

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION**

**MICHAEL MCCARTY; PERRY GALLOWAY;
MATT SMITH; GREG HART; ROSS BELL;
and BECTON BELL**

PLAINTIFFS

v.

Case No. 60CV-17-6539

**ARKANSAS STATE PLANT BOARD &
TERRY WALKER, in his official capacity as
DIRECTOR of THE STATE PLANT BOARD**

DEFENDANTS

**FIRST AMENDED COMPLAINT
FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF, AND
JUDICIAL REVIEW OF ADMINISTRATIVE ACTS**

COME NOW the Plaintiffs, Michael McCarty, Perry Galloway, Becton Bell, Matt Smith, Greg Hart and Ross Bell, by and through the undersigned Counsel, and for their First Amended Complaint for Declaratory Judgment and Judicial Review of administrative actions by the Arkansas State Plant Board do state as follows:

I. INTRODUCTION

1. The Plaintiffs have amended their Complaint to allege additional violations of Constitutional and Statutory Provisions that occurred during the State Plant Board's adjudication of Plaintiffs' Petition for Rule-making and the Board's consideration of its final rule which imposes an April 16, 2018, cutoff date for the in-crop use of dicamba herbicides during the 2018 crop year.

2. The Plaintiffs bring this First Amended Complaint for Declaratory Judgement because the Arkansas State Plant Board is currently organized in violation of the Arkansas Constitution and has consistently acted in violation of Arkansas Law. The Plaintiffs seek an Order

that Arkansas Code Annotated § 2-16-206, which provides for the appointment of State Plant Board members by private individuals and associations, is an unconstitutional delegation of legislative power to private interests in violation of Articles 4 and 5 of the Arkansas State Constitution.

3. The practical impact of Arkansas Code Annotated § 2-16-206 is that a majority of Arkansas' voting State Plant Board members are now directly appointed by private individuals and associations. The regulated citizens of the State of Arkansas have no voice in the appointment of these controlling members of the State Plant Board and there is no genuine opportunity for public interest to assert itself in the appointment of these members.

4. On November 9, 2017, the State Plant Board voted in support of an April 16, 2018, cutoff date for the in-crop use of dicamba herbicides. Such action will cause irreparable harm to the Plaintiffs. The Plaintiffs ask the Court to render this action void as the power of the currently seated State Plant Board is not constitutionally valid. The positions of members of the board who have been directly appointed by private groups or private individuals should be declared vacant.

5. The Plaintiffs further allege that the State Plant Board has exceeded its statutory authority and acted in violation of Arkansas Law in its regulation of dicamba herbicides. The Plaintiffs specifically appeal the Plant Board's denial of their Petition for Rulemaking concerning the proposed in-crop use of dicamba based herbicides during the 2018 crop year, as arbitrary, capricious, and not based on substantial evidence.

6. The Plaintiffs request declaratory judgment and injunctive relief under Arkansas Rules of Civil Procedure 57 (Declaratory Judgments) and 65 (Injunctions and Temporary Restraining Orders) as well as Arkansas Code Annotated section 16-111-101 et seq. (The

Arkansas Declaratory Judgment Act). The Plaintiffs also seek judicial review of the Defendants' actions, brought pursuant to Arkansas Code Annotated § 25-15-212.

7. In accordance with Ark. Code Ann. § 25-15-212, the Plaintiff specifically argues that the administrative hearing procedures employed by the Arkansas State Plant Board were made upon unlawful procedure, in violation of constitutional and statutory provisions, violated basic principles of due process, and that the Plant Board's findings and rulings in regard to the 2018 use of dicamba herbicides were in excess of the agency's statutory authority and not supported by substantial evidence of record. The Agency's actions in denying the Plaintiffs' formal petition for rule-making, as outlined in the attached letter, were arbitrary, capricious and characterized by an abuse of discretion.

II. JURISDICTION AND PARTIES

8. The Plaintiffs are farmers and residents of Arkansas who intended to use dicamba herbicides during the 2018 crop year. The Plaintiffs used Dicamba herbicides during the 2017 crop year. The Plaintiffs will suffer actual injury to their crops as well as financial injury if they are not allowed to use Dicamba herbicides, in-crop, after April 16, 2018.

9. Plaintiffs Michael McCarty, Perry Galloway, Matt Smith, Greg Hart, and Becton Bell have previously petitioned the Arkansas State Plant Board to initiate administrative rule-making to allow limited growing season applications of dicamba herbicide products including formulations such as XtendiMax, FeXapan, and Engenia for the 2018 crop year. The Defendants arbitrarily denied the Plaintiffs' Petition on October 19, 2017, and the Plaintiffs have exhausted their administrative remedies.

10. The Defendant, Arkansas State Plant Board, is an Arkansas State Agency¹ subject to the Arkansas Administrative Procedure Act, found at Ark. Code Ann. § 25-15-201 *et seq.* The State Plant Board is a regulatory body which has been entrusted with duties and powers,² including the regulation of herbicide use and application, which have significant impact upon Arkansas farmers. The Plant Board is governed by eighteen (18) members appointed pursuant to Arkansas Code Annotated § 2-16-206. The Director and Members of the State Plant Board are Defendants in their official capacity only.

11. While the Plant Board exercises significant regulatory control over Arkansas farmers and other regulated individuals, this Agency is unresponsive and unaccountable to the majority of individuals it regulates due to the fact that half of its governing members are directly appointed by private interests including, but not limited to, the Arkansas Seed Growers Association and Arkansas Feed Manufacturer's Association. The Plaintiffs believe that the Arkansas legislature's delegation of its appointment powers to private entities is an unconstitutional delegation of legislative authority to private industry groups and has resulted in a State Plant Board that is not focused on public interest.

12. Jurisdiction and venue are proper in this court under Arkansas Code Annotated § 20-20-221, Arkansas Code Annotated § 25-15-214, and Arkansas Code Annotated § 25-15-207. The decision of the Defendant State Plant Board was issued on October 19, 2017. A copy of the Findings of Fact and Order was received on or about October 20, 2017. This Petition is timely filed, within thirty (30) days thereof.

¹ Ark. Code Ann. § 25-15-202(2)(A).

² The State Plant Board's powers are defined by statute including Ark. Code Ann. § 2-16-201-401.

III. BACKGROUND & HISTORY

13. Arkansas row crop farmers have struggled for years with competition from palmer amaranth, commonly referred to as pigweed, on their farms. Pigweed is a highly competitive weed species which can and does result in significant yield loss for Arkansas' row crop farmers on an annual basis.

14. In recent years, pigweed has developed significant resistance and tolerance to the chemicals traditionally used by Arkansas farmers to control pigweed populations and reduce negative yield impacts. There is now no effective alternative to Dicamba based herbicides, for the control of resistant pigweed populations. The members of the Arkansas State Plant Board are well-aware of the fact that pigweed is a significant economic problem for Arkansas' row crop farmers and have recognized there is no good alternative to Dicamba, for Arkansas farmers.

15. The Arkansas State Plant Board exercises authority over the approval and use of herbicides by Arkansas Farmers. Dicamba based herbicides have been allowed for limited use in Arkansas for years but, prior to 2017, had not been approved for in-crop applications on soybeans. However, in previous years, there have been Complaints that Arkansas farmers have been using dicamba based herbicides in an effort to control otherwise resistant pigweeds.

16. For the 2017 crop year, the State Plant Board approved *Engenia*, a dicamba based herbicide for in-crop use and application. Engenia has been called a "low-volatility" dicamba herbicide as it was designed with the intent to reduce off-target injury to vegetation near to the application area (field).

17. The Plaintiffs herein used Engenia, in their farming operations, during the 2017 crop year.

18. The State Plant Board staff also receives and investigates complaints about improper use of pesticides. Every year, numerous complaints concerning off-target pesticide damage or improper pesticide application are made to the State Plant Board Staff. In 2016 when Dicamba herbicides were not approved for in-crop use, the State Plant Board received and investigated claims of dicamba injury to susceptible crops and there were allegations that some Arkansas farmers were applying volatile formulations of dicamba improperly.

19. There have always been chemical drift issues in Arkansas' farming areas. Despite complaints regarding dicamba injury in 2016, the State Plant Board approved a dicamba based herbicide, Engenia, for in-crop use by Arkansas Farmers for the 2017 crop year.

20. In mid-to late June of 2017, the State Plant Board began receiving an unprecedented number of complaints of off-target dicamba herbicide injury. There is wide disagreement as to whether the increased number of pesticide injury complaints resulted from improper use of the product, environmental conditions, or simply the volatility of the Engenia product itself. There is also much disagreement as to whether the Engenia product was the cause of the off-target injury or whether certain producers and pesticide applicators were using unapproved, more volatile dicamba herbicides.

21. The State Plant Board appointed a "Dicamba Task-Force" to address the increased number of Complaints and propose rules for the use of dicamba by Arkansas Farmers for the 2018 crop year. This Task-Force was lauded as a collaborative effort to avoid off-target dicamba injury in 2018. However, Freedom of Information Act requests have revealed repeated suggestions that there was an intentional effort by members and staff of the State Plant Board to prevent farmers from becoming members of the "Task-Force" and to limit their input in regard to the 2018 rules.

In the end, the input of Arkansas row crop farmers (those primarily affected by the issue at hand) were placed second to industry groups including the Arkansas Poultry industry.

22. The Plaintiffs believe that members of the State Plant Board actively attempted to suppress the input of Arkansas Farmers.

23. The bizarre nature of the State Plant Board's appointment of Dicamba Task-Force members is readily apparent in the appointment of James King, to the Task-Force. James King was appointed to represent the "Arkansas Green Industry," yet it is not apparent that anyone from the State Plant Board ever spoke to Mr. King, Mr. King did not participate in the Task-Force meetings, and was even quietly removed from the final Task-Force report. Quite frankly, Mr. King does not appear to exist, yet he was appointed to a Task-Force of utmost importance to Arkansas row crop farmers. Please refer to the Announced List of Task Force Members attached hereto as Exhibit 1.

24. The above-referenced Dicamba Task-Force originally attempted to reach an 85% consensus on proposals for 2018 dicamba use. The Task-Force could not reach such a consensus, so the Task-Force determined to reach 75% consensus. The Task-Force did not reach a 75% consensus, yet a package of proposals, in the form of a report, resulted from the Task-Force meeting. These proposals included an April 15th cutoff date for the use of dicamba herbicides in Arkansas. The Plaintiffs herein argue that an April 15th cutoff date is not a cutoff date but an arbitrary ban on in-crop use of dicamba herbicides because only a minor percentage of Arkansas' soybean crop is planted by April 15th.

25. The April 15th cutoff date and associated proposals were recommended to the State Plant Board by members of its pesticide committee. The Plant Board Staff and certain members

suggested that there was a consensus by the Task-Force. This was not true and was misleading. The Task-Force report itself states that it takes 14 members to reach a 75% consensus and only 13 Task-Force members were in support of an April 15th cutoff date.

26. Nevertheless, the misrepresentation of this alleged Task-Force “consensus” was used as a basis for the State Plant Board to proceed with instituting an April 16th ban on the use of dicamba herbicides for the 2018 crop year, making Arkansas the only state in the South to presently ban in-crop use of dicamba for 2018.

27. The Plaintiffs and other interested farmers responded to the arbitrary actions of the State Plant Board by organizing an informal petition which was supported by over 330 Arkansas Farmers (representing over 1.33 million Arkansas cropland acres) who opposed the April 15th cutoff date and suggested that a May 25th cutoff date would prevent off-target injury and allow Arkansas farmers use of dicamba herbicides in 2018. The Plant Board initially would not allow this group time to present their petition to the State Plant Board.

28. As a result of the State Plant Board’s refusal to listen to Arkansas producers, the Plaintiffs herein were forced to file a formal “Petition for Rule-Making” with the State Plant Board so that they could express their concerns to State Plant Board members. The Plaintiffs pointed out that the proposed dicamba ban was going to have a significant and negative financial impact on Arkansas Farmers and that restricted use of the product could avoid off-target and unintended injury to susceptible crops and plants. The Petition is attached hereto as Exhibit 2.

29. On October 19, 2017, The Defendant, Arkansas State Plant Board, held a special meeting to consider the Plaintiffs’ Petition to Initiate Rule-making. The Plaintiff’s Petition for

Rule-making was arbitrarily denied on the basis that it “could cause confusion.”³ Again, the interests of Arkansas farmers were summarily dismissed due to arbitrary concerns not based on substantial evidence but, instead, an apparent unwillingness to find answers to relevant questions concerning the potential use of dicamba during the 2018 crop year.

30. Since the date of the Hearing, it has become evident that members of the State Plant Board have been personally advocating for a total ban on dicamba use in Arkansas and against the Plaintiffs’ Petition for Rule-making, specifically. Good government, based on reasonably objective decision-making, has been sacrificed by vested private interests that are entrenched on the State Plant Board due to an unlawful delegation of Plant Board appointment authority to private industry. The Plaintiffs have also been denied an impartial adjudicator as required by the Administrative Procedure Act.

31. Ark. Code. Ann. § 25-15-212 affords the Plaintiff a right to judicial review of the record and decision made by the Arkansas State Plant Board as stated in its letter of October 20, 2017.

32. The State Plant Board’s November 9, 2017, approval of an April 16, 2018, cutoff date for the in-crop use of dicamba herbicides in Arkansas Row Crops has since been approved by the Arkansas Legislative Council and has taken effect.

33. As a result of the denial of Plaintiffs’ Petition for Rulemaking and the Plant Board’s imposition of an April 16th cutoff date for in-crop use of dicamba based herbicides in 2018, the Plaintiffs have been forced to alter their means of doing business for the 2018 crop year, which will result in injury to growing crops, decreased yields, and increased expenses

³ Please refer to the October 20th Letter from Plant Board Director Terry Walker attached hereto as Exhibit 3.

including but not limited to the hiring of hoe crews to combat the presence of pigweed in their fields. This is the direct result of the Plant Board's denial of Plaintiffs' Petition for Rulemaking and adoption of a rule which is inconsistent with the rules proposed by the Plaintiffs.

34. All Arkansas farmers will be prejudicially impacted by the Plant Board's prohibition on the application of dicamba herbicides in the 2018 crop year. Arkansas is the only State in the Nation, of which Plaintiffs are aware, where there has been an all out prohibition on the in-crop use of dicamba.

35. A reversal or invalidation of the Plant Board's 2018 dicamba ban would redress the Plaintiffs' injury.

IV. CAUSES OF ACTION

A. Unlawful Delegation of Legislative Authority to Private Interests

36. The Plaintiffs hereby appeal the State Plant Board's decision in regard to their Petition for Rule-Making. Plaintiffs also seek an Order declaring the State Plant Board's vote on the Plaintiff's Petition, as well as subsequent votes relating to the 2018 in-crop use of dicamba, to be deemed void and unlawful. The Plaintiffs seek declaratory and injunctive relief, barring the State Plant Board from banning in-crop use of dicamba for the 2018 crop year, on the grounds that Arkansas Code Annotated § 2-16-206 is unlawful and unconstitutional as it allows the majority of voting members of the State Plant Board to be directly appointed by private interests who are not accountable to the people of Arkansas, the Legislature, or the Governor.

37. Specifically, Arkansas Code Annotated § 2-16-206 is an unconstitutional attempt by the Legislature to delegate legislative appointment power to private industry. This statute

established a state plant board composed of members “elected by”: 1) the Arkansas State Horticultural Society; 2) the Arkansas Green Industry Association; 3) the Arkansas Seed Grower’s Association; 4) The Arkansas Pest Management Association, Inc.; 5) The Arkansas Seed Dealer’s Association; 6) the Arkansas Feed Manufacturer’s Association; 7) The Arkansas Crop Protection Association, Inc.; 8) the Arkansas Agricultural Aviation Association; and 9) the Arkansas Forestry Association.

38. These aforementioned members are not subject to any elected officials’ approval. While they do not receive compensation, they direct the use of Arkansas’ funds and receive expense reimbursements from the State Treasury. The Plaintiffs are not aware of another State Agency whose members are directly appointed by private interests.

39. The Arkansas Constitution provides for a clear separation of powers by the Departments of State Government. See Article 4 of the Arkansas State Constitution. Arkansas Code Annotated § 2-16-206 is an unconstitutional delegation, to private industry groups, of the legislature power to appoint persons to conduct governmental functions as Members of the State Plant Board.

40. Article 5 of the Arkansas Constitution vests legislative and rule-making powers in the Arkansas General Assembly. Any assignment of rule-making or legislative authority to private entities is in violation of the Arkansas Constitution.

41. Arkansas Code Annotated § 2-16-206 should be deemed unconstitutional, the actions of the State Plant Board in regard to its 2018 pesticide rules and dicamba use should be enjoined, and the actions of the current State Plant Board should be declared void on the basis that the majority of the State Plant Board were without lawful authority to initiate rule-making and to disperse public funds.

42. Put simply, the legislature may not delegate the authority to appoint members of a State agency to private organizations. Arkansas Code Annotated § 2-16-206 was an unconstitutional delegation of legislative authority in violation of the nondelegation doctrine and the fundamental separation of powers principles embodied in the Arkansas State Constitution.

43. Under our constitutional doctrine of separation of powers the functions of the Legislature must be exercised by it alone. *Walden v. Hart*, 243 Ark. 650, 652, 420 S.W.2d 868, 870 (1967). That power cannot be delegated to another authority. *Id.* (citing Ark. Const. art. 4; *Oates v. Rogers*, 201 Ark. 335, 144 S.W.2d 457 (1940)). In this case, the Arkansas Legislature has unlawfully attempted to delegate its functions to the private entities that are listed in Arkansas Code Annotated § 2-16-206.

44. States around the nation have held that “private individuals cannot be empowered to select boards to spend public funds.” *Gamel v. Veterans’ Memorial Auditorium Commission*, 272 N.W.2d 472, 476 (Iowa Sup. 1978). The Plaintiffs have brought their request for a declaratory Judgment, which seeks a ruling, that the current make-up of the State Plant Board is unlawful and unconstitutional, in an effort protect the basic principle that Americans “are to be governed by our elected representatives in accordance with the Constitution.” *Hetherington v. McHale*, 458 Pa. 479, 329 A.2d 250, 253 (1974).

B. Defendants’ Violation of Constitutional and Statutory Provisions While During the Rule-Making Process and While Considered a Proposed Dicamba Ban.

45. As previously noted in this Complaint, On November 9, 2017, the State Plant Board voted in support of an April 16, 2018, cutoff date for the in-crop use of dicamba herbicides. This cutoff date effectively bans the use of dicamba herbicides in crops grown during the 2018 crop year.

46. Information has come to light within the past week indicating that the Defendants violated Arkansas Code § 25-15-209(a) and deprived the Plaintiffs of a fair hearing on their Petition for Rulemaking by holding unannounced meetings by Plant Board members where the Plant Board members (the ultimate finders of fact and law) discussed the merits of Plaintiffs' Petition and the proposed final rule on 2018 dicamba use, prior to the November 9 vote by the State Plant Board.

47. Upon information and belief, Certain plant board members directly communicated with third -parties about the facts relating to the Plaintiffs' Petition for Rule-making and the merit of the proposed dicamba ban, prior to the November 9, 2017, hearing on the final rule. Plaintiffs and Plaintiffs' Counsel were not provided notice of these meetings or an opportunity to attend such meetings, as required by Arkansas Code Annotated §25-15-209(a).

48. Within the last five (5) days, facts have been publicly reported which indicate the State Plant Board never impartially considered the Plaintiffs' Petition for Rule-making or the negative effect of the April 16, 2018 cutoff date which has been imposed by the State Plant Board (the Dicamba Ban).

49. Dr. Rich Zollinger, formerly of North Dakota State University, reported to a Nationwide agricultural media source that the State Plant Board sent a jet to pick up Dr. Zollinger in North Dakota to testify in support of the proposed dicamba ban, at the Hearing of the matter on November 7, 2017. Dr. Zollinger reported to *AGWEEK* that the jet "personally delivered me to the plant board."

50. Upon information and belief, certain State Plant Board members had communicated with Dr. Zollinger and confirmed the facts that Dr. Zollinger would submit and cemented his support for the State Plant Board's proposed dicamba ban, prior to requesting that

he be “personally delivered” to testify at a State Plant Board hearing and in opposition to the positions being taken by the Plaintiffs herein.

51. The State Plant Board has never previously disclosed that it was *privately* seeking individuals to testify in a hearing in opposition to the interests of many Arkansas farmers, including the Plaintiffs herein. Such action reflects manifest bias by the State Plant Board and is a slap in the face to the citizens regulated by the State Plant Board.

52. Arkansas Code Annotated §25-15-209(a) specifically provides that

members or employees of an agency assigned to render a decision or to make final or proposed findings of fact or conclusions of law in any case of adjudication shall not communicate, directly, or indirectly in connection with any issue of fact with any person or party nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate.

53. State Plant Board members have violated Arkansas Code Annotated §25-15-209(a) by communicating with each other and third parties regarding the merits of Plaintiffs’ Petition for Rulemaking without providing notice for all parties to participate.

54. Certain Plant Board members have further violated Arkansas’ “Open Public Meeting” statute, found at Arkansas Code § 25-19-106, by communicating with out of state professionals concerning proposed plant board rules and arranging for Dr. Zollinger’s travel to Arkansas and testimony before the Full Plant Board. Arkansas Code § 25-19-106 requires that “all meetings, formal or informal,” by State agencies be public meetings. Notice was never given of the meeting whereby the Plant Board determined to arrange for a jet to deliver Dr. Zollinger to testify against the in-crop use of dicamba herbicides in 2018. Notice was not provided as dictated by Arkansas Code § 25-19-106(b)(2).

55. Upon information or belief, before Plant Board meetings held on October 19, 2017 and November 7, 2017, the adjudicating Plant Board Members violated Arkansas Code § 25-15-209(a) by communicating directly and indirectly about the subject matter of the Hearings.

56. The Supreme Court of Arkansas has indicated that ex parte contact between Agency members and third parties, regarding the facts of a case which will come before the Agency, is impermissible under Arkansas Code §25-15-209. At a minimum, this contact has tainted the proceedings before the State Plant Board so that there is a severe appearance of impropriety.

57. Under the Fourteenth Amendment and Article 2 §8 of the Arkansas Constitution, a hearing before a neutral and detached judge, and one who appears to be neutral and detached is a requirement of due process. See *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S. Ct. 80 (1972). The Plaintiffs argue that certain Plant Board members' actions to marshal hearing testimony adverse to the interests of the Plaintiff on October 19, 2017 and November 7, 2017, demonstrate that they were not provide a fair hearing in front of a neutral and detached adjudicating body.

C. Arbitrary and Capricious Agency Action

58. The Plaintiffs contend that the State Plant Board's refusal to initiate rule-making, as requested in the attached Petition for Rulemaking was arbitrary and capricious agency action, not based on substantial evidence. Plaintiff's further argue that the Plant Board's later actions in support of an April 16, 2018, cutoff date for the use of dicamba herbicides was arbitrary, capricious, and made without the support of substantial evidence.

59. The proposed April 16th cutoff date, and the refusal to consider an alternative cutoff date, is not based on science, the number of complaints, or any reasonable position. Instead, the State Plant Board has taken a zero-risk position that has never been applied to any other pesticide.

60. The State Plant Board's April 16th dicamba ban is not based on any ascertainable standard, thereby demonstrating arbitrary and capricious decision-making. In fact, members of the State Plant Board have publicly suggested that the April 16th cutoff date is arbitrary and simply a default position. The Plaintiffs respectfully suggest that the State Plant Board should not be taking zero-risk or default positions when the livelihoods of Arkansas Farmers are concerned and should instead base their decisions on facts and articulable science.

D. Request for Discovery

61. The Supreme Court of Arkansas has held that contacts, between members of State Agencies and third parties, regarding the facts which will be before the Agency for decision-making may violate Arkansas Code §25-15-209 and constitute "procedural irregularities" to which testimony is properly allowed before trial courts.⁴ The Administrative Procedure Act also allows the presentation of additional evidence.⁵

62. As evidence of contacts between Plant Board members and third parties, undisclosed meetings between Plant Board Members, and procedural irregularities continue to be revealed, the Plaintiffs request time to conduct formal discovery of these issues as allowed by the Arkansas Rules of Civil Procedure. Depositions of Board Members are appropriate before Circuit Court Judicial Review of Administrative Proceedings, when procedural irregularities are at issue.⁶ Depositions will assist the Parties in this case in identifying the extent of ex parte contacts by Board Members and proper testimony to be heard by this Court.

⁴ Arkansas Alcoholic Beverage Control Division, 307 Ark. 82, 811 S.W. 2d 305, 307 (1991).

⁵ Ark. Code Ann. §25-15-212(f).

⁶ See Arkansas Alcoholic Beverage Control Division, 307 Ark. 82, 811 S.W. 2d 305, 307 (1991). (Depositions of two ABC Board members were taken over the Agency's objection and admitted into evidence at trial).

63. As such, the Plaintiffs hereby request leave to conduct discovery, supplement the record, and present additional evidence, in accordance with Arkansas Code Annotated § 25-15-212(g) and Arkansas Code Annotated § 25-15-212(f).

VI. CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, the Plaintiff respectfully requests that this Court declare Arkansas Code Annotated § 2-16-206 an unconstitutional delegation of legislative authority to private interests, The Plaintiffs ask that the Court render the regulatory and rule-making actions by this Plant Board, concerning the 2018 use of dicamba unlawful and void. The seats of State Plant Board members who were appointed by private interests should be deemed vacant, and this Court should reverse and vacate the Defendant's proposed 2018 dicamba ban. Similarly, the Plant Board's decision of October 20, 2017, denying the attached Petition for Rule-making should be reversed, as an action not supported by substantial evidence of record; characterized by arbitrary and capricious action; and made upon unlawful procedure in violation of the Plaintiffs' constitutional rights. Finally, the Plaintiffs ask that this Court enter an injunction, barring the State Plant Board from banning the in-crop use of dicamba herbicides for the 2018 crop year.

DATED: January 26, 2018

Respectfully Submitted,

Michael McCarty, Perry Galloway,
Ross Bell,
Matt Smith, Greg Hart, and Becton Bell

PETITIONERS

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CERTIFICATE OF SERVICE

The undersigned Counsel hereby certifies that this document has been provided to the following individuals on this 26th day of January, via Submission to the Court's E-Filing System.

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/S/ Grant Ballard
Grant Ballard, AR Bar No. 2011185

From: Adriane Barnes
To: ~~Adriane Barnes~~
Subject: FOR IMMEDIATE RELEASE: Arkansas Dicamba Task Force Members Announced
Date: Monday, August 07, 2017 2:11:46 PM

FOR IMMEDIATE RELEASE: 8/7/2017

Contact: Adriane Barnes, (501) 516-6255, adriane.barnes@arkansas.gov

See this release online:

http://www.aad.arkansas.gov/Web/Content/5987602/Dicamba_Task_Force_Announcement_Aug_7_2017.pdf

Arkansas Dicamba Task Force Members Announced

LITTLE ROCK, AR — Governor Hutchinson has directed Secretary of Agriculture Wes Ward and Plant Board Director Terry Walker to convene and co-chair a task force to review the dicamba technology, investigate current problems with its use and application, and make long term recommendations for the future.

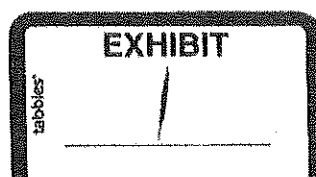
The following individuals have been selected to serve on the task force:

- **David Wildy**, Farmer, Northeast Arkansas;
- **Joe Mencer**, Farmer, Southeast Arkansas;
- **Shawn Peebles**, Farmer, Central Arkansas;
- **AJ Hood**, Arkansas Soybean Association;
- **Terry Dabbs**, Arkansas Farm Bureau;
- **Andrew Grobmyer**, Agricultural Council of Arkansas;
- **David Hundley**, Arkansas Poultry Industry;
- **Blake Foust**, CCA, Arkansas Agricultural Consultants Association;
- **Sterling Clifton**, CCA, Arkansas Agricultural Consultants Association;
- **Billy Maddox**, Arkansas Seed Growers Association;
- **John Petrus**, Arkansas Seed Growers Association;
- **Chad Duckworth**, Arkansas Seed Dealers Association;
- **Stacey Bruff**, Arkansas Seed Dealers Association;
- **Don Johnson**, Arkansas Crop Protection Association;
- **Brad Koen**, Arkansas Crop Protection Association;
- **Dale Reed**, Arkansas Plant Food Association;
- **Dan Gladden**, Arkansas Plant Food Association;
- **Danny Townsend**, Arkansas Green Industry;
- **James Kling**, Arkansas Green Industry

The task force will be assisted by technical experts serving as non-voting advisory members.

Task Force meetings will be facilitated by the Winthrop Rockefeller Institute on Petit Jean Mountain with the first meeting scheduled for August 17, 2017. The task force will attempt to reach consensus on a set of recommendations for the use of dicamba products in Arkansas as quickly as possible in order to provide certainty for the 2018 growing season. Upon conclusion of the task force, findings will be provided to Governor Hutchinson, the Arkansas Agriculture Department, and the State Plant Board.

Learn more at aad.arkansas.gov. The Arkansas Agriculture Department offers its programs to all eligible persons regardless of race, color, national origin, sex, age or disability and is an Equal Opportunity Employer.



BEFORE THE ARKANSAS STATE PLANT BOARD

IN THE MATTER OF:

Michael McCarty; Perry Galloway;
Tom Burnham; Franklin Fogleman;
Matt Smith; Greg Hart; and Beeton Bell

Petitioners

And

Docket No.: _____

The Arkansas State Plant Board

Respondent

PETITION FOR RULEMAKING AND AMENDMENT TO PROPOSED RULES

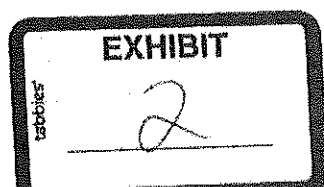
COME NOW, the above-referenced Petitioners, by and through the undersigned Counsel and for their Petition for Rulemaking and Amendment to Proposed Rules brought pursuant to Arkansas Code Annotated § 25-15-204(d) do state as follows:

1. Introduction

1. The Petitioners herein are Arkansas farmers who request that the State Plant Board initiate administrative rule-making to allow limited growing season applications of dicamba herbicide products including formulations such as XtendiMax, FeXapan, and Engenia for the 2018 crop year.

2. The State Plant Board is well-aware of the fact that Palmer Amaranth (Pigweed) is a significant economic problem for Arkansas' row crop farmers. The Petitioners assert that limited use of dicamba herbicides are necessary to effectively and economically control pigweed populations. Competition from pigweeds results in well documented financial damage to farmers including damage in the form of decreased crop yields.

3. The State Plant Board has voted to adopt the recommendations of the Arkansas Dicamba Task Force and ban the use of Dicamba herbicides from April 16, 2018, to October 31,



2018. This proposed ban and amendment to the current regulations will result in significant financial injury and harm to the Petitioners and other Arkansas farmers who suffer from pigweed competition in row crop fields. Testimony at the Plant Board's September 21, 2017, meeting uniformly noted that there are areas of the state where pigweed cannot be controlled and that Arkansas farmers need the best available technology to manage pigweeds in Arkansas fields.

II. Argument

4. The Petitioners generally oppose the recommendations of the Arkansas Dicamba Task Force but recognize the concern that middle to late summer applications of dicamba herbicide products may result in plant and yield injury. As a compromise to those concerned with plant injury, the Petitioners seek a May 25th cutoff date for the application of dicamba herbicides. The Petitioners further propose that a one-mile buffer be required for dicamba applications made during May of 2018.

5. The Petitioners believe that the April 16th cutoff date for dicamba applications, as currently proposed for the 2018 crop year, is an arbitrarily established cutoff date that is not fair for all of Arkansas farmers. Farmers in Southeast Arkansas will be allowed to continue growing season dicamba applications while Farmers in Northern Arkansas will have extremely limited opportunities to make dicamba herbicide applications after planting. In fact, an April 16th cutoff date will effectively bar many Northern Arkansas producers from making a dicamba application at the time of planting.

6. Had a May 25th cutoff date been implemented for dicamba applications during the 2017 crop year, complaints of dicamba injury submitted to the State Plant Board would have been greatly reduced and, in fact, would have been minimal. A May 25th cutoff date offers protection

for farmers concerned with off-target dicamba injury while still allowing producers a limited opportunity to use the latest and most effective technology to battle pigweed competition.

7. The restrictions on the use of dicamba technology, currently proposed by the Dicamba Task Force, will certainly result in financial losses and economic damage to row crop farmers in Arkansas. In experience, alternative platforms for the management of pigweeds are not competitive with the available dicamba based technology.

8. The Petitioners believe that the Arkansas Dicamba Task Force was not representative of the majority of Arkansas row crop producers and Arkansas farmers' concerns regarding the recommendations of the Dicamba Task Force were not adequately addressed but, instead, were actively suppressed.

9. Palmer Amaranth is a major problem for Arkansas row crop producers and the Arkansas State Plant Board should not be the only state in the South where dicamba technology is taken from farmers.

10. In support of the Petitioners' request for rule-making and amendment to the proposed 2018 dicamba "ban," a Petition in Opposition to the April 15th dicamba cutoff has been attached hereto. This Petition in opposition to the April 15th cutoff contains the signatures of well over 300 Arkansas farmers, representing over 1.3 million (1,300,000) acres of Arkansas cropland in production. These individuals' voices have not been heard and are in opposition to the restrictions previously proposed by the Arkansas State Plant Board's Dicamba Task Force which have now been adopted by the Plant Board for public comment.

III. Action Requested of State Plant Board

11. The Petitioners request the following rule-making action by the State Plant Board:

- a. The implementation of a May 25th cutoff date for Dicamba applications during the 2018 crop year (this later cutoff date could be contingent upon geography);
- b. A requirement that there be a one (1) mile buffer between a dicamba application and any growing crop susceptible to dicamba injury, unless the applicator receives a written waiver for the application;
- c. The creation of a special application permit for the growing-season use of dicamba herbicides in circumstances of severe pigweed infestation; and
- d. The instatement of a requirement that any individual or entity applying dicamba after April 15th must carry a mandatory liability insurance policy in the amount of \$500,000.00.

12. The Petitioners ask that rule-making be initiated on the issues addressed in paragraph 11, herein, and that the Petitioners be given the opportunity to present evidence and testimony in support of the allegations contained in this Petition.

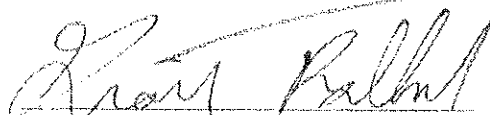
DATED: September 29, 2017

Respectfully Submitted,

Michael McCarty, Perry Galloway,
Tom Burnham, Franklin Fogleman,
Matt Smith, Greg Hartt, and Becton Bell

PETITIONERS

By:



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ASA HUTCHINSON
GOVERNOR

ARKANSAS AGRICULTURE DEPARTMENT

ARKANSAS FORESTRY COMMISSION
ARKANSAS LIVESTOCK & POULTRY COMMISSION
ARKANSAS STATE PLANT BOARD



WES WARD
SECRETARY OF AGRICULTURE

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October 20, 2017

Grant Ballard
Ark Ag Law, PLLC
724 Garland Street
Little Rock, AR 72201-1310

RE: Petition for Rulemaking

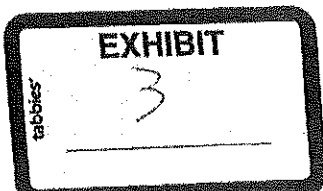
Mr. Ballard:

This is in response to the Petition for Rulemaking you submitted to the Arkansas State Plant Board (Board) on behalf of Michael McCarty, Perry Galloway, Tom Burnham, Franklin Fogleman, Matt Smith, Greg Hart and Becton Bell (Petitioners). As you are aware, at its October 19, 2017 meeting, the Board voted, after giving thorough consideration to the Petition and statements made at the meeting, to deny the Petition.

As you are also aware, the Board currently has a proposed rule restricting the use of dicamba scheduled for public hearing on November 8, 2017. To adopt a rule, a state agency must first comply with Executive Order 15-02 which requires each proposed rule to be first reviewed by the Governor's office prior to promulgation. Then after receiving approval from the Governor's office, the agency must publicize notice of its intent to adopt the rule for and provide for at least thirty (30) days of public comment. The Board will also entertain oral comments at the November 8 hearing. The rule must then be reviewed and approved by a legislative committee, and then filed with the Secretary of State before becoming effective. The Board has complied, is still in the process of complying, and will continue to comply, with these requirements.

A primary factor in the Board's action in deciding to not initiate rulemaking as requested in the Petition was the concern felt by the Board that initiating the Petitioner's suggestions at this point in the rulemaking process could cause confusion. The Board felt that in order to more coherently comply with the applicable rulemaking procedures, the better decision was to deny the Petitioners' request at this time. However, the Board also voted to refer the points raised in the Petition to a committee, and while the Petition has been denied, the points raised in the Petition will be again discussed at the Board's Pesticide Committee meeting scheduled for October 23, 2017. The committee will then decide whether to propose any changes, potentially including the suggestions in the Petition, at the November 8 hearing.


The Board also specifically addressed the four main points in the Petition. First, the Petitioners requested a "cut-off" date of May 25 for the application of dicamba. The Board discussed the need to look at available temperature data, as well as North/South geography. It was noted that studies are being done this year which could impact the decision, and the data from that study would be helpful. The Petition also suggested a one mile buffer zone between dicamba application and "any growing crop susceptible to dicamba injury . . .". The Board discussed the need for more discussion on what is meant by "crops susceptible to dicamba", and whether this restriction should apply to lawns, trees, etc.



The Petition suggested the creation of a special application permit. The Board felt more time was needed to compare this request to the processes that the Board already has in place. The Petition further suggested that anyone applying dicamba after a certain date carry a liability insurance policy of \$500,000.00. The Board had concerns over whether it had the statutory authority to impose such a requirement, and also felt further time for discussion was needed over whether this would apply to the current exceptions in the rule, such as pasturelands, forestry, lawns, etc.

In short, the Petition raised more questions than could be adequately answered in such a limited time frame. However, as previously noted, the Pesticide committee will revisit the issues raised in the Petition on October 23, 2017.

Sincerely,

A handwritten signature in dark ink, appearing to read "Terry Walker", is written over a horizontal line.

Terry Walker, Director
Arkansas State Plant Board