



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

February 21, 2020

The Honorable Sally Toone  
Idaho House of Representatives  
2096 East 1500 South  
Gooding, Idaho 8330

Dear Representative Toone:

Deputy Attorney General Brian Kane asked me to prepare a response to your questions regarding House Bill 487 and proposed changes to Idaho's Rules Governing Pesticides and Chemigation Use and Application. I will address each of your questions below.

**1. What are the implications of the removal of the language "Apply improper and ineffective pesticides" from page 1, Line 18?**

Currently, Idaho Code § 22-3420(6) prohibits a person from applying "ineffective or improper pesticides." "Ineffective" and "improper" are not defined in the statute. However, these words are to be read given their common, ordinary definitions. *State v. Wilson*, 165 Idaho 64, 438 P.3d 302, 305 (2019). The definition of ineffective is "not producing an intended effect" or "not capable of performing efficiently or as expected."<sup>1</sup> Improper means, "not proper," or "not in accord with fact, truth, or right procedure."<sup>2</sup>

The Idaho State Department of Agriculture ("ISDA or "the Department") has issued one notice of violation under Idaho Code § 22-3420(6) in recent history. In that case, a pest control operator applied an insecticide to a lawn covered in snow. The insecticide's label featured no prohibitions against applying that insecticide on snow, in rain, or on frozen ground, meaning there was no label violation. However, snow began to melt resulting in diluted insecticide. This rendered the insecticide ineffective. Therefore, Idaho Code § 22-3420(6) was the most appropriate violation.

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<sup>1</sup> *Ineffective*, Meriam Webster's Collegiate Dictionary (11th ed. 2009).

<sup>2</sup> *Improper*, Meriam Webster's Collegiate Dictionary (11th ed. 2009).

Although ISDA has not issued a citation under this section for some time, Section 22-3420(6)'s language covers activities related to the fraudulent use of pesticides. This provision gives the Idaho State Department of Agriculture the authority to pursue civil penalties for those who apply illegal or counterfeit pesticides. Illegal pesticides are those that have not been evaluated by the Environmental Protection Agency (EPA) to ensure the pesticide's use will not harm people or the environment.<sup>3</sup> Illegal pesticide products may make false claims that they are "harmless to humans and animals" or "safe to use" when in fact, they are much higher in toxicity than legal products. Counterfeit products are those that are produced and packaged to look like legal products, but their contents do not match their labels. These products may have less of an active ingredient than the legal version, rendering the product ineffective. Counterfeit products may also have cheaper, but possibly more toxic ingredients, creating dangers for human and animal health and the environment.<sup>4</sup>

At first glance, it may appear that concerns regarding the use of "ineffective or improper pesticides" are adequately addressed by provisions in the Federal Insecticide, Fungicide, and Rodenticide Act prohibiting the sale or distribution of adulterated or misbranded pesticides. 7 U.S.C. § 136j(a)(1)(A)-(E). Idaho also prohibits selling adulterated or misbranded pesticides under Idaho Code § 22-3420(10)-(11). "Adulterated" and "misbranded" are also terms defined in Idaho Code.

On review, the term "ineffective or improper pesticides" is broader in scope than the terms "adulterated" and "misbranded." Under Idaho's Pesticides and Chemigation law, "adulterated" means the pesticide's "strength or purity... is below the purported or professed standard of quality as expressed in its labeling, or any substance has been substituted wholly or in part for any ingredient of the pesticide, or any valuable constituent thereof has been omitted wholly or in part." Idaho Code 22-3401(1).

The "misbranded" designation applies to "any pesticide or device if its labeling bears any false or misleading statement, design or graphic representation," any pesticide not labeled as required by Section 22-3402, and any pesticide if the label bears any reference to the registration requirements of section 22-3402 unless that reference is required by rules promulgated by the director.

Idaho Code § 22-3420(6)'s use of the words "improper" or "ineffective" seems to encompass both adulterated and misbranded pesticides, as well as those that are counterfeit or illegal. Further, this section only applies to application of improper or ineffective pesticides, not just the sale of these products. To provide an example, Section 22-3420(6) provides the Department with an effective means of pursuing applicators who apply an ineffective pesticide to kill pests at a consumer's home. The implication of removing this language would mean narrowing the Department's ability to pursue civil penalties against those who apply these types of pesticide products.

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<sup>3</sup> *Illegal or Counterfeit Pesticides*, National Pesticide Information Center, (February 21, 2020) <http://npic.orst.edu/ingred/ptype/illegal/index.html>

<sup>4</sup> *Id.*

**2. Idaho Code 22-3420(7) removes language in code that states "Apply pesticides in a faulty, careless, or negligent manner." from pg. 1, line 21? What are the standards used to determine faulty, careless, & negligent? Does striking faulty & careless expand protections for someone accused of misusing pesticides? What are the implications of the removal of the language?**

Currently, Idaho Code § 22-3420(8) states that no person shall “apply pesticides in a faulty, careless or negligent manner.” House Bill Number 487 seeks to strike the terms “faulty” and “careless.” As currently written, violations of this section are used in cases involving drift, property damage, or human exposure.

*A. The Standards Used to Determine whether a pesticide application was faulty, careless, or negligent.*

There is no statutory definition of faulty or careless. Faulty may be defined as “marked by fault or defect” or “imperfect.”<sup>5</sup> Careless means “indifferent, unconcerned,” or “not showing care.”<sup>6</sup> Negligence is a well-established legal standard requiring four elements to be met. *Obendorf v. Terra Hug Spray Co.*, 145 Idaho 892, 898 (2008). The elements of negligence are: (1) a duty, recognized by law, requiring a person to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between that person’s conduct and the resulting injury; and (4) actual loss or damage. *Id.*

Pesticides and chemigation law is marked by the adage, “The label is the law.” Pesticide product labels provide critical information about how to safely and legally handle and use the products. Unlike most other types of product labels, pesticide labels are legally enforceable, and all of them carry the statement: “It is a violation of Federal law to use this product in a manner inconsistent with its labeling.”<sup>7</sup> Similarly, Idaho requires that all pesticides used in this state must be registered with the Idaho State Department of Agriculture and meet all state label requirements. Idaho Code § 22-3402. Idaho Code § 22-3420(1) prohibits pesticides from being used in a manner inconsistent with their labeling.

In determining whether an application was faulty, careless or negligent, the pesticide label requirements are the first thing the Idaho State Department of Agriculture considers. The Department also considers the elements of negligence—whether a duty was owed, whether damage was caused to property or humans, and whether there is a causal link between an alleged violator’s actions and damages suffered. The Department also considers other factors delineated in its Penalty Assessment Guidelines and Matrix which have been attached to this document for your review. For more information regarding the standards used to determine whether an application was faulty, careless, or negligent, please contact the Idaho State Department of Agriculture. ISDA’s Deputy Director Brian Oakey may be contacted by phone at (208) 332-8552 or by email at [brian.oakey@isda.idaho.gov](mailto:brian.oakey@isda.idaho.gov).

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<sup>5</sup> *Faulty*, Meriam Webster’s Collegiate Dictionary (11th ed. 2009).

<sup>6</sup> *Careless*, Meriam Webster’s Collegiate Dictionary (11th ed. 2009).

<sup>7</sup> Introduction to Pesticide Labels, United States Environmental Protection Agency (February 21, 2020) <https://www.epa.gov/pesticide-labels/introduction-pesticide-labels>.

*B. Does striking faulty & careless expand protections for someone accused of misusing pesticides?*

Labels, as well as other statutory provisions, create duties that must be adhered to by all pesticide applicators. There may be instances when an applicator adheres to all label requirements and complies with all other pesticide and chemigation laws. Even so, there may be instances when the Department would rely on this section's "faulty [or] careless" language to issue a violation. This situation could arise where members of the public either ignore or are otherwise unaware of posted pesticide spray notices. Members of the public, (i.e., joggers, farm workers, children) may be present in a spray area. Applicators may still choose to proceed with a spray operation even with people present near the spray area. This action may not necessarily be negligent, but it may fit into the realm of faulty or careless if the application results in human exposure. Removing the faulty and careless language narrows the scope of Idaho Code § 32-3420(7) to only apply to conduct which fits the negligence standard, which may result in expanding protections for persons accused of misusing pesticides.

*C. What are the implications of removal of the faulty and careless language?*

Removal of this language would limit the Department of Agriculture's enforcement authority only to those situations meeting the negligence standard. Thus, there must be a duty owed and a breach of that duty for the Agency to proceed with a notice of violation. A faulty ("imperfect") application may not rise to that standard.

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**3. The addition of 22-3427(4) directs the agency to promulgate rules relating to restrictions and penalties that assess whether the violation occurred knowingly or unknowingly in section 9 on pg. 3? How does this relate to 22-3420(4) and the legal standard for negligence? Is there already a legal standard for negligence that assesses whether it occurred knowingly or unknowingly?**

To answer this question, first ISDA's penalty matrix will be addressed, with its definitions of "knowing" and "unknowing." The matrix and its mental requisites will then be discussed in comparison to a negligence standard.

*A. Penalty Matrix and the distinction between a knowing and unknowing violation of Idaho's Pesticides and Chemigation law.*

The proposed changes to Idaho Code § 22-3421(3) would require the Department to promulgate rules for restrictions and penalties through negotiated rulemaking. In doing so, the Department must include its penalty assessment guidelines and a penalty assessment matrix as required by the proposed Section 22-3421(4). ISDA's penalty matrix is broken down into offenses that are either done knowingly or unknowingly. The Idaho State Department of

Agriculture Idaho Pesticides and Chemigation Law Penalty Assessment Guidelines and Matrix are attached.

Under this matrix, “knowingly” means that the alleged violator knew or should have known that conditions existed that would result in adverse effect(s) or knew that a violation would occur. In determining whether an alleged violator knew or should have known about potential adverse effects or the nature of a violation the Department will consider a person’s licensing status, prior contacts with the Department, prior audits related to the violation, past enforcement action(s) (to the extent these factors apply), and any other relevant evidence.<sup>8</sup> Under the same guidance, “unknowingly” means that the alleged violator did not act knowingly, or without the requirements discussed above.<sup>9</sup> “Adverse effects” are defined as “the possibility of pesticide exposure that could cause damage or injury to humans, animals, plants, or the environment. Factors considered include, but are not limited to the risk associated with a particular action(s) and the pesticide(s) involved.”<sup>10</sup>

*B. Brief overview of Idaho Code § 22-3420(4) prohibitions against operation of faulty or unsafe pesticide spray apparatus, aircraft, or other application device or equipment.*

Idaho Code § 22-3420(4) prohibits operation of a faulty or unsafe pesticide spray apparatus, aircraft, or other application device or equipment. Again, “faulty” is not defined in Idaho code, but “faulty” means “marked by fault or defect” or “imperfect.”<sup>11</sup> “Unsafe” means not “free from harm or risk,” or not “secure from threat of danger, harm, or loss.”<sup>12</sup>

Under ISDA’s penalty matrix, knowingly operating a faulty or unsafe spray apparatus, aircraft or other application device or equipment garners a higher penalty than doing so unknowingly.

*C. Operation of a faulty or unsafe pesticide spray apparatus, aircraft, or other application device or equipment under Idaho Code § 22-3420(4) and relationship to a negligence standard.*

Unknowingly or knowingly operating a faulty or unsafe pesticide spray apparatus, aircraft, or other application device or equipment may constitute negligence. Idaho Code § 22-3420(4) creates a duty for applicators to operate their pesticide spray apparatus, aircraft, or other application device or equipment in a safe and unfaulty status. The Department considers the previously discussed elements of negligence when determining whether to issue violations of

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<sup>8</sup> Penalty Assessment and Guidelines and Matrix, Idaho State Department of Agriculture Pesticides and Chemigation Law (June 20, 2000) at 3.

<sup>9</sup> *Id.*

<sup>10</sup> Penalty Assessment and Guidelines and Matrix, Idaho State Department of Agriculture Pesticides and Chemigation Law (June 20, 2000) at 2.

<sup>11</sup> *Faulty*, Meriam Webster’s Collegiate Dictionary (11th ed. 2009).

<sup>12</sup> *Safe*, Meriam Webster’s Collegiate Dictionary (11th ed. 2009).

Idaho Code § 22-3420(4). Whether a violation was done knowingly or unknowingly determines the penalties sought against an applicator in violation of this section.

*D. Is there already a legal standard for negligence that assesses whether it occurred knowingly or unknowingly?*

In assessing whether a violation of *any* part of Idaho Code § 22-3420 occurred knowingly or unknowingly, the Department considers whether the violator had actual knowledge or “should have known that conditions existed that would result in adverse effect(s) or knew that a violation would occur.”<sup>13</sup> In assessing whether a violator knew or should have known, the Department considers a person’s licensing status, prior contact(s) with the Department, prior audits related to the violation, past enforcement actions (to the extent that these factors apply), and any other relevant evidence.<sup>14</sup>

**4. Are there any other implications on the removal of docket IDAPA 02.03.03 Rules Governing Pesticide Use & Chemigation, Section 310 on pg. 139, Section 320, on pg. 139, Section 550-subsection 03 on pg. 142 and section 600 on pg. 143. as well as the introduction of HB487 combined?**

The removal of different parts of this rule have different consequences; therefore, they will be broken down individually as follows.

*A. Removal of low-flying prohibitions under IDAPA 02.03.03.310.*

IDAPA 02.03.03.310 is a prohibition against low-flying for aerial applicators. It reads as follows,

310. LOW-FLYING PROHIBITIONS.

01. Low-Flying Prohibitions. Aircraft pilots during spray operations are prohibited from turning or low-flying:

- a. Over cities, towns, schools, hospitals and densely populated areas unless the pilot obtains an agreement in writing for pesticide applications from the authorized agent for the city, town, school, hospital, or densely populated area in question; or
- b. Directly over an occupied structure without prior notification by some effective means such as daily newspapers, radio, television, telephone, or door-to-door notice.

02. Restriction. The low-flying restrictions listed in Subsection 310.01 shall only pertain to persons other than those persons whose property is to be treated.

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<sup>13</sup> Penalty Assessment and Guidelines and Matrix, Idaho State Department of Agriculture Pesticides and Chemigation Law (June 20, 2000) at 3.

<sup>14</sup> *Id.*

The implication of removing this section of the Rule is that ISDA will no longer have authority to regulate low-flying aerial applicators. Rather, aerial applicators would be responsible for meeting Federal low-flying requirements. There are two sets of standards that aerial applicators must meet under Federal law: those that apply to general flight operations and flight rules for minimum safe altitudes<sup>15</sup> and those regulations that apply only to agricultural aircraft operations.<sup>16</sup>

The federal standards are similar to those that are found in IDAPA 02.03.03.310. If Section 310 is removed, Idaho citizens' primary point of contact regarding low-flying aerial applicator complaints would be the Federal Aviation Association through the Flight Standards District Office.

*B. Removal of Wind Velocity Restrictions under IDAPA 02.03.03.320.*

IDAPA 02.03.03.320 addresses wind velocity restrictions. It reads:

320. WIND VELOCITY RESTRICTIONS.

01. Restrictions. No person shall apply any pesticide in sustained wind conditions exceeding ten (10) miles per hour or in wind conditions exceeding product label directions, except as provided in Subsection 320.04.

02. Exceptions. Application of pesticides by injection into application site or by impregnated granules shall be made according to label directions.

03. Approval for Use of Other Application Techniques. Other pesticide application techniques or methods may be approved by the Director or his agent on a case-by-case basis.

04. Chemigation Wind Speed Precautions. Chemicals shall not be applied when wind speed favors drift beyond the area intended for treatment or when chemical distribution is adversely affected.

Idaho is one of a few states that imposes a wind velocity restriction for all applicators. Other states typically adhere to the adage "the label is the law" with regard to wind velocity restrictions. In Idaho, the more restrictive of the two sources will be applied, either the label's stricter requirements or Idaho's default ten mile an hour threshold. The implication of removing Section 320 is that only a pesticide's label will provide wind velocity restrictions, which may be less restrictive than Idaho's current ten mile an hour wind rule.

Removing section 320 removes the ISDA's authority to regulate wind restrictions for pesticide applications. This is especially relevant where certain pesticide labels do not provide a wind velocity restriction or the label simply provides, "Do not allow product to drift." As the rule is currently written, if a person were to apply these types of pesticides during wind conditions higher than ten miles an hour and the product drifted and damaged another's property, the

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<sup>15</sup> 14 CFR § 91.1 *et. seq.*; <https://www.law.cornell.edu/cfr/text/14/part-91/subpart-A>.

<sup>16</sup> 14 CFR § 137.1 *et. seq.*; <https://www.law.cornell.edu/cfr/text/14/part-137>.

Department has express authority to issue a violation. Without section 310, the Department must evaluate whether the applicator has applied the pesticide in a negligent manner even though the applicator has complied with all label requirements and other standards.

*C. Removal of phenoxy herbicide restrictions*

This removal seeks to remove the following table with regard to applications of phenoxy herbicide (2,4-D; MCPA; MCPB; and Dicamba) restrictions. That portion of IDAPA 02.03.03.550.03 reads as follows:

03. Hazard Area. Aircraft pilots shall maintain the following spray distances from hazard areas when applying amine or acid formulations of 2,4-D; MCPA; MCPB; and Dicamba:

Mean Sustained Wind Velocity	Downwind	Upwind
0-3 MPH	1/2 mile	600 feet
4-7 MPH	1 mile	200 feet
8-10 MPH	1 mile	50 feet
Over 10 MPH	Do not apply	Do not apply

Idaho has not cited a violation to this section in recent history. This is because label requirements for these products are generally more restrictive than Idaho’s rule. However, the implications of removing the Wind Velocity Restrictions for phenoxy products are similar to the implications of removal of all wind velocity restrictions under 320. If IDAPA 02.03.03.550.03 is removed, the pesticide’s label will govern its application, not restrictions set by rule.

**D. What are the implications of removal of IDAPA 02.03.03 sections in combination with the introduction of House Bill 487?**

The overarching objectives of House Bill 487 in combination with section removals from IDAPA 02.03.03 are to narrow the ISDA’s authority to regulate certain pesticide-related activities. The following is a brief summary of the implications as discussed above.

ISDA will no longer have an enforcement authority where pesticides are ineffective or improperly applied, but otherwise comply with other statutory requirements. Additionally, ISDA will only have authority to enforce the provisions of proposed Section 22-3420(7) if behavior rises to the negligence standard.

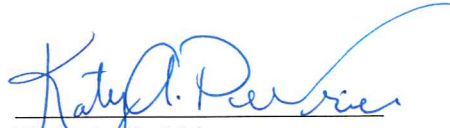
House Bill Number 487’s proposal that ISDA’s penalty matrix be codified in rule may result in rigid application of Idaho’s Pesticide and Chemigation law. Although the Penalty Assessment Guidelines and Matrix are intended to take into account a variety of factors, a codified matrix does not account for case-by-case intricacies. For example, a first time violation that is egregious may result in a relatively small penalty because there is no history of prior violations. Conversely, harsher penalties would be required for applicators with minor violations but with a history of enforcement.



Further, removing low-flying prohibitions would require Idahoans to take complaints regarding aerial applicators to the Federal Government. General and phenoxy-specific wind velocity requirements mean that Idaho specific protections will be replaced with wind restrictions on pesticide labels.

I hope you have found this information to be helpful.

Sincerely,

A handwritten signature in blue ink that reads "Katy A. DeVries". The signature is fluid and cursive, with a long, sweeping flourish extending from the end of the name.

Katy A. DeVries  
Deputy Attorney General