to show proof of having minimum liability insurance coverage.**
- (4) Commercial for hire general use pesticide applicators (category 7b) must disclose to customers any omissions from label required termite control applications.**

ADDED...IC 15-16-4-72
(page 83-84)

...(5) Commercial applicators and school employees applying general use pesticides at schools:

(A) may not apply when students are present;

(B) must notify students, parents, and staff of planned and conducted applications;

(C) must store pesticides safely;

(D) must keep students and staff out of treated areas until spray has dried; and

(E) may only apply rodenticide baits in areas inaccessible to students.

ADDED...IC 15-16-4-72
(page 83-84)

...(6) Commercial and private applicators must store and contain general use pesticide portable refillable containers (minibulks**) safely to prevent releases to the environment.**

(7) Commercial and private applicators may not store, mix, or load general use pesticides within two hundred (200) feet of a community public drinking water well.

(8) Commercial and private applicators must store general use pesticide containers on impervious surfaces within a wellhead protection area zone.

ADDED...IC 15-16-4-72
(page 83-84)

...(9) Commercial and private applicators must cleanup general use pesticide spills within a wellhead protection area immediately upon discovery.

(10) Commercial and private applicators may not open burn general use pesticide containers.

WORST CASE?

Current GUP rules not “specifically authorized” and, therefore, targeted for voiding?

- Commercial applicators must be certified to apply general use pesticides:
 - a. on a golf course,
 - b. at a school, or
 - c. for community-wide mosquito control.
- No exam attempted more than 3 times per year.
- Commercial for-hire turf pest control applicators (category 3b) must complete a practical hands-on training program or have applicable experience to become certified.

Targeted for voiding?

- Noncertified persons applying general use pesticides or fertilizers commercially for hire on another person's property must be **competent**. *No definition of "competent" in law.*
- Noncertified persons applying general use pesticides or fertilizers commercially for hire on another person's property must be working under the **direct supervision** of a licensed applicator. *No definition of "direct supervision" in law.*
- Commercial for-hire **noncertified technicians** must pass the core or attend training, file an application, & pay a fee to become registered.

Targeted for voiding?

- The following commercial general use pesticide applicators must keep **specified application records** for two years:
 - a. For hire applicators
 - b. Applications to golf courses
 - c. Applications at schools
 - d. Termite control applications
- Commercial general use pesticide application records must be made available, when requested, to health care professionals treating pesticide exposure patients.

Targeted for voiding?

- Commercial for hire turf pest control (category 3b) applicators must post lawns treated with general use pesticides to alert customers and neighbors of a recent application. *(Still applies to RUPs?)*
- Commercial for hire turf pest control (category 3b) applicators must provide customers with application records and label mandated safety precautions for general use pesticide applications. *(Still applies to RUPs?)*

Targeted for voiding?

- Applicators may not apply a pesticide (GUP) in a manner to allow it to drift off target and cause an adverse effect. *(Still applies to RUPs?)*
- Commercial and private applicators must label GUP service containers with at least a minimal amount of information to allow for positive identification of the container content. *(Still applies to RUPs?)*
- Commercial for-hire termite control applicators (cat. 7b) must notify OISC in advance of making a preconstruction termiticide application.

Targeted for voiding?

- Secondary containment requirements for GUP portable refillable containers (minibulks) stored over 45 days. (*Still applies to RUPs?*)
- Secondary containment requirements for stationary bulk GUP containers other than Tox Cat. I and Tox Cat. II. (*EPA 40 CFR 165 regs.*)

GUP requirements believed to be “specifically authorized by Indiana statute”

- IC 15-16-5-48
- Business license required for commercial for-hire RUP & GUP applications on another person’s property.
- Business license requires at least one certified licensed applicator that has passed exams.

GUP requirements believed to be “specifically authorized by Indiana statute”

- IC 15-16-5-49
- A competent person who is not a licensed applicator for hire may use a GUP under the direct supervision of a licensed applicator.
- Noncertified individuals can continue to use GUPs for hire, if we ignore strict interpretations of “competent” and “direct supervision.”

State Primary Enforcement Responsibility (FIFRA Sec. 26)

- State shall have primary pesticide use enforcement responsibility if:
 - State has adopted adequate pesticide laws & regulations.
 - State has adopted & is implementing adequate enforcement procedures.
 - State is keeping records & making reports to demonstrate preceding.
- State with an EPA enforcement cooperative agreement must have an EPA-approved state plan for certification & training of RUP applicators to maintain enforcement use primacy.
- State determined by EPA to not be carrying out their responsibilities may have **primacy** rescinded. *(Why would we propose or maintain state rules different than or other than federal rules for RUP use?)*

Conflicts within State Law ?

IC 15-16-5-44 Rules; use; applications; inspections

Sec. 44. (a) The board may adopt rules under IC 4-22-2 prescribing policies and procedures relating to: (1) the use and application of pesticides; and (2) diagnostic inspections and reports for wood destroying pests.

(b) For the purpose of uniformity and in order to enter into both cooperative and reciprocal agreements, the board may adopt restricted use pesticide classifications as determined by the United States Environmental Protection Agency. The state chemist may adopt additional rules under IC 4-22-2 as required to accomplish the purpose of this chapter.

(c) Rules adopted under this chapter may not permit any pesticide use that is prohibited by federal law and regulations or orders issued under federal law.

Next Steps?

- Seek AG opinion on current impact analysis.
- Develop a plan for post rule voiding implementation & enforcement.
- Seek input & support for 2024 legislative adjustments, if needed.



Questions or Comments?

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