

WSR 22-24-081

PROPOSED RULES

DEPARTMENT OF AGRICULTURE

[Filed December 5, 2022, 4:27 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 22-17-169.

Title of Rule and Other Identifying Information: Chapter 16-228 WAC, General pesticide rules. The department is proposing to modify WAC 16-228-1100 through 16-228-1150 by updating penalty amounts (that have not been increased since 1999) to serve as an effective deterrent, restructure the penalty schedule to address equity related to different categories of violations instead of a "one size fits all" approach, and clarifying the rule by adding language and modifying existing language.

Hearing Location(s): On January 10, 2023, at 9:00 a.m., Microsoft Teams meeting. Join on your computer, mobile app, or room device. Click here to join the meeting [contact agency for link], Meeting ID 298 320 828 26, Passcode diwArZ; or call in (audio only) +1 564-999-2000, Phone Conference ID 397 558 423#; and on January 10, 2023, at 6:00 p.m., Microsoft Teams meeting. Join on your computer, mobile app, or room device. Click here to join the meeting [contact agency for link], Meeting ID 294 474 000 53, Passcode iH7hv5; or call in (audio only) +1 564-999-2000, Phone Conference ID 534 530 563#.

Date of Intended Adoption: January 17, 2023.

Submit Written Comments to: Gloriann Robinson, Agency Rules Coordinator, P.O. Box 42560, Olympia, WA 98504-2560, email wsdarulescomments@agr.wa.gov, fax 360-902-2092, by 5:00 p.m., January 10, 2023.

Assistance for Persons with Disabilities: Contact Maryann Connell, phone 360-902-2012, fax 360-902-2093, TTY 800-833-6388, email mconnell@agr.wa.gov, by January 3, 2023.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The department regulates the distribution, storage, transportation, use, and disposal of pesticides. In particular, the pesticide management division's pesticide compliance program is charged with enforcing laws and rules associated with application and the control of the use of various pesticides within the state of Washington.

Regulatory action is necessary to deter violations of pesticide laws and rules, and to educate persons about the consequences of those violations. One component of regulatory action is the issuance of monetary and/or license suspension penalties.

Currently, WAC 16-228-1100 through 16-228-1150 describes the basis for penalties, how penalties are calculated, and the penalty assignment schedule. These rules have not been substantially updated since they were first adopted in 1999.

The department is proposing to update these rules by updating penalty amounts (that have not been increased since 1999) to serve as an effective deterrent, restructuring the penalty schedule to address equity related to different categories of violations instead of a "one size fits all" approach, and clarifying the rule by adding language and modifying existing language.

Reasons Supporting Proposal: Penalties have not increased since 1999, and the current \$450 penalty per violation in the median section of the penalty schedule does not act as a deterrent. Higher penalties are proposed not only to adjust for inflation but to act as a deterrent to help prevent pesticide violations from occurring. Amending the

single general penalty schedule to three specific penalty schedules will allow for more appropriate and equitable penalties for different types of pesticide violations. The three proposed schedules will cover: (1) Human exposure/property damage, (2) worker protection standard, and (3) unlicensed applicator/distributor violations. Establishing a new penalty of \$250 for recordkeeping violations would separate these relatively minor violations from the penalty schedule designed for more egregious violations. Clarifying the rule language increases stakeholder and licensee understanding of these regulations.

Statutory Authority for Adoption: RCW 15.58.040, 17.21.030.

Statute Being Implemented: RCW 15.58.040, 15.58.335, 17.21.030, 17.21.315.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Washington state department of agriculture, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Scott Nielsen, 1111 Washington Street S.E., Olympia, WA, 509-990-6518.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is not required under RCW 34.05.328. The Washington state department of agriculture is not a listed agency under RCW 34.05.328 (5) (a) (i).

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 19.85.040(1).

Explanation of exemptions: RCW 19.85.040(1) states that the department shall analyze the costs of compliance for businesses required to comply with the proposed rule. Since the proposed amendments are only applicable to those in violation of this chapter, the department has concluded that the costs for compliance are \$0.00 and a small business economic impact statement is not required.

Scope of exemption for rule proposal:

Is fully exempt.

December 5, 2022
R. Schoen-Nessa
Assistant Director

OTS-4210.3

AMENDATORY SECTION (Amending WSR 03-22-029, filed 10/28/03, effective 11/28/03)

WAC 16-228-1100 ((What is the)) Basis for penalties((?)). For the purpose of fair, uniform determination of penalty as set forth in WAC 16-228-1110 through 16-228-1150, the director hereby declares:

(1) Regulatory action is necessary to deter violations of the pesticide laws and rules, 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 17.21 RCW,)) chapter

15.58 (~~RCW, and/or~~) or 17.21 RCW, or the rules adopted thereunder 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.

[Statutory Authority: Chapters 17.21, 15.58, 34.05 RCW. WSR 03-22-029, § 16-228-1100, filed 10/28/03, effective 11/28/03. Statutory Authority: Chapters 15.54, 15.58 and 17.21 RCW. WSR 99-22-002, § 16-228-1100, filed 10/20/99, effective 11/20/99.]

AMENDATORY SECTION (Amending WSR 03-22-029, filed 10/28/03, effective 11/28/03)

WAC 16-228-1110 ((What are the)) Definitions specific to penalties(?). 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 that the alleged activity or mishap actually causes(~~(r)~~) or creates the possibility of damage, injury, or a public health threat((r)) to, or endangerment of, humans, animals, plants, property (~~(e)~~), the environment, or beneficial pollinating insects. (~~(In those situations involving)~~) This term includes circumstances when a wood destroying organism inspection((r, adverse effects exist when the inspection)) has been performed in a faulty, careless or negligent manner.

(2) "Beneficial pollinating insects" means those insects commonly considered as pollinators. This term does not include any of the following:

(a) Insects in any life stage that are presenting a current harm to humans, animals, plants, property, or the environment;

(b) Insects in any life stage normally considered to be a pest;

(c) Insects which the director declares to be a pest; and

(d) Any pollinating insect that may be incidentally adversely affected by any properly licensed public health vector control program as a result of that program's normal operations done in compliance with the law and which operates with reasonable care.

(3) "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.

(4) "Human exposure" means a pesticide exposure to humans caused by a violation of chapter 15.58 or 17.21 RCW, or the rules adopted thereunder.

(5) "Level of violation" means that the alleged violation is a first, second, third, (~~(fourth,)~~) or more violation(s). For purposes of calculating the level of violation, prior incidences 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.

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

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

(c) "Third violation" ~~((This))~~ means the alleged violator committed two or more prior incidents ~~((which resulted in a violation or violations))~~ resulting in a notice of intent 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))~~ 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))~~ (6) "License in good standing" means an unexpired license that is not currently suspended or revoked by the director.

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

~~((4))~~ (8) "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 thereunder, but that 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.

(9) "Notice of intent" means a document issued by the department that alleges specific violations of chapter 15.58 or 17.21 RCW, or the rules adopted thereunder. 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.

(10) "Pesticide exposure" means intentional or unintentional contact with pesticides caused by a violation of chapter 15.58 or 17.21 RCW, or the rules adopted thereunder.

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

~~((5))~~ (12) "Revoke" or "revocation" means the termination of a license for violations of chapter 15.58 or 17.21 RCW, or the rules adopted thereunder. The department will not reactivate revoked licenses.

(13) "Suspend" or "suspension" means the abeyance of a license for a specific period of time for violations of chapter 15.58 or 17.21 RCW, or the rules adopted thereunder. The department may reactivate suspended licenses following the period of suspension.

(14) "Unlicensed" means any person or apparatuses that does not hold or has not been issued a license in good standing for an activity where a license is required by chapter 15.58 or 17.21 RCW, or the rules adopted thereunder.

(15) "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) chapter 15.58 or 17.21 RCW, or the rules adopted thereunder.~~

[Statutory Authority: Chapters 17.21, 15.58, 34.05 RCW. WSR 03-22-029, § 16-228-1110, filed 10/28/03, effective 11/28/03. Statutory Authority: Chapters 17.21 and 15.58 RCW. WSR 01-01-058, § 16-228-1110, filed 12/12/00, effective 1/12/01. Statutory Authority: Chapters 15.54, 15.58 and 17.21 RCW. WSR 99-22-002, § 16-228-1110, filed 10/20/99, effective 11/20/99.]

AMENDATORY SECTION (Amending WSR 03-22-029, filed 10/28/03, effective 11/28/03)

WAC 16-228-1115 (~~When can the department issue a civil penalty without first issuing~~) Civil penalty may be issued prior to 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~~) or conduct or both 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)~~) (5), 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~~) or the rules adopted (~~under the authority of chapter 15.58 or 17.21 RCW~~) thereunder, 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)~~) (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 previous notice of the same or similar type of violation of the same statute or rule; or (~~(+2)~~) (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; (~~(+3)~~) (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~~) \$1,000; or (~~(+4)~~) (d) the violation was committed by a business that employed (~~fifty~~) 50 or more employees on at least one day in each of the preceding (~~twelve~~) 12 months.

[Statutory Authority: Chapters 17.21, 15.58, 34.05 RCW. WSR 03-22-029, § 16-228-1115, filed 10/28/03, effective 11/28/03. Statutory Authority: Chapters 17.21 and 15.58 RCW. WSR 01-01-058, § 16-228-1115, filed 12/12/00, effective 1/12/01.]

AMENDATORY SECTION (Amending WSR 03-22-029, filed 10/28/03, effective 11/28/03)

WAC 16-228-1120 ((How are penalties calculated?)) Calculation of penalties. ((1) Median penalty selection. In the disposition of administrative cases, the department shall use the penalty assignment schedule listed in WAC 16-228-1130 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 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. 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) 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 committed within the last three years.

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

(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, in-

~~crease 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. Mitigating factors include but are not limited to, the following:~~

~~(a) Voluntary disclosure of a violation.~~

~~(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.))~~ (1) For recordkeeping violations described in WAC 16-228-1126, licensing violations described in WAC 16-228-1127, and violations of chapter 16-233 WAC described in WAC 16-228-1128, the department will assess the civil penalty according to the schedule unless circumstances warrant a deviation from the penalty calculation rules as allowed under subsection (5) of this section.

(2) For the penalties assessed under WAC 16-228-1129, the department will select the level of violation and use the appropriate base penalty according to the type of pesticide violation as the starting point for calculating penalties. The base penalty shall be assessed unless either an adjustment is warranted, or there are aggravating or mitigating factors present, or both.

(3) Adjustment of base penalty for violations calculated under WAC 16-228-1129:

(a) The department reserves the right to increase the civil penalty and decrease the licensing action under certain circumstances. Such circumstances include situations where the licensing actions(s) are ineffective as a deterrent and include, but are not limited to:

(i) Violations involving unlicensed or during a license suspension;

(ii) Situations where the civil penalty assessed is not substantially equivalent to the economic benefit derived by the violator from the violation; and

(iii) Where the violation is the result of a business or other management decision(s).

(b) The department may decrease the civil penalty and increase the licensing action in circumstances that demonstrate the ineffectiveness of a civil penalty as a deterrent.

(4) Each violation of chapter 15.58 or 17.21 RCW, or the rules adopted thereunder, are separate and distinct violations. When a person has committed multiple violations in a single incident, each violation is individually and separately subject to the maximum civil penalty of \$7,500. Penalties for separate violations related to a single event are added together for the purpose of the notice of intent.

(5) The department may, in its discretion, deviate from the penalty calculation rules adopted in this chapter. The department has complied with these rules if it acknowledges the deviation and states its reasons for deviating from the penalty calculation rules in this chapter, in the notice of intent.

(6) Nothing in this chapter shall prevent the department from:

(a) Adjusting either a licensing action to a level greater than the maximum licensing action listed in any penalty assignment schedule, or a civil penalty to a level greater than the maximum civil penalty listed in any penalty assignment schedule; or

(b) Aggravating either a licensing action or civil penalty, or both, to either a level greater than the maximum licensing action listed in any penalty assignment schedule or a civil penalty to a level greater than the maximum civil penalty in any penalty assignment schedule or both.

(7) When adjusting a penalty, the department may aggravate, mitigate, or proportionally adjust either the civil penalty or the license suspension, or both. Generally, the department will aggravate, mitigate, or proportionally adjust both the civil penalty and the license suspension when the department determines such factors are present; however, the department retains the discretion to aggravate, mitigate, or proportionally adjust a civil penalty without also aggravating, mitigating, or proportionally adjusting the license suspension, and may aggravate, mitigate, or proportionally adjust the license suspension without aggravating, mitigating, or proportionally adjusting the civil penalty. In the event the department aggravates, mitigates, or proportionally adjusts either the civil penalty or the license suspension without aggravating, mitigating, or proportionally adjusting the other, the department will indicate its basis for doing so in the notice of intent.

[Statutory Authority: Chapters 17.21, 15.58, 34.05 RCW. WSR 03-22-029, § 16-228-1120, filed 10/28/03, effective 11/28/03. Statutory Authority: Chapters 17.21 and 15.58 RCW. WSR 01-01-058, § 16-228-1120, filed 12/12/00, effective 1/12/01. Statutory Authority: Chapters 15.54, 15.58 and 17.21 RCW. WSR 99-22-002, § 16-228-1120, filed 10/20/99, effective 11/20/99.]

AMENDATORY SECTION (Amending WSR 07-11-041A, filed 5/9/07, effective 6/9/07)

WAC 16-228-1125 ((When can the department revoke or deny)) Revocation or denial of a license(?)

~~(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 department may revoke a license when:~~

~~(i) The penalty schedule allows for revocation; ((and/or)) or~~

~~((b)) (ii) 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.) or~~

(iii) The circumstances surrounding the violation are such that a suspension of the license will not serve as an adequate deterrent for future conduct.

(b) The department may in its discretion, revoke any or all licenses held by the person when this section permits revocation. Where the circumstances warrant revocation of more than one license held by the person, the department shall explain its reasons for revoking each license in its notice of intent.

(c) In circumstances where the department revokes a license, the department may order that person will not be granted new licensure or new license categories for a period of time. This period of ineligibility for the person to be granted a new license or category shall be determined at the discretion of the department, but shall not exceed five years.

(2) The department may deny an applicant a license when the applicant has committed a violation(s) of chapter ~~((s))~~ 15.58 ~~((and))~~ or 17.21 RCW ~~((and/or))~~, or the rules adopted ~~((under those chapters))~~ thereunder. 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))~~ (a) 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))~~ (b) The department may deny an application for a license when that person's license was revoked under subsection (1) of this section or when the department has prohibited a person from being issued a license for a period of time, and that time has not expired.

(3) 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))~~ in accordance with the appropriate penalty schedule and the penalty provisions of this chapter.

[Statutory Authority: Chapters 17.21, 15.58, and 34.05 RCW. WSR 07-11-041A, § 16-228-1125, filed 5/9/07, effective 6/9/07; WSR 03-22-029, § 16-228-1125, filed 10/28/03, effective 11/28/03. Statutory Authority: Chapters 17.21 and 15.58 RCW. WSR 01-01-058, § 16-228-1125, filed 12/12/00, effective 1/12/01.]

NEW SECTION

WAC 16-228-1126 Penalties for certain recordkeeping violations.

The department will assess a penalty of \$250 for failing to properly record the information required by RCW 17.21.100 (1)(a) through (j), WAC 16-228-1320 (1)(a) through (n), and WAC 16-228-1300 (1) through (8) unless circumstances warrant a deviation as allowed under WAC 16-228-1120(5), or the application of aggravating and mitigating factors as allowed by WAC 16-228-1131. Violations of other subsections of RCW 17.21.100, WAC 16-228-1320 and 16-228-1300 are assessed under WAC 16-228-1129.

[]

NEW SECTION

WAC 16-228-1127 Penalties for unlicensed using, handling, applying, distributing, or consulting about pesticides. (1) Violations committed during the period when an individual's license is suspended shall be subject to the maximum civil penalty of \$7,500 or suspension of the license for a period of up to five years, or both.

(2) Violations committed following the revocation of a license, and where the previous licensee has not successfully obtained a new license, shall be subject to the maximum civil penalty of \$7,500 or an extension of the time during which the person is ineligible for reissuance of a license, or both. Violations are considered to be "operating without a license" for the purpose of RCW 17.21.320(4).

(3) Penalties for unlicensed use will be assessed according to the penalty assignment schedule in WAC 16-228-1130 Table I. The penalty schedule in WAC 16-228-1130 Table I does not apply to violations described in subsections (1) and (2) of this section.

(4) Nothing herein shall prevent the department from seeking an injunction against persons operating without a license as allowed under RCW 17.21.320(4).

[]

NEW SECTION

WAC 16-228-1128 Penalties for violations of chapter 16-233 WAC—Worker protection standard. (1) Violations of WAC 16-233-211(1) are assessed under WAC 16-228-1129.

(2) Except for violations described in (1) of this section, violations of chapter 16-233 WAC are assessed in accordance with the penalty assignment schedule in WAC 16-228-1130 Table II.

[]

NEW SECTION

WAC 16-228-1129 Penalties for other violations of chapter 15.58 or 17.21 RCW, or the rules adopted thereunder. (1) This section covers all violations of chapter 15.58 or 17.21 RCW, or the rules adopted thereunder, that do not have a more specific penalty assignment schedule described in WAC 16-228-1126, 16-228-1127, and 16-228-1128.

(2) The penalties in this section will be calculated by selecting the appropriate level of violation, then selecting the appropriate base penalty, and then adjusting the base penalty for aggravating and mitigating factors. The base penalty shall be assessed unless either a deviation is warranted or there are either aggravating or mitigating factors present, or both.

(3) Except as provided in WAC 16-228-1120(5), when penalties are calculated under this section, and the department determines that one or more aggravating factors are present, the department may increase the penalty by a factor of no more than 25 percent of the base penalty for each aggravating factor.

(4) Except as provided in WAC 16-228-1120(5), when penalties are calculated under this section, and the department determines that one or more mitigating factors are present, the department may decrease the penalty by a factor of no more than 25 percent of the base penalty for each mitigating factor.

(5) Violations described in this section are assessed in accordance with the penalty assignment schedule in WAC 16-228-1130 Table III.

[[

AMENDATORY SECTION (Amending WSR 03-22-029, filed 10/28/03, effective 11/28/03)

WAC 16-228-1130 ((What is the)) Penalty assignment ((schedule?)) schedules—Tables I, II, and III. ((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 Notice of Corrections.)

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

Level of Violation	Commercial Applicator Operating Unlicensed	Pesticide Dealer Distributing Restricted Use Pesticides Unlicensed	All Other Violations for Operating Unlicensed
First	\$2,500	\$1,000	\$1,000
Second	\$5,000	\$2,500	\$2,500
Third or more	\$7,500	\$5,000	\$5,000

Table II Worker Protection Standard Violations

<u>Level of Violation</u>	<u>WAC 16-233-021(6) providing emergency assistance.</u> <u>WAC 16-233-201 failure to provide sufficient training to handlers prior to mixing or applying category 1 pesticides, unless handler is exempt from training requirements.</u> <u>WAC 16-233-211 (3) and (4) monitoring handlers applying highly toxic and enclosed space fumigants.</u> <u>WAC 16-233-216 PPE for handlers.</u> <u>WAC 16-233-221 decontamination and eye flush for handlers.</u> <u>WAC 16-233-311 protection of early-entry workers.</u>	<u>All other violations of chapter 16-233 WAC, excluding WAC 16-233-211(1), that warrant a civil penalty</u>
<u>First</u>	<u>\$1,000</u>	<u>\$500</u>
<u>Second</u>	<u>\$2,000</u>	<u>\$750</u>
<u>Third or more</u>	<u>\$3,000</u>	<u>\$1,000</u>

Table III Base Penalties

<u>Level of Violation</u>	<u>Human Exposure</u>	<u>Adverse Effects Probable (Other than Human Exposure)</u>	<u>Adverse Effects Not Probable</u>
<u>First</u>	<u>\$1,500 and five-day license suspension</u>	<u>\$1,000 and four-day license suspension</u>	<u>\$300</u>
<u>Second</u>	<u>\$3,000 and 10-day license suspension, denial, or revocation</u>	<u>\$2,000 and eight-day license suspension, denial, or revocation</u>	<u>\$600</u>
<u>Third or more</u>	<u>\$6,000 and 20-day license suspension, denial, or revocation</u>	<u>\$4,000 and 16-day license suspension, denial, or revocation</u>	<u>\$1,200 and three-day license suspension, denial, or revocation</u>

[Statutory Authority: Chapters 17.21, 15.58, 34.05 RCW. WSR 03-22-029, § 16-228-1130, filed 10/28/03, effective 11/28/03. Statutory Authority: Chapters 17.21 and 15.58 RCW. WSR 01-01-058, § 16-228-1130, filed 12/12/00, effective 1/12/01. Statutory Authority: Chapters 15.54, 15.58 and 17.21 RCW. WSR 99-22-002, § 16-228-1130, filed 10/20/99, effective 11/20/99.]

NEW SECTION

WAC 16-228-1131 Aggravating and mitigating factors. The department may consider the following factors when calculating penalties under WAC 16-228-1130. The department is not required to apply every aggravating or mitigating factor that may be present or relevant to a particular violation, and will only apply those factors that the department determines significantly affect a case or contribute to a particular violation.

(1) Aggravating factors. When calculating penalties under WAC 16-228-1130, the department may consider circumstances that warrant enhancing the penalty above base penalty. Aggravating factors include, but are not limited to, the following:

- (a) The number of separate alleged violations contained within a single notice of intent.
- (b) The high magnitude of the harm, or potential harm, including either the quantity or degree, or both, to humans, animals, plants, property, or the environment caused by the violation(s).
- (i) Number of individuals directly exposed as a result of the violation. The department may aggravate the penalty for each individual exposed.
- (ii) Number of individuals reporting verifiable health symptoms to the department or to the state department of health. The department may aggravate the penalty for each individual that reported verifiable symptoms.
- (iii) Number of individuals requiring emergency medical treatment. The department may aggravate the penalty for each individual that required emergency medical treatment.
- (c) The similarity of the current alleged violation to previous violations committed within the last six years, regardless of whether those violations resulted in notices of correction or notices of intent, and regardless of whether a notice of intent was resolved by a settlement unless otherwise expressly indicated in the agreement.
- (d) The extent to which the alleged violation is part of a pattern of the same or substantially similar conduct.
- (e) Lack of, or deficiency in, either training or supervision of operator(s), or both, regardless of whether the pesticide(s) applied required direct supervision of uncertified applicators.
- (f) High pesticide toxicity. This may be indicated by a product's signal word or words on any pesticide label involved in the offending investigation including, but are not limited to, "Danger/Poison."
- (g) One or more pesticides involved in the incident were state or federal restricted use pesticides.
- (h) The high degree of visible and accessible damage that was not reported in conjunction with a complete wood destroying organism inspection, when the damage was located in an area that was not allowably excluded from inspection.
- (i) The violation involved a careless or negligent operation.
- (j) Inappropriate or insufficient equipment safeguards or operation including, but not limited to, the failure to properly calibrate and configure application equipment prior to application.
- (k) Extent to which the location of the violation, including near sensitive areas or areas near human population, creates the potential for harm to the environment or human health or safety.
- (l) False information provided to the department during an investigation of the violation.
- (m) Applicator failed to follow advisory precautionary language on label, which impacted the violation.
- (n) Except as exempted in WAC 16-228-1110(2), the violation had a direct adverse effect on bees, honey bees, or other beneficial pollinating insects.
- (2) Mitigating factors. When calculating a penalty under WAC 16-228-1130, the department may consider circumstances that warrant reducing the penalty below the base penalty. Mitigating factors include, but are not limited to, the following:
- (a) Voluntary disclosure by the violator of a violation.
- (b) The low magnitude of the harm, or potential harm, including quantity and/or degree, caused by the violation.
- (c) Safety protocol established and prevention measures taken prior to incident.

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

(e) Good faith efforts of the violator to comply with the pesticide laws and rules that are applicable to the violation and the application was made in a careful and safe manner.

(f) Violator did not, and could not with exercise of reasonable diligence, have known the risk of the application to safety, human health, or property.

(g) Low toxicity of pesticide involved. This may be indicated by the lack of a label signal word, or the signal word "Caution" on all pesticides involved.

(h) Applicator followed advisory precautionary language on label, which impacted the violation.

[]

AMENDATORY SECTION (Amending WSR 03-22-029, filed 10/28/03, effective 11/28/03)

WAC 16-228-1150 ((What are the)) Other dispositions of alleged violations that the department may choose(?). Nothing herein shall prevent the department from:

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

(2) Issuing a notice of correction in lieu of pursuing 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 for a previous violation may be used by the department for the purpose of determining the appropriate penalty for the current alleged violation(s) if not expressly prohibited by the agreement.

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

[Statutory Authority: Chapters 17.21, 15.58, 34.05 RCW. WSR 03-22-029, § 16-228-1150, filed 10/28/03, effective 11/28/03. Statutory Authority: Chapters 17.21 and 15.58 RCW. WSR 01-01-058, § 16-228-1150, filed 12/12/00, effective 1/12/01. Statutory Authority: Chapters 15.58, 17.21 RCW. WSR 00-22-073, § 16-228-1150, filed 10/30/00, effective 11/30/00. Statutory Authority: Chapters 15.54, 15.58 and 17.21 RCW. WSR 99-22-002, § 16-228-1150, filed 10/20/99, effective 11/20/99.]