



RULE-MAKING ORDER

(RCW 34.05.360)

CR-103 (12/31/00)

Agency: Agriculture

- Permanent Rule
- Emergency Rule
- Expedited Repeal

(1) Date of adoption: January 2, 2003

(2) Purpose: Establish a procedure to uniformly and fairly assess penalties for violations of the Fertilizer Law (15.54 RCW) and the rules adopted under it.

(3) Citation of existing rules affected by this order: WAC 16-200

- Repealed:
- Amended:
- Suspended:

(4) Statutory authority for adoption: 15.54 RCW; 34.05 RCW

Other authority:

PERMANENT RULE ONLY

Adopted under notice filed as WSR 02-21-126 on October 23, 2002 (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

- 31 days after filing
- Other (specify) ___*

Emergency Rules

- Immediately
- 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)

VALORIA LOVELAND

SIGNATURE

Valoria Loveland

TITLE

DIRECTOR

DATE

1/2/2003

CODE REVISER USE ONLY

CODE REVISER'S OFFICE
STATE OF WASHINGTON

FILED

JAN 2 2003

1001

03-02-100

TIME _____ AM/PM

WSR _____

(COMPLETE REVERSE SIDE)

**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Federal statute:	New	Amended	Repealed
Federal rules or standards:	New	Amended	Repealed
Recently enacted state statutes:	New	Amended	Repealed

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

New	Amended	Repealed
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The number of sections adopted in the agency's own initiative:

New <u>7</u>	Amended	Repealed
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New <u>7</u>	Amended	Repealed
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The number of sections adopted using:

Negotiated rule making:	New	Amended	Repealed
Pilot rule making:	New	Amended	Repealed
Other alternative rule making:	New <u>7</u>	Amended	Repealed

NEW SECTION

WAC 16-200-7401 Statement of purpose--Penalty assignment.

For the purpose of fair, uniform determination of penalty as set forth in WAC 16-200-7401 through 16-200-7407, the director hereby declares:

(1) Regulatory action is necessary to deter violations of the Fertilizer Regulation Act and rules adopted under it, and to educate persons about the consequences of such violation(s); and

(2) Any regulatory action taken by the department against any person who violates the provisions of chapter 15.54 RCW and/or rules adopted under it shall be commensurate with the seriousness of the violation under the circumstances; and

(3) Each person shall be treated fairly in accordance with the rules set forth in this chapter and in adherence with the Administrative Procedure Act (chapter 34.05 RCW).

NEW SECTION

WAC 16-200-7402 Definitions--Penalty assignment. In addition to the definitions set forth in RCW 15.54.270 and WAC 16-200-695, the following shall apply to WAC 16-200-7401 through 16-200-7407.

(1) "Adverse effect(s)" means that the effects resulting from violations of chapter 15.54 RCW or the rules adopted under it actually causes, or creates the possibility of damage or injury to humans, animals, plants, property or the environment, or causes or creates the possibility of a threat to public health.

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

(a) First violation. This means the alleged violator has committed no prior violation within three years of committing the current alleged violation.

(b) Second violation. This means the alleged violator committed one prior violation within three years of committing the current alleged violation.

(c) Third violation. This means the alleged violator committed two prior violations within three years of committing the current alleged violation.

(d) Fourth violation. This means the alleged violator committed three or more prior violations within three years of committing the current alleged violation.

(e) For purposes of calculating the level of violation, prior violations will be measured from the date that a final action was

taken by the department and not from the date that the violation(s) occurred.

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

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

(5) "Violation" means commission of an act or acts prohibited by chapter 15.54 RCW, and/or rules adopted under it.

(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, taxes owed, 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 15.54 RCW, or the rules adopted under it 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 15.54 RCW, or any rules adopted under it. A notice of intent is a formal enforcement document issued with the intent to assess civil penalties to the alleged violator and/or to deny or cancel a license issued under the authority of chapter 15.54 RCW.

NEW SECTION

WAC 16-200-7403 Application of RCW 43.05.100 and 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 16-200-7402(2), but may, at the discretion of the department, be considered as an aggravating factor for the purposes of WAC 16-200-7404(2).

(2) Prior to issuing a civil penalty for a violation of chapter 15.54 RCW and/or the rules adopted under it, the department shall comply with the requirements of RCW 43.05.110. RCW 43.05.110 allows the department of agriculture to issue a civil penalty provided for by law without first issuing a notice of correction if:

(a) 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 a previous notice of the same or similar type of violation of the same statute or rule; or

(b) 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; or

(c) 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

(d) 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.

NEW SECTION

WAC 16-200-7404 Calculation of a civil penalty. (1) In the disposition of administrative cases, the department shall use the penalty assignment schedules listed in WAC 16-200-7407 to determine the appropriate penalty. 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 an adjustment is warranted due to aggravating or mitigating factors. The median penalty may be adjusted to a level greater than the maximum penalty listed for the violation in the penalty assignment schedule table, but shall not exceed seven thousand five hundred dollars per violation. The median penalty may be adjusted to a lesser amount due to mitigating factors, but not less than the minimum penalty listed for the violation.

(2) Adjustment of median penalty.

(a) The department reserves the right to increase the civil penalty when certain aggravating factors are present. Such aggravating factors include, but are not limited to:

(i) Situations where the civil penalty assessed is not substantially equivalent to the violator's economic benefit derived from the violation;

(ii) The number of separate alleged violations contained within a single notice of intent;

(iii) 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);

(iv) The similarity of the current alleged violation to previous violations committed within the last three years;

(v) The extent to which the alleged violation is part of a pattern of the same or substantially similar conduct.

(b) The department also reserves the right to decrease the civil penalty when certain mitigating factors are present. Such mitigating factors include, but are not limited to:

(i) Situations involving voluntary disclosure of a violation;
(ii) Situations involving a low magnitude of the harm, or potential harm, including quantity and/or degree, caused by the violation;

(iii) 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.

(3) 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 civil penalty. The penalties are added together.

(4) Violation(s) committed during the period when a bulk fertilizer distribution license is denied or canceled shall be subject to the maximum civil penalty of seven thousand five hundred dollars and/or cancellation of the bulk fertilizer distribution license for a period of up to five years.

NEW SECTION

WAC 16-200-7405 Denial or cancellation of a bulk fertilizer distribution license. (1) The department retains the sole discretion to determine when a bulk fertilizer distribution license should be canceled. Cancellation of a license shall be an option for the department in those circumstances where:

(a) The penalty schedule allows for cancellation; and/or

(b) One or more aggravating factors are present.

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

(3) The department may deny an applicant a license when the applicant has committed a violation(s) of chapter 15.54 RCW and/or the rules adopted under that chapter. 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.

(4) 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).

NEW SECTION

WAC 16-200-7406 Other dispositions of alleged violations.

Nothing herein shall prevent the department from:

(1) Choosing not to pursue a civil penalty or bulk fertilizer distribution license denial or cancellation.

(2) Issuing a notice of correction in lieu of pursuing a civil penalty, or bulk fertilizer distribution license denial or cancellation.

(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.

NEW SECTION

WAC 16-200-7407 Penalty assignment schedule. This

assignment schedule shall be used for violations of chapter 15.54 RCW and rules adopted under it.

Level of Violation	Adverse Effects Not Probable			Adverse Effects Probable		
	Minimum	Median	Maximum	Minimum	Median	Maximum
First	\$400	\$600	\$1000	\$700	\$900	\$1100
Second	\$700	\$1000	\$2000	\$1200	\$2600	\$4000 and/or license denial or cancellation
Third	\$1400	\$2000	\$4000	\$1600 and/or license denial or cancellation	\$4800 and/or license denial or cancellation	\$7500 and/or license denial or cancellation
Fourth or more	\$1800 and/or license denial or cancellation	\$4000 and/or license denial or cancellation	\$6000 and/or license denial or cancellation	\$2000 and/or license denial or cancellation	\$7500 and/or license denial or cancellation	\$7500 and license denial or cancellation