

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
_____ DIVISION

**GLEN HOOKS, MICHAEL DOUGAN,
PRATT REMMELL, REED STOREY,
TIM FISHER, VICTOR GRAY,
BLAND CURRIE, GLADYS WHITNEY,
FRANCES WILSON SHACKLEFORD,
ADAM FISHER, GUY FISHER, PADEN BALL,
GALE STEWART and COY'S HONEY FARM, INC.**

PLAINTIFFS

VS.

CASE NO. 60CV-21-_____

**ARKANSAS STATE PLANT BOARD,
a Division of the ARKANSAS DEPARTMENT
OF AGRICULTURE; AND ARKANSAS STATE
PLANT BOARD MEMBERS IN THEIR
OFFICIAL CAPACITIES:**

**WALTER "BRUCE" ALFORD;
KYLE BALTZ; SCOTT MILBURN;
DR. NATHAN SLATON; JASON PARKS;
TERRY STEPHENSON; MARK HOPPER;
MARTY EATON; BARRY WALLS;
TERRY FULLER; DARRELL HESS;
BRAD KOEN; SAM STUCKEY;
REYNOLD MEYER; TOMMY ANDERSON;
DR. KEN KORTH; DENNIE STOKES;
MATTHEW MARSH; AND MARK MORGAN**

DEFENDANTS

**COMPLAINT FOR DECLARATORY JUDGMENT
AND
PERMANENT INJUNCTIVE RELIEF**

Come now Plaintiffs, Glen Hooks, Michael Dougan, Pratt Remmell, Reed Storey, Tim Fisher, Victor Gray, Bland Currie, Frances Wilson Shackelford, Gladys Whitney, Adam Fisher, Guy Fisher, Paden Ball, Gale Stewart and Coy's Honey Farm, Inc. (collectively "Plaintiffs"), and for their Complaint against the Defendants Arkansas State Plant Board, a division of the Arkansas Department of Agriculture ("The Plant Board"), and the currently-serving members of the Arkansas Plant Board, to-wit: Walter "Bruce" Alford, Kyle Baltz, Scott Milburn, Dr. Nathan Slaton, Jason Parks, Terry Stephenson, Mark Hopper, Marty Eaton, Barry Walls, Terry Fuller, Darrell Hess, Brad Koen, Sam Stuckey, Reynold Meyer, Tommy Anderson, Dr. Ken Korth, Matthew Marsh and Mark Morgan solely in their official capacities (collectively the "Plant Board"), and allege as follows:

Nature of the Case

1. At a regular meeting of the the Arkansas Plant Board ("The Plant Board") held on May 3, 2021, the Plant Board adopted an amendment to an existing regulation/rule regarding the use of certain dicamba-containing herbicide formulations ("the herbicides") in the State of Arkansas.

2. The previously-existing regulation (“the 2018 Dicamba Rule) allowed farmers and other herbicide applicators in the State of Arkansas to apply three dicamba-containing herbicides that had been approved for use by the U.S. Environmental Protection Agency, subject to base restrictions required by EPA as a condition of approval of the herbicides, and additional restrictions required by the Arkansas State Plant Board as further conditions of the approval of the use of the herbicides in the State of Arkansas, as to the date and manner of application.

3. The restrictions under the 2018 Rule included:

- (a) The herbicide had to be applied by sprayer over-the-top of the subject crops (soybeans, cotton, etc.) by no later than May 25 of each year;
- (b) A one-mile buffer in all directions had to be maintained between the fields in which the herbicide was applied and research stations operated by the University of Arkansas System Division of Agriculture;
- (c) A one-mile buffer in all directions had to be maintained between the fields in which the herbicide was applied and fields in which certified organic crops and commercially grown specialty crops

(defined as at least 1,000 plants or average annual sales of \$25,000 for three years).

(d) A half-mile buffer in all directions had to be maintained between the fields in which the herbicide was applied and fields in which soybeans and cotton that are not genetically-engineered to resist dicamba are grown.

4. The Plant Board had reaffirmed the efficacy of the 2018 Rule as recently as a meeting of the Plant Board in December 2020.

5. The rule adopted at the Plant Board meeting on May 3, 2021 (the 2021 Rule”) purports to change the 2018 Rule in the following particulars and respects:

The restrictions under the 2018 Rule included:

(a) The herbicides must be applied by sprayer over-the-top of the subject crops (soybeans, cotton, etc.) by no later than June 30 of each year;

(b) A one-mile buffer in all directions must be maintained between the fields in which the herbicide is applied and research stations operated by the University of Arkansas System Division of Agriculture;

(c) A *one-half* mile buffer in all directions must be maintained

between the fields in which the herbicide is applied and fields in which certified organic crops and commercially grown specialty crops (defined as at least 1,000 plants or average annual sales of \$25,000 for three years). (The previous buffer distance was one mile.)

(d) A quarter-mile buffer in all directions must be maintained between

the fields in which the herbicide is applied and fields in which soybeans and cotton that are not genetically-engineered to resist dicamba are grown. (The previous buffer distance was one-half mile.)

6. The Plant Board is subject to the Arkansas Administrative Procedure Act, Arkansas Code Ann. 25-15-201 (“the APA”), and is required to follow the procedures prescribed therein for the enactment, revocation or amendment of any regulation. Ark. Code Ann. §25-15-204(h) further provides that “A rule adopted after June 30, 1967, is not valid unless adopted and filed in substantial compliance with this section.”

7. The adoption by the Plant Board of its May 2021 amendments to the 2018 Rule were not in compliance with the requirements of the APA, and the actions of the Plant Board in adopting the purported 2021 Rule are and were arbitrary, capricious, and otherwise not in compliance with law.

8. A justiciable issue exists regarding this matter, and Plaintiffs request that the Court render a Declaratory Judgment declaring that the actions of the Plant Board in proposing and adopting the 2021 Rule were invalid; that the Plant Board be preliminarily and permanently enjoined from enforcing the 2021 Rule; and that the use of Dicamba in Arkansas be restricted to only those provided and allowed by the Plant Board's 2018 Rule.

JURISDICTION AND VENUE

9. This Court has jurisdiction over the Plant Board, and venue is proper in Pulaski County Circuit Court, pursuant to Ark. Code Ann. § 20-15-207 that authorizes an action for declaratory judgment in this Court seeking to set aside a rule of the Plant Board, and this Court has personal jurisdiction over the members of the Plant Board acting in their official capacities as the Plant Board is an agency of the State of Arkansas located in Pulaski County and conducts its business in the State of Arkansas under the direction of its board members.

PARTIES

10. Plaintiff, Glen Hooks, is an individual resident of the State of Arkansas domiciled in Pulaski County, Arkansas. Mr. Hooks has been a long-time advocate for environmental protection and preservation, and is concerned about the adverse impacts of dicamba on the environment of east Arkansas.

11. Plaintiff, Michael Dougan, is an individual resident of the State of Arkansas domiciled in Craighead County, Arkansas. Mr. Dougan resides in east Arkansas; is an advocate for environmental protection and preservation, and has observed and is concerned about the adverse impacts of dicamba on the environment of east Arkansas.

12. Plaintiff, Pratt Remmell, is an individual resident of the State of Arkansas domiciled in Pulaski County, Arkansas. Mr. Remmell has been a long-time resident of Arkansas; an advocate for environmental protection and preservation; and frequently travels through east Arkansas. He is concerned about the impacts of dicamba on the environment of east Arkansas.

13. Plaintiff, Reed Storey, is an individual resident of the State of Arkansas domiciled in Phillips County, Arkansas. Mr. Story owns farmland in Phillips, Lee and Monroe Counties in east Arkansas on which he grows crops and other

vegetation that have been damaged by the spread of dicamba from soybean and/or corn fields. He is concerned about the adverse impacts of dicamba on the environment of east Arkansas.

14. Plaintiff, Tim Fisher, is an individual resident of the State of Arkansas domiciled in Cross County, Arkansas. Mr. Fisher owns farmland in east Arkansas on which he grows crops and other vegetation that have been damaged by the spread of dicamba from soybean and/or corn fields. He is concerned about the adverse impacts of dicamba on the environment of east Arkansas.

15. Plaintiff, Victor Gray, is an individual resident of the State of Arkansas domiciled in Prairie County, Arkansas. Mr. Gray owns farmland in east Arkansas on which he grows crops and other vegetation that have been damaged by the spread of dicamba from soybean and/or corn fields. He is concerned about the adverse impacts of dicamba on the environment of east Arkansas.

16. Plaintiff, Bland Currie, is an individual resident of the State of Arkansas domiciled in Ashley County, Arkansas. Ms. Currie owns farmland in east Arkansas on which are grown crops and other vegetation that have been damaged by the spread of dicamba from soybean and/or corn fields. She is concerned about the adverse impacts of dicamba on the environment of east Arkansas.

17. Plaintiff, Frances Wilson Shackleford, is an individual resident of the State of Arkansas domiciled in Pulaski County, Arkansas. Ms. Shackleford owns farmland in east Arkansas on which are grown crops and other vegetation that have been damaged by the spread of dicamba from soybean and/or corn fields. She is concerned about the impacts of dicamba on the environment of east Arkansas.

18. Plaintiff, Gladys Whitney, is an individual resident of the State of Arkansas domiciled in Pulaski County, Arkansas. Ms. Whitney owns farmland in east Arkansas on which are grown crops and other vegetation that have been damaged by the spread of dicamba from soybean and/or corn fields. She is concerned about the adverse impacts of dicamba on the environment of east Arkansas.

19. Plaintiff, Adam Fisher, is an individual resident of the State of Arkansas domiciled in Cross County, Arkansas. Mr. Fisher owns farmland in east Arkansas on which are grown crops and other vegetation that have been damaged by the spread of dicamba from soybean and/or corn fields. He is concerned about the adverse impacts of dicamba on the environment of east Arkansas.

20. Plaintiff, Guy Fisher, is an individual resident of the State of Arkansas domiciled in Cross County, Arkansas. Mr. Fisher owns farmland in east Arkansas

on which are grown crops and other vegetation that have been damaged by the spread of dicamba from soybean and/or corn fields. He is concerned about the adverse impacts of dicamba on the environment of east Arkansas.

21. Plaintiff, Paden Ball, is an individual resident of the State of Arkansas domiciled in Cross County, Arkansas. Mr. Ball owns farmland in east Arkansas on which are grown crops and other vegetation that have been damaged by the spread of dicamba from soybean and/or corn fields. He is concerned about the adverse impacts of dicamba on the environment of east Arkansas.

22. Plaintiff, Gail Stewart, is an individual resident of the State of Arkansas domiciled in Pulaski County, Arkansas. Ms. Stewart owns farmland in east Arkansas on which are grown crops and other vegetation that have been damaged by the spread of dicamba from soybean and/or corn fields. She is concerned about the adverse impacts of dicamba on the environment of east Arkansas.

23. Coy's Honey Farm, Inc. ("Coy's"), is a corporation organized and existing under the laws of the State of Arkansas, with its principal offices in Craighead County, Arkansas. Coy's has been the largest honey producer in the State of Arkansas, and at one time during the mid-2010s, had as many as 13,000 hives of bees scattered throughout east Arkansas collecting pollen and nectar from row

crops, ornamental plants, fruit trees and native plants in that area from which to produce honey. Coy's hives and bees have been harmed as a result of the impact of dicamba herbicides on the crops, plants, trees and flowers in east Arkansas.

24. The Arkansas State Plant Board is a division of the Arkansas Agriculture Department and a regulatory body created by Ark. Code Ann. § 2-16-206. The Plant Board's powers are defined by statute pursuant to Ark. Code Ann. §§ 2-16-201 to - 419 and various related statutes pertaining to agriculture. The Plant Board is governed by its board members, one of which is nonvoting, determined pursuant to Ark. Code Ann. § 2-16-206. The members of the Plant Board are sued solely in their official capacities whereby they adopt regulations and otherwise direct actions of the Plant Board.

FACTUAL ALLEGATIONS

Information Regarding Dicamba

25. Dicamba is a chemical that has been used for decades to kill weeds, but it is also highly lethal to many other crops and plants. To make it more dangerous, Dicamba is volatile — that is, it can turn from the liquid form in which it is applied to plants to a gaseous form after it is applied, allowing it to move in the air as a

suspended gas, and spread to other locations without leaving a drift trail. The lack of a drift trail makes it unlikely the responsible party can be identified. Dicamba volatility can begin below 70 degrees Fahrenheit (F), and the rate of volatility increases as temperatures move higher. The Environmental Protection Agency (“EPA”) states that volatility “can occur, in the case of dicamba, for days after an application”.

26. Within the last decade, as weeds developed a resistance to herbicides in use, manufacturers of dicamba developed genetically-modified soybeans and cotton that can withstand the poisonous effects of dicamba. Those manufacturers sell dicamba-resistant seeds to farmers along with dicamba-containing herbicides that can be used on weeds that have become resistant to other herbicides.

27. However, due to the characteristic of dicamba to easily drift or volatilize and migrate to other areas, it also destroys row crops, vegetables, fruit and nut trees, other trees such as cherry, white oak, sycamore, maple, cypress, Bradford pear, ornamental plants, natural vegetation and other plant life in the surrounding areas that have no resistance to dicamba. Dicamba also is found in surface waters in east Arkansas and is harmful to certain wildlife, birds and insects.

History of Use of Dicamba in Arkansas

28. The U.S. EPA first authorized the use of dicamba herbicide formula year round in the United States in 2017. Federal law allows the states to be more restrictive than EPA-permitted pesticide use. In that same year, the Plant Board authorized the EPA-approved dicamba use in Arkansas in 2017 without additional restrictions.

29. However, due to the unprecedented number of complaints of damage from dicamba received by the Plant Board as early as June 15, 2017, the following day (June 16, 2017), the Pesticide Committee of the Plant Board recommended that dicamba be *banned for further use in the 2017 growing season*, and on June 23, 2017, in an emergency proceeding the Plant Board adopted that recommendation and banned use of dicamba for the remainder of that 2017 growing season. By the end of 2017, nearly 1,000 dicamba complaints were filed in Arkansas. Other states also experienced unprecedented dicamba complaints.

30. For 2018, the Plant Board set the dicamba Cutoff Date at April 15 for that year and subsequent years, along with other restrictions, such as buffer zones around sensitive ecological and crop areas. Until the Plant Board's adoption of the 2021 Rule, those restrictions have since been applicable for the use of dicamba

formulations until the Plant Board's rulemaking of May 3, 2021. Notwithstanding such restrictions, the Plant Board received nearly 200 dicamba complaints during 2018, which indicates there were many illegal dicamba applications after April 15, 2018. The Plant Board has continued to receive hundreds of complaints of dicamba damage each year to the present time.

31. Weed scientists in academic institutions (including those at the University of Arkansas Division of Agriculture and other highly respected universities) and other professional organizations are in agreement that dicamba cannot be controlled in the current formulations and herbicide uses and applications. With the removal of the restrictions that were imposed in the 2018 rulemaking as a result of the 2021 Rule, continued and accelerated damage to crops, native and domestic plants, flowers and trees that are not genetically-engineered to be tolerant of dicamba will occur.

32. Dicamba's off-target movement is a chemical trespass that damages or kills other people's crops, gardens, plants and trees, causing millions of dollars of economic and property value loss to those persons. This damage was discussed in the Plant Board meeting of May 3, 2021, but the majority of the Plant Board – most, if not all of whom are farmers who use dicamba herbicides, disregarded that

damage and voted for the 2021 Rule.

The 2021 Dicamba Rulemaking

33. On January 31, 2021, a Petition entitled “Petition for Rulemaking and Amendment to Current Rules” (“the Hydrick Petition”) was filed by one Huntington Tyler Hydrick with the Plant Board. Mr. Hydrick holds a Masters Degree in weed science from Mississippi State University, is a licensed Arkansas crop consultant, and is the owner of or consultant to crop consulting businesses that purport to operate in northeastern Arkansas, and parts of Missouri and Tennessee. Mr. Hydrick advocates the use of dicamba-based herbicides and advises his clients to utilize dicamba-based herbicides. There are a considerable number of misstatements and unsupported hyperbole in the Hydrick Petition. A copy of Mr. Hydrick’s Petition is attached to this Complaint as Exhibit No. 1.

34. Section III of the Hydrick Petition entitled “Action Requested of the Arkansas State Plant Board” provides:

I request the following as part of the rule-making process:

The implementation of a full, federally-approved label¹
for all reduced volatility dicamba formulation in the state
of Arkansas without additional restrictions.

35. Pursuant to the filing of that Petition, the Plant Board, in its meeting on March 3, 2021, took up the Petition for consideration. The following Motion was made by Board Member Stuckey and seconded by Board Member Walls that the Board:

Accept the Hydrick Petition for full federal label for dicamba
use over the top of dicamba tolerant crops.

36. The motion was repeated by Chairman Fuller, and then voted on and approved without change. Therefore, the resolution was, as stated in Mr. Hydrick's Petition, only that the restrictions added by the State Plant Board to the EPA-approved label be removed.

¹ A Federal "label" is a trade name for the terms and conditions imposed by the U.S. EPA in approving a herbicide/pesticide for use. A written statement of such terms and conditions is attached to the container in which the chemical is sold. A state is authorized to add additional terms and conditions on use, if necessary, in a state label.

37. However, the proposed rule that the Plant Board submitted to Governor Hutchinson, as required by the APA, was that “*All pesticides containing dicamba shall be used in compliance with their respective labels.*” (Italics added)

38. The proposed Rule provided to the Governor is a significantly different proposal than that contained in the Hydrick Petition, and is a different and broader proposal than that approved by the Plant Board in its vote on March 3. It is also a violation of the AAPA, in that the Rule proposed by the Board is required to be the same as that provided to the Governor and published for public notice and opportunity for comment.

39. The Plant Board issued a notice to the public advising of its intent to propose changes to the Arkansas Rules on Pesticide Use and Classification, and that “*The proposed changes will be to consider changes for the use of dicamba in the State of Arkansas.*” A copy of the newspaper public notice of proposed rulemaking is contained in Exhibit 1A to Exhibit 4 to this Complaint.

40. On May 3, 2021, the Plant Board held a public hearing on the Petition, and adopted the new Rule (the 2021 Rule) containing the major terms and conditions set forth in Paragraphs 2 through 5, above, which were yet again different from the proposed rules contained in Hydrick’s Petition and that

contained in the Notice of Rulemaking. The Rule also contained an “emergency clause” declaring the rule to be both “permanent” and “temporary.”

41. The actions of the Plant Board in proposing, giving notice of, and promulgating the 2021 Rule were arbitrary, capricious and otherwise contrary to law. The Plaintiffs and their property, and the environment of east Arkansas, are harmed and will be and are threatened to be harmed by such actions. Plaintiffs have standing to maintain this action pursuant to Ark. Code Ann. §25-15-207(a).

Claims

42. The procedures used by the Plant Board in its proposal of the 2021 Dicamba Rule were not in compliance with the requirements of the APA and the law of Arkansas in the respects and particulars set forth herein, and are arbitrary, capricious and otherwise not in compliance with law. The action of the Plant Board in adopting the 2021 Dicamba Rule should be voided.

Count 1.

The State Plant Board Failed to Give Adequate Notice of the Proposed Rule Change

43. The proceedings of the Plant Board in the adoption, modification

or revocation of rules and regulations are governed by Ark. Code Ann. §25-15-204. In relevant part, subsection (a) of that section provides:

Prior to the adoption, amendment, or repeal of a rule, the agency shall:

- (1)(A)(i) Give at least thirty (30) days' *notice* of its intended action;
- (B) The notice shall include:
 - (i) A statement of the *terms or substance of the intended action or a description of the subjects and issues involved*;
(Emphasis added)

44. The Notice of Rulemaking issued by the Plant Board consisted only of the newspaper notice described in Paragraph 39 of this Complaint and a statement on the Arkansas Department of Agriculture's Plant Industries website stating:

The Arkansas State Plant Board is proposing changes to the Arkansas Rules on Pesticide Use and Classification. *The proposed changes will be to consider changes for the use of dicamba in the State of Arkansas.* The proposed rule change may be viewed **here** [*hyperlink*].

A copy of the Agriculture Department's website containing the above referenced notice and hyperlink is contained as Exhibit 1B to Exhibit 4 to this Complaint.

45. The hyperlink takes the reader to the Arkansas Rules on Pesticide Use consisting of 21 pages. There is no explanation given to the reader regarding any

portion of those Rules that are to be added, amended or repealed. On page 16, the wording “All pesticide products containing dicamba shall be used in compliance with their respective federal labels” is underlined. Thereafter, on pages 16 through 19, there is text through which lines are drawn. No other comments or explanation are provided regarding the proposed rule change or the effects of any proposed rule change. A copy of the above-described Arkansas Rules on Pesticide Use is also contained in Exhibit 1B of Exhibit 4 to this Complaint.

46. This “Notice” does not meet the requirements of Ark. Code Ann. §25-15-204(a)(1)(B). There is no “statement of the terms or substance of the intended action or a description of the subjects and issues involved.” Interested parties cannot determine what is being proposed so that they can formulate and present rational responses to the proposal. Persons not familiar with legislation and regulation promulgation will not be familiar with the underlying and strike-through editing used in the Arkansas Rules on Pesticide Use and Classification.

47. The statement in the Notice that “*The proposed changes will be to consider changes* for the use of dicamba in the State of Arkansas,” is highly uninformative and misleading, in that it appears to say that the rule is being changed so that the Board can thereafter consider other changes for the use of

dicamba – not that the proposed changes in the rule will actually make changes for the use of dicamba.

Count 2.

The Board Has Violated the AAPA By Submitting a Proposed Rule That Is Significantly Different from That Approved By The Board at Its March 3, 2021 Meeting.

48. The Petition for Rulemaking and Amendment to Current Rules submitted to the Plant Board by Mr. Hydrick to initiate the rulemaking procedure concluded with a section III entitled “Action Requested of the Arkansas State Plant Board.” That section provides:

- a. I request the following as part of the rule-making process:
 - i. The implementation of a full, federally-approved label for all reduced volatility dicamba formulation in the state of Arkansas without additional restrictions.

[there is no other subsection]

(See Exhibit No. 1 to this Complaint)

49. In its meeting on March 3, 2021, a Motion was made by Board Member Stuckey and seconded by Board Member Walls that the Board:

Accept the Hydrick Petition for full federal label for dicamba use *over the top of dicamba tolerant crops.*
(Emphasis added)

The motion was voted on and approved without change.

50. However, the proposed Rule that the Plant Board submitted to Governor Asa Hutchinson, as required by the APA, was that “*All pesticides containing dicamba* shall be used in compliance with their respective labels.” (Italics added) This is a significantly different proposal than that contained in the Hydrick Petition, and is a violation of the APA in that the proposed rule must be the same throughout the rulemaking process.

Count 3.
***The Plant Board Acted Improperly by Allowing Members
To Vote Who Have and Exhibited Conflicts of Interest and Bias***

51. In the discussion of the dicamba rules in the Plant Board meeting of May 3, 2021, the first issue to be discussed was that of the requested recusal of Board Member Brad Koen. Mr. Koen is employed by BASF chemical company, a manufacturer of dicamba herbicides that were the subject of the proposed Rule, a conflict of interest that is apparent, and which Mr. Koen did not attempt to deny.

52. Notwithstanding Mr. Koen’s self-interest in the adoption of the proposed Rule, Mr. Koen stated that he thought that he could be fair and impartial

in his consideration of the issues. The Board voted to not require Mr. Koen to recuse from the proceeding. Subsequently, Mr. Koen voted to adopt the proposed Rule.

53. It was also disclosed by Board Member Eaton during the proceeding that his son is employed by one of the chemical companies that manufactures dicamba-based herbicides. Both Mr. Eaton and Mr. Koen stated that every member of the Board has a conflict of interest of some sort.

54. Other members of the Board who voted for the proposed Rule expressed viewpoints indicating that they had preconceived and irreversible opinions on the need of Arkansas farmers who use dicamba-tolerant seeds to use dicamba under less restrictive conditions than those imposed by the 2018 Rule; and that farmers who did not plant dicamba-resistant seeds or other crops, such as vegetables, and whose crops were likely to be destroyed by dicamba, should not be planting their crops near soybean fields and other areas where dicamba is used.

55. Arkansas law provides that a party appearing before an administrative agency is entitled to due process in the proceedings. *See Smith v. Everett*, 276 Ark. 430, 637 S.W.2d 537 (1982). The Arkansas Supreme Court has held that a fair trial by a fair tribunal is a basic requirement of due process. This rule applies

to administrative agencies as well as to courts. *Sexton v. Ark. Supreme Ct. Comm. on Profess. Conduct*, 299 Ark. 439, 774 S.W.2d 114 (1989); *See also Arkansas Elec. Energy Consumers v. Ark. Pub. Serv. Comm'n*, 35 Ark.App. 47, 813 S.W.2d 263 (1991). Administrative agency adjudications are also subject to the “appearance of bias” standard applicable to judges. *Acme Brick Co. v. Missouri Pac. R.R.*, 307 Ark. 363, 821 S.W.2d 7 (1991). As the underlying philosophy of the Administrative Procedures Act is that *fact finding bodies should not only be fair but appear to be fair, it follows that an officer or board member is disqualified at any time there may be reasonable suspicion of unfairness. Ark. Racing Comm'n v. Emprise Corp.*, 254 Ark. 975, 497 S.W.2d 34 (1973). (Emphasis supplied) *Wacaser v. Insurance Comm'r*, 321 Ark. 143, 149, 900 S.W.2d 191, 195 (1995).

56. The Plant Board, in its discussions and deliberations on the proposed 2021 Dicamba Rule, included members who had a personal, financial and/or professional interest in the result of the rule, and who should have recused themselves, but did not. Instead, they participated in the debate in a partisan and biased manner, and clearly exhibited their bias in adopting the proposed 2021 Dicamba Rule.

57. The May 3, 2021 vote on and adoption of the 2021 Dicamba Rule should be declared null and void as a result of the failure of the above-named persons to recuse from the vote, and who all voted for the proposed Rule despite their conflicts of interest and bias.

Count 4.

The State Plant Board Has Not Provided A Reasoned Explanation For The Change In The Existing Rule Adopted in 2018

58. The Petition for Rulemaking proposes to change a previously-existing rule imposing restrictions on the use of dicamba that have been in effect since 2018. Since that time, the Board has rejected proposals to remove those restrictions as late as December 2020 – only four months before the filing of the Petition for Rulemaking.

59. Mr. Hydrick’s Petition for Rulemaking contains no information whatsoever that presents any new science or other information about how the dangers of dicamba that led to restrictions in 2018 have changed so that such restrictions are no longer reasonable or required. Nor was any such information presented to the Plant Board during the public comment period.

60. An administrative agency cannot change an existing rule without providing a reasoned explanation for the proposed change, and, under the APA, the public be given an opportunity to comment upon the proposal. The public was not given an opportunity to comment on the Board's reason for the change, because nowhere in the proposed rule or background information is there a reasoned explanation for the proposed rule, or for the abrupt change in the rule from the pre-existing limitations.

Count 5.

The Plant Board Did Not Provide A Concise Statement of The Principal Reasons For and Against The Adoption of The Proposed Rule as Required By The Arkansas Administrative Procedure Act

61. Arkansas Code Ann. §25-15-204(a)(2)(D) relative to agency rulemaking provides that:

(a) *Prior to the adoption, amendment, or repeal of a rule, the agency shall:*

...

(2)(D) If an interested person requests a statement of the reasons for and against the adoption of a rule before adoption or within thirty (30) days after adoption, the agency shall issue a concise statement of the principal reasons for and against the adoption, incorporating the reasons for overruling the considerations urged against its adoption. (Underlining added)

62. Pursuant to that statute, counsel for Plaintiffs requested, by letter dated April 5, 2021 (a copy of which is attached hereto as Exhibit No. 2) that the Arkansas Plant Board issue, *before adoption of the rule*, a concise statement of the principal reasons for and against the adoption of the proposed rule described in the first paragraph of this letter. The purpose of such request, and for requesting that the statement be provided before adoption of the rule, was to enable understanding by the Plaintiffs and others of the rationale for the proposed Rule, and to enable preparation of comments regarding that rationale.

63. On Friday, April 30, 2021 (three days before the Plant Board's public hearing and vote on the proposed rule, Plaintiffs' counsel received an e-mail from Wade Hodge, General Counsel of the Plant Board, stating that in his opinion, the APA did not require the issuance of the statement of the principal reasons for or against the adoption of the proposed rule until after the rule was issued, and that there would be no response to Plaintiffs' counsel's letter until that time. The e-mail from Wade Hodge is attached to this Complaint as Exhibit No. 3.

64. Receiving the statement of principal reasons for and against the adoption of the proposed rule after the vote on the rule by the Board would frustrate the purpose of Arkansas Code Ann. §25-15-204(a)(2)(D). That position is

contrary to the letter and spirit of Arkansas Code Ann. §25-15-204(a)(2)(D), and hindered the Plaintiffs in the formulation and submission of responsive comments to the proposed Rule.

Count 6.

The Board Did Not Review the Best Reasonably Obtainable Scientific, Technical, Economic Evidence And Information Available Showing A Need For, Consequences Of, And Alternatives To The Existing Rule

65. Regarding the criteria and factors on which the Plant Board is to rely in its rulemaking, A.C.A. § 25-15-204(a)(3)(b)(1), provides:

An agency *shall not* adopt, *amend*, or repeal a rule *unless* the rule is based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule. (Italics added)

66. By use of the word “shall” the General Assembly intended that the Plant Board was obligated to consider those factors in any rulemaking. Arkansas courts have long interpreted that word in a statute to be mandatory.

67. Nothing in the administrative record of this matter indicates that the Board based its decision on the factors required by A.C.A. § 25-15-204(a)(3)(b)(1).

A. Nothing was submitted to the Plant Board showing that there had been any change in science, technology or the economy from the

adoption of the 2018 Dicamba Rule, or from the Board's 2020 reaffirmation of the 2018 Rule, to the present time.

B. No evidence was submitted to the Plant Board supporting a determination that dicamba herbicides can, as a practical matter, be used in Arkansas without widespread and unacceptable damage to non-dicamba resistant crops, ornamentals, fruits and vegetables, and native plants and trees.

C. Nothing was submitted to the Plant Board showing that the economics favored use of dicamba sufficiently to offset the severe damages and loss of crops (and consequently, income) by neighboring farmers, residents of east Arkansas, and loss of trees and native vegetation.

68. In contrast to the lack of scientific, technical and economic evidence to support the Petition, the Plaintiffs and other commentators provided a wealth of information supporting the position that the rulemaking should be denied.

69. Such information included opinions and reports of reputable weed scientists in academia and professional consulting services, within and outside the State of Arkansas, who are virtually unanimous in their opinion that dicamba

herbicides are extremely difficult, if not impossible, for applicators to control, and that through drift, volatilization and other migration off-target, they are causing and will continue to cause widespread damage. A few of those scientists were:

- A. Jason K. Norsworthy, Ph.D.** Dr. Norsworthy is a member of the University of Arkansas Agricultural Service, where he is a Distinguished Professor; and a fellow of the Weed Science Society of America (WSSA). Dr. Norsworthy is considered to be an expert on the subject of the characteristics of dicamba herbicides, and their effect, not only on crops but also “non-target” plants.

Numerous scientific and academic articles authored by Dr. Norsworthy expressing the opinion that dicamba herbicides could not be used without extensively damaging other crops, native plants, trees, and other plant life in east Arkansas were attached to the comments submitted to the Board by Plaintiffs’ counsel, but were disregarded by the Board.

Dr. Norsworthy concluded, among other things, that “secondary movement” is considered by academics across multiple states to be “a major concern with off-target movement of dicamba, *and is not manageable by the applicator.*”

- B. Ford Baldwin, Ph.D.** Dr. Baldwin was the University of Arkansas Extension Weed Scientist for 28 years, and a Fellow of the Weed Science Society of America since 1996. Since 2001, he has worked as a private agricultural consultant with Practical Weed Consultants, LLC.

Dr. Baldwin’s opinion regarding the use of dicamba is summarized as: “Dicamba has a chemistry problem that likely cannot be fixed, or at least no evidence has been provided that it can be successfully

applied. ... [I]gnoring the significant scientific data regarding the off target movement of dicamba will be the biggest environmental disaster agriculture has ever seen.”

Scientific and academic articles authored by Dr. Bradley expressing the opinion that dicamba herbicides could not be used without extensively damaging other crops, native plants, trees, and other plant life in east Arkansas were attached to the comments submitted to the Board by Plaintiffs’ counsel, but were disregarded by the Board.

C. Trey Koger, Ph.D. Dr. Koger is a Research Agronomist with, and owner of Delta Crop and Research, Inc. in Indianola, Mississippi, and also farms. In 2018, he was commissioned by the Arkansas Plant Board to conduct an independent investigation regarding the impacts of dicamba herbicides on non-crop species in Arkansas.

Dr. Koger’s reports to the Plant Board contained statements such as:

Dicamba-like symptomology was prevalent in every city, town and community I visited. ... Significant injury was documented to the following tree species: cherry, white oak, sycamore, maple, cypress, Bradford pear. Injury was also documented on virtually every broadleaf vegetable species, including: tomato, squash, okra, cucumbers, watermelons, and cantaloupe. ... In summary, dicamba injury was prevalent to sensitive trees, roadside plants, and non-dicamba crops throughout many of the areas in eastern AR in which made [sic] evaluations.

D. Dr. Kevin W. Bradley. Dr. Bradley is a Professor of Plant Sciences at the University of Missouri, and holds a PhD in Plant Pathology, Physiology, and Weed Science from Virginia Tech University. He is also a Fellow in WSSA, and is highly-regarded in his profession.

Dr. Bradley's views on the propensities of dicamba herbicides to be transmitted to off-target vegetation, and its effect on non-dicamba tolerant broadleaf vegetation are very similar to those of Dr. Norsworthy, Dr. Baldwin and the other scientists discussed herein.

Numerous scientific and academic articles authored by Dr. Bradley expressing the opinion that dicamba herbicides could not be used without damaging other crops, native plants, trees, and other plant life were attached to the comments submitted to the Board by Plaintiffs' counsel, but were disregarded by the Board.

E. Dr. Thomas C. Mueller and Dr. Lawrence E. Steckel are both Professors of Plant Sciences at the University of Tennessee, and frequently collaborate on research and writing of articles regarding that research. They are likewise highly-regarded in their professions. Much of their research has been on the subject of the characteristics of dicamba herbicides and its impact on off-target vegetation.

Their views on the propensities of dicamba herbicides to be transmitted to off-target vegetation, and its effect on non-dicamba tolerant broadleaf vegetation is very similar to those of Dr. Norsworthy, Dr. Baldwin, Dr. Bradley, and the other scientists mentioned herein.

Scientific and academic articles authored by Drs. Mueller and Steckel expressing the opinion that dicamba herbicides could not be used without extensively damaging other crops, native plants, trees, and other plant life in east Arkansas were attached to the comments submitted to the Board by Plaintiffs' counsel, but were disregarded by the Board.

70. The Plaintiffs' Comments on the proposed rule change (as the substance of that change could best be determined from the Notice) are attached hereto as Exhibit No. 4. That Exhibit includes the scholarly articles authored by the above-mentioned academics and experts on the impact of dicamba herbicides on other plant life and the environment.

71. In addition, comments on the proposed rule were submitted to the Plant Board by the University of Arkansas System Division of Agricultural Scientists (U of A) which confirmed the previous opinions of the weed scientists in that Division that the use of dicamba herbicides results in drift and volatilization of the dicamba; in widespread damage to non-dicamba resistant crops and other plant life in the area; and that it cannot be controlled. Some of the major points of the U of A comments are:

Over the past 4 years, there has been a plethora of research and reports by university weed scientists from multiple states who walked fields of soybean exhibiting dicamba injury symptoms showing unequivocally that dicamba volatilization was responsible for the landscape damage observed across much of the U.S. soybean production region.

...

Physical drift leaves a pattern of injury most severe closest to the spray source. For this reason, physical drift can often be traced to a source. However, of the 1,642 dicamba complaints that have occurred since 2017, *only 15% were traceable*. Hence, volatilization or

atmospheric loading appears to be the main culprit leading to these complaints.

...

Physical drift occurs directly downwind, whereas dicamba volatilization of the new formulations can move across the landscape in multiple directions and is known to occur even at 4 days after application in the absence of rainfall.

...

It is well established that volatilization and risk for off-target movement of dicamba differ greatly among geographies across North American soybean-producing regions. Conditions unique to eastern Arkansas partly contribute to potentially enhanced dicamba movement, and it is unknown whether the new volatility reducing agents will alleviate this problem.

...

There is no residue tolerance for dicamba on vegetable and fruit crops (EPA 2014), meaning that *fruit from any plant that exhibits symptoms for which dicamba residues are found could result in total crop destruction*. (Emphasis in original)

...

Sublethal rates of dicamba have a serious effect on the growth and physiology of trees. High concentrations of dicamba can inhibit cell division and growth. Sublethal doses result in curling and twisting of the stem, defoliation, and abortion of flowers and fruit. Dintlema et al. (2019) found that apple, crabapple, dogwood, elderberry, elm, grape, hydrangea, maple, oak, peach, pecan, redbud, rose, red raspberry, strawberry, sweetgum, blueberry, and walnut exhibited dicamba injury symptoms at 1/200 of an application rate.

...

Repeated exposure to sublethal doses of dicamba has a cumulative effect. Loss of photosynthesis and carbohydrate reserves due to defoliation will lead to tree death and this process may take years. Increasing exposure events will increase the chances of death and death is often a result of a secondary pest being able to overcome the

weakened tree defenses.

...

Several studies have demonstrated that dicamba movement affected the food and habitat of pollinators (Olszyk et al. 2015; Hatterman-Valenti 2004). Bohenbust et al (2020) demonstrated the indirect effects of dicamba on butterflies including monarch butterflies through food source reduction.

Low doses of dicamba reduce the number of flowers and the size of flowers ... This reduction led to a reduced number of feeding sites and less visitation of pollinators to the plants.

...

Federal labels failure to include multiple exposures, the lack of modeling landscape scale applications, and the use of biomass or height reductions as criteria for setting a sufficient buffer may be ineffective in preventing dicamba symptomology on surrounding plants.

...

In the past 4 years, there have been 1,642 complaints filed with the AR State Plant Board alleging dicamba injury compared to 52 paraquat drift complaints, 106 glyphosate drift complaints, and 10 ALS herbicide drift complaints.

...

Conclusions

There are no scientific results that show dicamba can be used throughout the year in Arkansas without substantially injuring crops. There is, however, an abundance of complaint data showing that dicamba applications made in the summer months will cause a substantial number of complaints.

...

We are not aware of new published or unpublished research since the last approval of the dicamba regulations on December 2, 2020 that supports or refutes the labels or would support a regulation change. (Bold in original)

72. The U of A comments are attached hereto as Exhibit No. 5.

73. There was absolutely no scientific evidence presented to rebut this information and other similar information submitted by other opponents of the proposed Rule. This evidence clearly shows that there is no way of safely applying dicamba herbicides in this State, and the removal of the limitations that have been imposed upon such application since 2018, while largely ineffective to prevent damage, will make the damage even worse.

74. Regulation No. 7 of the Plant Board promulgated pursuant to the Arkansas Pesticide Control Act, Ark. Code Ann. §2-16-402, provides that the Board will give special consideration to the *unique environment* of Arkansas, and that research conducted by *scientists from universities within the state will be the primary source of expertise source of opinions* about that environment, stating:

The Board considers the environment in Arkansas to be unique; therefore, *there will be a higher consideration given to research that is specific to Arkansas*. Research conducted by *scientists from universities within the state will be the primary source of expertise* to allow the Board to determine if the data is scientifically sound and relevant to growing and cropping conditions in the state of Arkansas.
...

75. Pursuant to the Plant Board’s own Regulation 7, a “higher consideration” will be given to research that is specific to Arkansas. There was no

information provided to the Plant Board regarding research specific to Arkansas other than that provided by the Plaintiffs, the U of A, and other commentators opposing the proposed Rule. Further, Rule 7 also requires that “Research conducted by scientists from universities within the state will be the primary source of expertise.” The only scientists who have conducted research presented to the Plant Board and who are affiliated with universities within the State are Dr. Norsworthy and the other U of A agricultural scientists and Dr. Baldwin. Under Rule 7, their opinions are to be the primary source of expertise to determine whether the proposed Rule is scientifically sound. Notwithstanding the Board’s own Rule 7, and the dictates of A.C.A. § 25-15-204(a)(3)(b)(1), the Board completely disregarded scientific opinion of the Arkansas scientists, supported by the same opinions of other University weed scientists and those of surrounding states with similar dicamba problems, and adopted the 2021 Dicamba Rule without any scientific basis whatsoever.

Count 7.

***The Plant Board Did Not Consider Alternatives To Use of
Dicamba Herbicides as Required by ACA §25-15-204(a)(3)(b)(i)***

76. The Plant Board is required to consider, among other factors, alternatives to the proposed rule. That would include consideration of whether herbicides other than dicamba products are available and feasible for use.

77. Alternatives to dicamba exist for control of Palmer amaranth that have considerably less risk for off-target movement. See *Comparison of weed control technologies for protoporphyrinogen oxidase-resistant Palmer amaranth*, Crop Forage & Turfgrass Management, by the Department of Crop Soil and Environmental Sciences, University of Arkansas (2020). A copy of that document is attached hereto as Exhibit No. 6.

78. The “core ideas” of that paper were that: (i) Pre-emergent pyroxsulfone + metribuzin controlled multiresistant Palmer amaranth; (ii) Roundup Ready 2 Xtend, LibertyLink and Enlist are effective postemergent options; and (iii) season-long multiresistant Palmer amaranth control is feasible with RounupReady2 Xtend, LibertyLink and Enlist.

79. According to the best and most recent available scientific information, alternatives such as those described above exist to the use of dicamba-containing herbicides. There was no consideration given by the Plant Board to such alternatives as required by ACA §25-15-204(a)(3)(b)(i).

Count No. 8.

***The Plant Board Failed to Comply With The
Mandates of Ark. Code Ann. §20-20-202(b)***

80. The General Assembly intended that the Plant Board not only permit pesticides to be used, but to protect other parts of the environment from the potential impacts of those pesticides. That is clear from Ark. Code Ann. §20-20-202(b) (Legislative Intent) stating:

Pesticides perform a valuable role in protecting man and the environment including agricultural production from insects, rodents, weeds, and other forms of life which may be pests; but it is essential to the public health and welfare that they be used properly to prevent unreasonable adverse effects on man and the environment.
(Underlining added)

81. To emphasize protection of the environment as a factor to be considered by the Board, and to give the Board guidance on what type of environmental

impacts should be considered, Ark. Code Ann. § 20-20-206, regarding the powers and duties of the Plant Board, provide in relevant part:

(a)(1) The State Plant Board ... may restrict or prohibit use of pesticides in designated areas during specified periods of time *to prevent unreasonable adverse effects by drift or misapplication to:*

(A) Plants, *including forage plants, or adjacent or nearby lands;*

(B) Wildlife *in the adjoining or nearby areas;*

(C) Fish and other aquatic life *in waters in reasonable proximity to the area to be treated;* and

(D) Humans, animals, or beneficial insects.
(Emphasis added)

82. The Plant Board did not discuss these factors in their deliberations, and other than the comments presented by Plaintiffs herein and other opponents of the proposed Rule, no other information was presented to the Board on these factors.

Count No. 9.

***The Plant Board Erroneously Adopted An Emergency Rule
To Attempt To Place The Rule Into Effect Immediately***

83. At the conclusion of the meeting of the Plant Board on May 3, 2021, the Board adopted an Emergency Declaration stating that the Rule was to be both an emergency rule and a permanent rule. Pursuant to Ark. Code Ann. §25-15-204(c)(1), an emergency declaration may only be made

If any agency finds that imminent peril to the public health, safety or welfare or compliance with a federal law or regulation requires adoption of a rule upon less than thirty (30) days notice and states in writing its reasons for that finding”

84. While the Board adopted a declaration declaring an emergency, there was no evidence presented to the Board of any imminent peril to the public health, safety or welfare that would be affected by any delay in the effective date of the Rule without a declaration of emergency, or of any inability to comply with a federal law or regulation without such declaration.

85. An agency seeking an emergency rule adoption must demonstrate the circumstances which give rise to the emergency. The mere use of the phrase “the public health, safety or general welfare,” with no specific facts, demonstrate that

there is not justification for such action. *Wagnon v. Arkansas Health Services Agency*, 73 Ark. App. 269, 40 S.W.3d 849 (2001)

86. There was no discussion in the Plant Board meeting of the factual situation, if any, that constituted an emergency related to “public health, safety or general welfare” that required the use of the emergency declaration. The emergency declaration was, therefore, in violation of Ark. Code Ann. §25-15-204, and should be declared void and without effect.

Count No. 10.

***The Arkansas Supreme Court Has Ruled That Many Members
Of the Plant Board Were Not Legally Appointed, Thereby
Nullifying the Board’s Vote to Approve the 2021 Dicamba Rule***

87. On May 6, 2021, the Arkansas Supreme Court issued a decision in the case of *McCarty et al v. Arkansas State Plant Board, et al*, 2021 Ark. 105 (May 6, 2021), holding that Arkansas Code Ann. §2-26-206(a), pursuant to which nine (9) positions on the Arkansas Plant Board were filled by appointment by private organizations related to agriculture, rather than by the Governor of Arkansas or by the General Assembly, was unconstitutional, and that those members of the Plant

Board who were appointed as such organizational representatives must be removed.

88. The 2021 Dicamba Rule that is the subject of this litigation was adopted in large part by the votes of members of the Plant Board who were appointed as representatives of such industrial groups or organizations. As such, the 2021 Dicamba Rule was adopted by persons who were not entitled to membership on the Plant Board, and whose presence – and vote – was unconstitutional and illegal.

89. The 2021 Dicamba Rule should be declared null and void because it was adopted by vote of members who were not entitled to be on the Board and whose votes were illegal and unauthorized.

WHEREFORE, Plaintiffs pray that the Court:

- (i) enter a Declaratory Judgment determining that the Defendants failed to comply with the Arkansas Administrative Procedure Act in its procedures for adopting the 2021 Dicamba Rule;
- (ii) enter a Declaratory Judgment determining that the Defendants' failure to comply with the Arkansas Administrative Procedure

Act and the relevant provisions of the Arkansas Code applicable to adoption of the 2021 Dicamba Rule was arbitrary, capricious and otherwise contrary to law, and that the said 2021 Dicamba Rule is null, void and of no effect;

- (iii) Declare that the 2018 Dicamba Rule continues in effect until such time as it may be repealed or modified according to law; and
- (iv) Plaintiffs be awarded their costs and an attorney fee.

Respectfully submitted,

RICHARD MAYS LAW FIRM PLLC

/s/ Richard H. Mays

Richard H. Mays
Ark. Bar No. 61043
2226 Cottondale Lane – Suite 100
Little Rock, AR 72202
Tel: 501-891-6116
E-mail: rmays@richmayslaw.com
njackson@richmayslaw.com