



RULE-MAKING ORDER

(RCW 34.05.360)

CR-103 (7/10/97)

Agency: Agriculture

- Permanent Rule
- Emergency Rule
- Expedited Adoption
- Expedited Repeal

(1) Date of adoption: December 11, 2000

(2) Purpose: To revise WAC 16-228, Rules Related to the Pesticide Penalty Matrix. The rule addresses issues and concerns raised since the implementation of the original rule in 1992. More specifically, the rules ensure a fair and uniform method when assessing civil penalties and licensing actions for violations of the laws and rules related to pesticides. The changes also simplify and provide additional clarity to the rules. Changes will also provide an increased level of deterrence.

(3) Citation of existing rules affected by this order: WACs 16-228
 Repealed: 16-228-1140
 Amended: 16-228-1110, 16-228-1120, 16-228-1130, 16-228-1150
 Suspended: none

(4) Statutory authority for adoption: RCW 17.21 and RCW 15.58
 Other Authority:

PERMANENT RULE ONLY (Including EXPEDITED ADOPTION)
 Adopted under notice filed as WSR 00-21-097 on October 18, 2000 (date).
 Describe any changes other than editing from proposed to adopted version: None

EMERGENCY RULE ONLY
 Under RCW 34.05.350 the agency for good cause finds:
 (a) That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
 (b) That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.
 Reasons for this finding:

EXPEDITED REPEAL ONLY
 Under Preproposal Statement of Inquiry filed as WSR _____ on _____ (date)

(5.3) Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?:
 Yes No If Yes, explain:

(6) Effective date of rule:
Permanent Rules or Expedited Repeal **Emergency Rules**
 31 days after filing Immediately
 Other (specify) _____* Later (specify) _____
 *(If less than 31 days after filing, specific finding in 5.3 under RCW 34.05.380(3) is required)

Name (Type or Print)
 Jim Jesernig
 Signature
 [Handwritten Signature]
 Title Director Date 12/11/00

CODE REVISER USE ONLY

CODE REVISER'S OFFICE
 STATE OF WASHINGTON
 FILED

DEC 12 2000

TIME 1145 AM
 WSR 01-01-058 PM

**Note: If any category is left blank, it will be calculated as zero.
No descriptive text.**

Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.

The number of sections adopted in order to comply with:

Federal statute:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
Federal rules or standards:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
Recently enacted state statutes:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>

The number of sections adopted at the request of nongovernmental entity:

	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
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The number of sections adopted in the agency's own initiative:

	New	2	Amended	4	Repealed	1
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

	New	2	Amended	4	Repealed	1
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The number of sections adopted using:

Negotiated rule making:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
Pilot rule making:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
Other alternative rule making:	New	2	Amended	4	Repealed	1

AMENDATORY SECTION (Amending WSR 99-22-002, filed 10/20/99, effective 11/20/99)

WAC 16-228-1110 Definitions--Penalty assignment. In addition to the definitions set forth in RCW 17.21.020, 15.58.030, and WAC 16-228-1010, the following shall apply to WAC 16-228-1100 through 16-228-1150:

(1) "Adverse effect(s)" means ((a)) that the alleged activity actually causes, or creates the possibility of ((pesticide-exposure-that-could-cause)) damage ((or)), injury or public health threat, to humans, animals, plants, property or the environment. In those situations involving a wood destroying organism inspection, adverse effects exist when the inspection has been performed in a faulty, careless or negligent manner.

~~(2) ("Knowingly" means that the alleged violator knew or should have known that conditions existed that would result in adverse effect(s) or knew that a violation would occur.~~

~~(3)) "Level of violation" means that the alleged violation is a first, second, third, fourth, ((fifth,)) or more violation(s).~~

(a) First violation. This means the alleged violator has committed no prior incident(s) which resulted in a violation or violations within three years of committing the current alleged violation.

(b) Second violation. This means the alleged violator committed one prior incident which resulted in a violation or violations within three years of committing the current alleged violation.

(c) Third violation. This means the alleged violator committed two prior incidents which resulted in a violation or violations within three years of committing the current alleged violation.

(d) Fourth violation. This means the alleged violator committed three prior incidents which resulted in a violation or violations within three years of committing the current alleged violation.

~~(e) ((Fifth or more violation. This means the alleged violator committed at least four prior incidents which resulted in a violation or violations within three years of committing the current alleged violation.))~~

(4)) For purposes of calculating the level of violation, prior incidents will be measured from the date that a final order or stipulated order resolved the prior violation(s), and not from the date that the incident(s) occurred.

(3) "Not probable" means that the alleged violator's conduct more likely than not would not have an adverse effect.

~~((5))~~ (4) "Probable" means that the alleged violator's conduct more likely than not would have an adverse effect.

~~((6) "Unknowingly" means that the alleged violator did not act knowingly.)~~

~~((7))~~ (5) "Violation" means commission of an act or acts prohibited by chapter 17.21 RCW, chapter 15.58 RCW, and/or rules adopted thereunder.

(6) "Civil penalty" means a monetary penalty administratively issued by a regulatory agency for noncompliance with state or federal law, or rules. The term does not include any criminal penalty, damage assessment, wages, premiums, or taxes owed, or interest or late fees on any existing obligation.

(7) "Notice of Correction" means a document issued by the department that describes a condition or conduct that is not in compliance with chapter 15.58 or 17.21 RCW, or the rules adopted under the authority of chapter 15.58 or 17.21 RCW and is not subject to civil penalties as provided for in RCW 43.05.110. A notice of correction is not a formal enforcement action, is not subject to appeal and is a public record.

(8) "Notice of intent" means a document issued by the department that alleges specific violations of chapter 15.58 or 17.21 RCW, or any rules adopted under the authority of those chapters. A notice of intent is a formal enforcement document issued with the intent to assess civil penalties to the alleged violator and/or to suspend, deny or revoke the alleged violator's pesticide license.

NEW SECTION

WAC 16-228-1115 Application of RCW 43.05.100 and RCW 43.05.110— Issuance of a civil penalty without first issuing a notice of correction (1) Pursuant to RCW 43.05.100 a notice of correction may be issued by the department when they become aware of conditions and/or conduct that are not in compliance with the applicable laws and rules enforced by the department. The issuance of a notice of correction by the department shall not constitute a previous violation for purposes of WAC 16-228-1110(2), but may, at the discretion of the department, be considered as an aggravating factor for the purposes of WAC 16-228-1120(2).

(2) Prior to issuing a civil penalty for a violation of chapter 15.58 or 17.21 RCW, and the rules adopted under the authority of chapter 15.58 or 17.21 RCW the department shall comply with the requirements of RCW 43.05.110. RCW 43.05.110 provides that the department of agriculture may issue a civil penalty provided for by law without first issuing a notice of correction if: (1) The person has previously been subject to an enforcement action for the same or similar type of violation of the same statute or rule or has been given previous notice of the same or similar type of violation of the same statute or rule; or (2) compliance is not achieved by the date established by the department in a previously issued notice of correction, if the department has responded to any request for review of such date by reaffirming the original date or establishing a new date; (3) the violation has a probability of placing a person in danger of death or bodily harm, has a probability of causing more than minor environmental harm, or has a probability of causing physical damage to the property of another in an amount exceeding one thousand dollars; or (4) the violation was committed by a business that employed fifty or more employees on at least one day in each of the preceding twelve months.

AMENDATORY SECTION (Amending WSR 99-22-002, filed 10/20/99, effective 11/20/99)

WAC 16-228-1120 Calculation of penalty. (1) Median penalty selection. In the disposition of administrative cases, the department shall ~~((determine the penalty by first determining))~~ use the penalty assignment schedule ~~((table))~~ listed in ~~((either))~~ WAC 16-228-1130 ~~((or 16-228-1140 that is applied based on the type of violation alleged))~~ to

determine appropriate penalties. The department shall calculate the appropriate penalty based on the level of violation and the adverse effect(s) or potential adverse effects at the time of the incident(s) giving rise to the violation. The median penalty shall be assessed unless a proportionate adjustment is warranted and/or there are aggravating or mitigating factors present. The median penalty as listed in WAC 16-228-1130 may be proportionately adjusted and/or aggravated to a level more than the maximum penalty listed for the violation in the penalty assignment schedule table. The median penalty under Table B listed in WAC 16-228-1140 may be proportionately adjusted and/or aggravated to a level more than the maximum penalty listed for the violation. The penalty assignment schedule may not be proportionately adjusted and/or mitigated to a level less than the minimum penalty listed for the violation.

(2) Proportionate adjustment of median penalty.

(a) The department reserves the right to proportionately increase the civil penalty and proportionately decrease the licensing action under certain circumstances (in the particular case demonstrate the ineffectiveness of the licensing action as a deterrent including but not limited to violations by persons who are not licensed and violations by certified private applicator(s), or proportionately decrease the civil penalty and proportionately increase the licensing action when circumstances in the particular case demonstrate the ineffectiveness of a civil penalty action as a deterrent). Such circumstances include situations where licensing action(s) as a deterrent are ineffective and include, but are not limited to:

(i) Violations by persons who are not licensed; and

(ii) situations where the civil penalty assessed is not substantially equivalent to the violator's economic benefit derived from the violation.

(b) The department also reserves the right to proportionately decrease the civil penalty and increase the licensing action in circumstances that demonstrate the ineffectiveness of a civil penalty as a deterrent. Nothing shall prevent the department from proportionally adjusting a licensing action to a level greater than the maximum licensing action listed in the penalty assignment schedule.

(3) Aggravating factors. The department may consider circumstances enhancing the penalty based on the seriousness of the violation. Aggravating factors include, but are not limited to, the following:

(a) (Each separate additional incident of violation(s) alleged within a single notice of intent to have been committed by the alleged violator within the same calendar year.) The number of separate alleged violations contained within a single notice of intent.

(b) The high magnitude of the harm, or potential harm, including quantity and/or degree, to humans, animals, plants, property or the environment caused by the violation(s).

(c) The similarity of the current alleged violation to previous violations (that occurred) committed within the last three years (of the current alleged violation).

(d) The extent to which the alleged violation is part of a pattern of the same or substantially similar conduct (by others which necessitates a greater deterrent factor).

(4) When the department determines that one or more aggravating factors are present, the department may assess the maximum penalty as listed within the level of violation or may, in its discretion, increase the penalty to a level greater than the maximum penalty, including but not limited to revocation of the license.

(5) Mitigating factors. The department may consider circumstances reducing the penalty based upon the seriousness of the violation ((including, but)). Mitigating factors include but are not limited to, the following:

(a) ((A)) Voluntary disclosure of a violation ((by the alleged violator)).

(b) The low magnitude of the harm, or potential harm, including quantity and/or degree, caused by the violation.

(c) Voluntary taking of remedial measures that will result in increased public protection, or that will result in a decreased likelihood that the violation will be repeated.

(6) When the department determines that one or more mitigating factors are present, the department may assess the minimum penalty for the violation from the penalty schedule.

(7) The department considers each violation to be a separate and distinct event. When a person has committed multiple violations, the violations are cumulative for purposes of calculating the appropriate penalty. Penalties are added together.

(8) Violation(s) committed during the period when an individual's license is suspended or revoked shall be subject to the maximum civil penalty of seven thousand five hundred dollars and/or revocation of the license for a period of up to five years. Violation(s) committed by unlicensed individuals are subject to the provisions of this chapter, including the penalty provision.

NEW SECTION

WAC 16-228-1125 Revocation and denial of licenses—Actions against licenses only. (1) The department retains the sole discretion to determine when an individual license should be revoked rather than suspended. Revocation of a license shall be an option for the department in those circumstances where:

(a) The penalty schedule allows for revocation;

(b) One or more aggravating factors are present; and/or

(c) The duration of the licensure action exceeds six months.

In circumstances where the department determines revocation to be appropriate, the period of revocation shall be determined at the discretion of the department, but in no instance shall the revocation exceed five years.

(2) The department may deny an applicant a license when the applicant has committed a violation(s) of chapters 15.58 and 17.21 RCW and/or the rules adopted under those chapters. The duration of denial shall be determined based upon the penalty provisions of this chapter. In circumstances where the department determines denial to be appropriate, the period of denial shall not exceed five years.

(3) Nothing shall prevent the department from denying an applicant a license when the applicant has an outstanding civil penalty owed to the department from a previous violation(s).

(4) The department may, at its discretion, suspend a license without also seeking a civil penalty. Such circumstances include, but are not limited to, those incidents where a civil penalty is not available as an appropriate penalty pursuant to RCW 43.05.110. The appropriate period of suspension shall be determined from the penalty schedule.

AMENDATORY SECTION (Amending WSR 99-22-002, filed 10/20/99, effective 11/20/99)

WAC 16-228-1130 - Penalty assignment schedule((-Table A)). ((Pesticide use, application, disposal, licensing, distribution, recommendation, and label violations)) This assignment schedule shall be used for violations of chapter 17.21 or 15.58 RCW or chapter 16-228 WAC. (See WAC 16-228-1150 for other dispositions of alleged violations, including ((warning letters)) Notice of Corrections.)

((Level of Violation	Adverse Effects)	Unknowingly			Knowingly		
		Minimum	Median	Maximum	Minimum	Median	Maximum
First	a. Not probable	\$100 and 1-day suspension	\$200 and 3-days suspension	\$300 and 5-days suspension	\$200 and 3-days suspension	\$300 and 5-days suspension	\$400 and 7-days suspension
	b. Probable	\$150 and 1-day suspension	\$250 and 3-days suspension	\$350 and 5-days suspension	\$250 and 3-days suspension	\$350 and 5-days suspension	\$450 and 7-days suspension
Second	a. Not probable	\$200 and 3-days suspension	\$300 and 5-days suspension	\$400 and 7-days suspension	\$300 and 5-days suspension	\$400 and 7-days suspension	\$500 and 9-days suspension
	b. Probable	\$300 and 3-days suspension	\$350 and 5-days suspension	\$450 and 7-days suspension	\$350 and 5-days suspension	\$450 and 7-days suspension	\$550 and 9-days suspension
Third	a. Not probable	\$400 and 10-days suspension	\$700 and 15-days suspension	\$1000 and 20-days suspension	\$500 and 10-days suspension	\$1000 and 20-days suspension	\$1500 and 30-days suspension
	b. Probable	\$500 and 10-days suspension	\$1800 and 20-days suspension	\$3000 and 25-days suspension	\$700 and 20-days suspension	\$2100 and 30-days suspension	\$3500 and 40-days suspension
Fourth	a. Not probable	\$600 and 15-days suspension	\$1800 and 20-days suspension	\$3000 and 25-days suspension	\$700 and 20-days suspension	\$2100 and 30-days suspension	3500 and 40-days suspension
	b. Probable	\$700 and 20-days suspension	\$2100 and 30-days suspension	\$3500 and 40-days suspension	\$800 and 30-days suspension	\$2400 and 40-days suspension	\$4000 and 50-days suspension
Fifth or More	a. Not Probable	\$800 and 20-days suspension	\$3400 and 40-days suspension	\$6000 and 60-days suspension	\$900 and 50-days suspension	\$3700 and 60-days suspension	\$6500 and 7-days suspension
	b. Probable	\$900 and 50 days SUSPENSION OR DENIAL OR REVOCATION	\$3700 and 60 days SUSPENSION OR DENIAL OR REVOCATION	\$6500 and 70 days SUSPENSION OR DENIAL OR REVOCATION	\$1000 and 50 days SUSPENSION OR DENIAL OR REVOCATION	\$4250 and 70 days SUSPENSION OR DENIAL OR REVOCATION	\$7500 and 90 days SUSPENSION OR DENIAL OR REVOCATION))

<u>LEVEL OF VIOLATION</u>	<u>ADVERSE EFFECTS NOT PROBABLE</u>			<u>ADVERSE EFFECTS PROBABLE</u>		
	<u>MINIMUM</u>	<u>MEDIAN</u>	<u>MAXIMUM</u>	<u>MINIMUM</u>	<u>MEDIAN</u>	<u>MAXIMUM</u>
FIRST	<u>\$200 and or 2 days license suspension</u>	<u>\$300 and or 3 days license suspension</u>	<u>\$500 and or 6 days license suspension</u>	<u>\$350 and or 5 days license suspension</u>	<u>\$450 and or 7 days license suspension</u>	<u>\$550 and or 9 days license suspension</u>
SECOND	<u>\$350 and or 3 days license suspension</u>	<u>\$500 and or 6 days license suspension</u>	<u>\$1000 and or 9 days license suspension</u>	<u>\$600 and 10 days license suspension denial or revocation</u>	<u>\$1300 and 20 days license suspension denial or revocation</u>	<u>\$2000 and 30 days license suspension denial or revocation</u>
THIRD	<u>\$700 and or 4 days license suspension</u>	<u>\$1000 and or 9 days license suspension</u>	<u>\$2000 and or 12 days license suspension</u>	<u>\$800 and 30 days license suspension denial or revocation</u>	<u>\$2400 and 40 days license suspension denial or revocation</u>	<u>\$4000 and 50 days license suspension denial or revocation</u>
FORTH OR MORE	<u>\$900 and or 5 days license suspension denial or revocation</u>	<u>\$2000 and or 12 days license suspension denial or revocation</u>	<u>\$3000 and or 15 days license suspension denial or revocation</u>	<u>\$1000 and 50 days license suspension denial or revocation</u>	<u>\$4250 and 70 days license suspension denial or revocation</u>	<u>\$7500 and 90 days license suspension denial or revocation</u>

AMENDATORY SECTION (Amending WSR 00-22-073, filed 10/30/00, effective 11/30/00)

WAC 16-228-1150 Other dispositions of alleged violations. Nothing herein shall prevent the department from:

(1) Choosing not to pursue a ~~((case administratively))~~ civil penalty, license suspension or license revocation.

(2) Issuing a ~~((warning letter or))~~ notice of correction in lieu of pursuing ((administrative action)) a civil penalty, license suspension or license revocation.

(3) Negotiating settlement(s) of cases on such terms and for such reasons as it deems appropriate. Prior violation(s) covered by a prior settlement agreement may be used by the department for the purpose of determining the appropriate penalty for the current alleged violation(s) if not prohibited by the agreement.

(4) Referring violations or alleged violations, to any federal, state or county authority with jurisdiction over the activities in question, including but not limited to the Environmental Protection Agency (EPA) and the Federal Aviation Administration (FAA).

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 16-228-1140 Penalty assignment schedule--Table B.