

WSR 24-21-102

PROPOSED RULES

DEPARTMENT OF HEALTH

[Filed October 18, 2024, 8:38 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 24-13-109.

Title of Rule and Other Identifying Information: Large on-site sewage system rules; establishing a civil penalty schedule in WAC 246-272B-08105.

The department of health (DOH) is proposing to establish a civil penalty schedule for violations of a law or rule regulating large on-site sewage systems. This proposed rule is necessary to clarify DOH's penalties based on significance of the violation, previous compliance record, and the presence of aggravating or exacerbating circumstances.

Hearing Location(s): On December 18, 2024, at 8:00 a.m., at DOH, Town Center 2, Room 166, 111 Israel Road S.E., Tumwater, WA 98501; or virtual. Register in advance for this webinar <https://us02web.zoom.us/join/98501166111>. After registering, you will receive a confirmation email containing information about joining the webinar.

Date of Intended Adoption: December 27, 2024.

Submit Written Comments to: DOH c/o Ashlie Laydon, P.O. Box 47822, Olympia, WA 98504-7822, email ashlie.laydon@doh.wa.gov, beginning date and time of filing, by December 18, 2024, by 11:59 p.m.

Assistance for Persons with Disabilities: Contact Ashlie Laydon, TTY 711, email ashlie.laydon@doh.wa.gov, by December 4, 2024.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The proposed rule establishes a civil penalty schedule to protect public health and the environment by ensuring large on-site sewage systems are properly designed, operated, and maintained.

Reasons Supporting Proposal: A civil penalty schedule, in rule, provides transparency in how DOH calculates the penalty amount and serves as a deterrent to future noncompliance. Protection of public health and the environment requires properly designed, operated, and maintained on-site sewage systems. Failure of these systems can pose certain health and environmental hazards if sewage is not adequately treated, leaks above ground creating a potential of direct or indirect contact with the public, or if untreated sewage reaches surface or groundwater.

Statutory Authority for Adoption: RCW 70A.115.040.

Statute Being Implemented: RCW 70A.115.050.

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

Name of Proponent: DOH, governmental.

Name of Agency Personnel Responsible for Drafting: Ashlie Laydon, 111 Israel Road S.E., Tumwater, WA 98501; Implementation and Enforcement: Andrew Jones, 111 Israel Road S.E., Tumwater, WA 98501, 360-742-9233.

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

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Ashlie Laydon, P.O. Box 47822, Olympia, WA 98504-7822, TTY 711, email ashlie.laydon@doh.wa.gov.

Scope of exemption for rule proposal from Regulatory Fairness Act requirements:

Is not exempt.

The proposed rule does not impose more-than-minor costs on businesses. Following is a summary of the agency's analysis showing how costs were calculated. The proposed rule does not impose any costs if a business is compliant with chapter 70A.115 RCW and chapter 246-272B WAC. RCW 70A.115.050 gives DOH the authority to assess a penalty of not more than \$10,000 per day for each violation. The proposed rule establishes a civil penalty schedule, in rule, to outline how DOH will calculate civil penalties based on the significance of the violation, previous compliance record, and the presence of aggravating or exacerbating circumstances.

October 18, 2024
 Kristin Peterson, JD
 Chief of Policy
 for Umair A. Shah, MD, MPH
 Secretary

OTS-5771.1

NEW SECTION

WAC 246-272B-08105 Civil penalty schedule. (1) The department calculates penalties based on:

- (a) The significance of the violation;
- (b) Previous compliance record; and
- (c) The presence of aggravating or exacerbating circumstances.

(2) Significance of violation. The department determines significance of the violation based on risk:

- (a) Low. Low risk violations do not affect the function of the LOSS and have a low potential to threaten public health or the environment.
- (b) Medium. Medium risk violations are those relating to reporting requirements of LOSS function, including monitoring, operation, and maintenance of the LOSS and do not present an immediate threat to public health or the environment.
- (c) High. High risk violations are those relating to the functioning of the LOSS and present an immediate threat to public health or the environment.

(3) Previous compliance record. The department considers any notice of violation issued to the person responsible for compliance with LOSS requirements in the past five years when calculating a penalty.

(4) Penalty schedule.

| Number of Notice of Violations in the past 5 years | Low Risk | Medium Risk | High Risk |
|--|----------|-------------|-----------|
| 0 | \$250 | \$500 | \$1,000 |
| 1 | \$350 | \$700 | \$1,400 |
| 2 | \$450 | \$900 | \$1,800 |

| Number of Notice of Violations in the past 5 years | Low Risk | Medium Risk | High Risk |
|--|----------|-------------|-----------|
| 3 | \$550 | \$1,100 | \$2,200 |
| 4 | \$650 | \$1,300 | \$2,600 |
| 5 or more | \$750 | \$1,500 | \$3,000 |

(5) Aggravating or exacerbating circumstances. The department can also consider circumstances that aggravate or exacerbate the harm or risk to people or the environment. The violation can be aggravated or exacerbated by an existing circumstance, or the violation can aggravate or exacerbate an existing circumstance related to the system or its operation. Aggravating or exacerbating circumstances can include, but are not limited to, the following factors:

(a) The extent to which there is a history of unaddressed permit conditions;

(b) The extent that other actions or inactions by the owner or their representative contribute to the severity of the risk to public health or the environment posed by the violation; and

(c) The length of time that factors (a) or (b) of this subsection have been present for the system.

(6) If the department determines that one or more aggravating or exacerbating factors are present, then the department may increase the penalty to a level greater than listed in the penalty schedule.

(7) The maximum civil penalty that may be imposed by the department is \$10,000 per day for each violation.

(8) The department considers each violation to be a separate and distinct event. Each day a violation is continued is a separate and distinct violation. When a person has committed multiple violations, the violations are cumulative for the purpose of calculating the appropriate penalty. Penalties are added together, rather than served concurrently.

(9) Nothing in this section prevents the department from responding to a violation by:

(a) Declining to pursue a civil penalty;

(b) Issuing a notice of correction instead of pursuing a civil penalty; or

(c) Negotiating settlement of a case on such terms and for such reason as the department deems appropriate. Violations covered by a prior settlement agreement may be used for the purpose of determining the appropriate penalty for the current alleged violation(s), unless prohibited by the prior settlement agreement.