(Effective April 1, 2023)

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.

[Statutory Authority: RCW 15.58.040 and 17.21.030. WSR 23-04-041, § 16-228-1131, filed 1/26/23, effective 4/1/23.]