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ATTORNEY GENERAL'S OFFICE
AGRICULTURE & HEALTH DIVISION

WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS

In the matter of:

Docket No. 07-2015-AGR-00004

Lenard Beierle / Ag Air Flying Services
Inc.,

INITIAL ORDER

Appellant.

Agency: Dept. of Agriculture
Program: Pesticide Management
Agency No. PM-15-0005

1. ISSUES PRESENTED

1. Whether on or about August 27, 2014, Lenard Beierle / Ag Air Flying Services, Inc. violated RCW 15.58.150(2)(c), WAC 16-228-1200(1), WAC 16-228-1220(2), as alleged in the Department's April 28, 2015 Notice of Intent to Assess a Civil Penalty and to Suspend License.
2. Whether the Department abused its discretion in the April 28, 2015 Notice of Intent to Assess a Civil Penalty and to Suspend License when it calculated the penalties set forth in RCW 34.05.110, WAC 16-228-1120, and WAC 16-228-1130.

2. ORDER SUMMARY

3. On or about August 27, 2014, Lenard Beierle / Ag Air Flying Services, Inc. violated RCW 15.58.150(2)(c), WAC 16-228-1200(1), WAC 16-228-1220(2). The Department's April 28, 2015 Notice of Intent to Assess a Civil Penalty and to Suspend License is AFFIRMED as to the alleged violations.
4. The Department abused its discretion in assessing the penalties set forth in RCW 34.05.110, WAC 16-228-1120, and WAC 16-228-1130. The Department's penalty assessment in the Notice of Intent to Assess a Civil Penalty and to Suspend License is MODIFIED. The Appellant is liable for a penalty of \$550.00 and a nine (9) day license suspension.

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3. HEARING

Hearing Start Date	December 8, 2015
Administrative Law Judge	Courtney E. Beebe
Appellant	Leonard Beierle / Ag Air Flying Services Inc.
Appellant Representative	Timothy Coleman, Attorney at Law
Agency	Department of Agriculture
Agency Representatives	Kristen K. Mitchell and Christopher Wright, Assistant Attorneys General

4. WITNESSES

1. Department's Witnesses: Matt West, Compliance Investigator; Mike Firman, WSDA Chemical & Hop Lab; Bob Wolf, Wolf Consulting; Tim Schulz, WSDA Case Review Officer; Irma Gomez Aguilar; Rocio Gomez; Guadalupe Gonzalez Mendez; Alfredo Calderon Sanchez; Modesta Gomez; and Florencia Aguilar.

2. Appellant's Witnesses Dr. Todd Taruscio, Anatec Labs; Dr. Allan Felsott, WSU; Joel Kongiser, WSDA; Gail Amos; and Lenard Beierle, Appellant.

5. EXHIBITS

1. Department's Exhibits: The Administrative Law Judge admitted the Department's Exhibits 1-16, and the Declaration of Mike Firman.

2. Appellant's Exhibits: The Administrative Law Judge Admitted the Appellant's Exhibits A(1), B(2), C(3), D(4), E(5), H(8), I(9), K(11), L(12), M(13), N(14), O(15), P(16), Q(17), R(18), S(19), T(20), U(21), W(23), X(24), Y(25), and Z(26). Appellant's Exhibits F(6), G(7), J(10), and V(22) were withdrawn.

6. FINDINGS OF FACT

The Administrative Law Judge finds the following facts by a preponderance of the evidence:

Undisputed Facts

The following facts are undisputed:

1. Lenard Beierle owns and operates Ag Air Flying Services, Inc. ("Appellant") and has over thirty (30) years of experience in aerial pesticide application. Appellant is licensed by the Washington State Department of Agriculture ("Department") as a "private pesticide applicator."
2. The Appellant began performing an aerial pesticide application on a potato field at 7:55 a.m. on August 27, 2014, from a fixed wing plane. The potato field is located 2.1 miles east of Mattawa, Washington, paralleling the south side of Road 24 SW ("Target Field"). (Department's Exhibit 11, marked as field "12").
3. The field directly to the west of the Target Field, also paralleling Road 24 SW, is a field of Timothy hay owned by Ekensberg Farms ("Timothy Field"). (Department's Exhibit 11, marked as field "11").
4. The field directly to the west of the Timothy Field, also paralleling Road 24 SW, is the Grant 24 apple orchard ("Apple Orchard"). (Department's Exhibit 11, marked as field "25").
5. Appellant left the Target Field at 8:05 a.m. and reloaded his plane with pesticide. Appellant returned to the Target Field and continued the pesticide application at 8:05 a.m. Appellant finished the pesticide application on the Target Field at 8:37 a.m.
6. Appellant flew in a race track pattern making the first pass with smoke only along the northern edge of the Target Field parallel to Road 24, flying from east to west. (Appellant's Exhibit 25 and Exhibit 1.)
7. The first pesticide spray pass was made from west to east along the southern edge of the Target Field. Appellant then made the subsequent pass from east to west through the center of the Target Field. Appellant continued the flying pattern from west to east along the southern edge of the Target Field and returning to the middle and flying east to west working towards the north with his last pass being just south of the center of the field and along the north edge of the field.
8. Appellant used CP flat fan nozzles (40 degrees) at 55 psi and 0 degree deflection with an air speed of 140 mph. The configuration produces a droplet volume mean diameter of 350 microns which is a ASAE medium classification droplet size. The Same nozzle also produces droplet sizes that are less than 228 microns in 10% of the spray volume, meaning 10% of the droplets in the spray volume are less than 228 microns which could remain suspended in the air column longer and also be more prone to drift. The wingspan of the aircraft measured 56' and total

boom length measured just less than 60% of the total wingspan from the outside nozzle tip to outside nozzle tip.

9. At the time of application the Appellant recorded the wind as coming from the SE at 165 degrees, at a speed of 1 to 2 mph. Appellant verified the wind direction with smoke and noted "no workers present or adjacent." (Department's Exhibit 8.)
10. Appellant's flight log using GPS flight log information showed the Appellant's flight paths and the times when the planes booms were on or off. The flight log information overlaid on a google earth map shows that the booms were only turned on when Appellant's plane was within the confines of the Target Field. (Appellant's Exhibit 25 and Exhibit 1.)
11. The Appellant applied a pesticide with the trade name "Mana Silencer" with an active ingredient Lambda-cyhalothrin ("Lambda"), as well as a surfactant trade named "ORO WetCit" with active ingredient alcohol ethoxylate.
12. The label for Mana Silencer states in part:

HAZARDS TO HUMANS AND DOMESTIC ANIMALS

WARNING

May be fatal if swallowed. Causes substantial but temporary eye injury. Harmful if absorbed through skin or inhaled. Avoid breathing vapor or spray mist. Do not get in eyes, on skin, or on clothing. Prolonged or frequently repeated skin contact may cause allergic reaction in some individuals. Skin exposure may also result in a sensation described as a tingling, itching, burning or prickly feeling. Onset may occur immediately to 4 hours after exposure and may last 2-30 hours without damage. Wash exposed areas once with soap and water. Relief from skin sensation may be obtained by applying an oil based cream.

Wind Direction and Speed

Only apply this product if the wind direction favors on-target deposition. Do not apply when the wind velocity exceeds 15 mph."

Droplet size

Use only medium or coarser spray nozzles (for ground and non-ULV aerial application according to ASAE (S572) definition for standard nozzles. In conditions of low humidity and high temperatures, applicators should use a coarser droplet size.

Additional Requirements for Aerial Application

The spray boom should be mounted on the aircraft as to minimize drift caused by wingtip or rotor vortices. The minimum practical boom length should be used and must not exceed 75% of the wing span or 80% rotor diameter. Flight speed and nozzle orientation must be considered in determining droplet size. Spray must be released at the lowest height consistent with pest control and flight safety. Do not release spray at a height greater than 10 feet above the crop canopy unless a greater height is required for aircraft safety. When applications are made with a crosswind, the swath will be displaced downwind. The applicator must compensate for this displacement at the downwind edge of the application area by adjusting the path of aircraft upwind.

(Department's Exhibit 4.)

13. The label for Oro WetCit reads in part:

HAZARDS TO HUMANS AND DOMESTIC ANIMALS

Warning: Causes substantial but temporary eye injury. Harmful if absorbed through skin or inhaled. Do not get in eyes or on clothing. Avoid contact with skin. Wear goggles, face shield or safety glasses. Avoid breathing spray mist.

FIRST AID: IF IN EYES: Hold eye open and rinse slowly and gently with water for 15-20 minutes. Remove contact lenses, if present, after the first five minutes, then continue rinsing eye. Call a poison control center or doctor for treatment advice. IF INHALED: Move person to fresh air . . . IF ON SKIN OR CLOTHING: Take off contaminated clothing. Rinse skin immediately with plenty of water for 15-20 minutes. Call a poison control center or doctor for treatment advice.

14. At approximately 8:00 a.m. on August 27, 2014, 68 farm workers for Ag Management ("Farm Workers") arrived for field work at the Apple Orchard. The Farm Workers were assigned to two crews, one led by David Ramirez and one led by Alfonso Aguilar. The Farm Workers drove east on Road 24 SW and parked vehicles on the north edge of the Apple Orchard on or near Road 24 SW. The Farm Workers began work tying vines on the north-eastern and north-western rows of the Apple Orchard. The Farm Workers wore long pants, long sleeved shirts, gloves, hats, sunglasses and bandanas around their necks.

15. At approximately 8:30 a.m. or shortly thereafter, on August 27, 2014, Mr. Aguilar drove eastbound on Road 24 SW past the Target Field. Mr. Aguilar drove an Ag Management pick-up truck. The truck was sprayed with pesticide when the Appellant's plane sprayed the Target Field edge from east to west.
16. At 8:45, the Farm Workers left the Apple Orchard and returned to the Grant 24 shop located to the east of the Target Field complaining of scratchy eyes and throats, respiratory discomfort, dizziness, skin rash and nausea. The Farm Workers were instructed to go home or seek medical attention, change their clothes, shower, and return for work at 11:00 a.m. if they felt able to work.
17. After the Farm Workers reported the incident, Ag Management personnel contacted Ron Turner, Quincy Farm Chemical field man, who worked for the owners of the Target Field, and reported a possible exposure of the farm workers to a pesticide from an aerial application on the Target Field. Mr. Turner contacted the Appellant by leaving a note on the Appellant's vehicle windshield. Appellant discovered the note and contacted Mr. Turner. Mr. Turner informed Appellant of the incident.
18. On August 27, 2014, at 10:31 a.m. the Appellant voluntarily contacted the Department and reported the incident and requested an investigation. The Appellant properly reported the pesticide application on the August 27, 2014 Application Record. (Department's Exhibit 8.)
19. The Department interviewed the Appellant, a number of Farm Workers, Mr. Aguilar, Mr. Ramirez, Mr. Turner, and others with information regarding the incident.
20. The Department collected pesticide application records for the month of August 2014 for all neighboring fields within a 1 mile radius of the Appel Orchard, as well as road side and irrigation application records for the area. The records show that no applications of any pesticides containing Lambda occurred prior to August 27, 2014 in the one mile radius of the Appel Orchard, except for the Appellant's pesticide application.
21. The Department requested sales and distribution records for products containing Lambda during August 2014 from the following local pesticide dealers: Wilbur-Ellis, G.S. Long, Saddle Mountain Supply, NW Wholesale, QFC, Windflow Fertilizer, D&M Chemical, CHA, and CPS. The only purchase of a product containing Lambda was the sale to Appellant for the August 27, 2014 application to the Target Field.

22. The Appellant and the Department conducted a simulated fly over on September 8, 2014. During the simulated fly over Department investigator Matt West recorded a video while standing in the approximate location of the Farm Workers. The video does not show any leaking from the Appellant's nozzles, and the Appellant's plane is visible from the Orchard. (Exhibit 19.)
23. Weather data from the Washington State University AgWeatherNet Mattawa station which is near the Apple Orchard and Target Field, recorded the air speed between 7:45 a.m. and 8:45 a.m. on August 27, 2014 as averaging between 1.1 mph and 3.7 mph, with gusts of 4.2 mph to 5.3 mph. The wind direction was blowing to the NE and E.
24. Weather data from the Washington State University AgWeatherNet Wahluke Slope station which is near the Apple Orchard and Target Field, recorded the air speed between 7:45 a.m. and 8:45 a.m. on August 27, 2014 as averaging between 2.8 mph and 3.9 mph and gusting at 4.6 mph to 5.3 mph. The wind direction was blowing to the E and SE and S.
25. The Department of Health investigated the effects of the incident on the Farm Workers. The Department of Health's conclusions were that 1 worker was classified as having a pesticide-related illness, 65 workers were classified as having a probable pesticide related illness, and two workers were classified as having insufficient information to classify. All but two workers reported experiencing more than one symptom: ninety-three percent (93%) reported respiratory symptoms; eighty-seven percent (87%) reported headaches; fifty-six percent (56%) reported gastro-intestinal symptoms, and thirty-seven (37%) percent reported eye symptoms.
26. Eight (8) Farm Workers sought medical attention on August 27, 2014.
27. Investigator West collected weed, hay, grass, and potato foliage samples from the Apple Orchard, the Timothy Field, and the Target Field on August 27, 2014, using nitrile gloves. Investigator West collected the samples moving in line from east to west. Investigator West placed the samples into individually labeled paper bags which were sealed and placed into a plastic bag that was also sealed.
28. The same day, Investigator West also collected water samples from the pond on the eastern edge of the Target Field, and placed it in an amber glass gallon container, which was sealed, placed in a plastic bag that was then sealed.

29. On August 27, 2014, Investigator West also collected a swab sample from the vehicle window driven by Alberto Aguilar. The swab was placed into a paper bag, sealed, and placed into a plastic bag that was sealed.
30. Investigator West collected clothing samples from the Farm Workers on August 28, 2014. The samples were taken from clothing worn by the Farm Workers who placed the clothing in the bags the day before. The clothing samples were placed into paper bags that were sealed and placed into plastic bags and sealed.
31. All foliage, water and swab samples were placed on ice into coolers in a Department vehicle and then transported to a freezer in Wenatchee the same day collected. The clothing samples were placed on ice into coolers in a Department vehicle on the same day collected. All samples were transported to the Department's Lab on August 28, 2014.
32. The Department's Lab conducted a residue analysis on each of the samples using the Department's standard equipment and procedures. The Department's Lab conducted residue tests for multiple compounds. The Department's lab results showed that Lambda was found at a detectible level in each sample taken by Investigator West. (Department's Exhibit 7.)
33. The Department provided the unused samples to Appellant after the conclusion of the investigation, and the Appellant employed Anatek Labs to conduct a residue analysis. The swab samples of Mr. Aguilar's truck were not provided to the Appellant, as the sample had been completely used in the initial testing performed by the Department. The unused samples tested by Anatek Labs resulted in a positive detection of Lambda, though the levels detected varied from the Department's results for a variety of reasons. (Appellant's Exhibit 5.)
34. The Appellant also employed Anatek Labs to use its equipment that is more sensitive than the Department's to test the samples for spiromesifen. Appellant applied a pesticide that contained spiromesifen to corn field prior to the application on the Target Field and did not completely clean the tanks on his plane between the applications. Anatek Labs confirmed the presence of spiromesifen in samples taken from the foliage from the Target Field and foliage from the Timothy field. (Appellant's Exhibit 5.)
35. Appellant took foliage samples on September 13, 2014. Appellant collected sample numbers 3 and 8 from foliage from the Apple Orchard and the rest of the samples from hay fields to the north of the apple orchard (Appellant's Exhibit 23).

36. Appellant's sample numbers 3 and 8 from the Apple Orchard were positive for Lambda. (Appellant's Exhibit 5.)
37. The Department confirmed that on September 2, 3, and 4, 2014, Larry Anderson of Windflow had made an application of the pesticide Mustang to a hay field north of Road 24 SW between the Target Field (Department's Exhibit 11 and Appellant's Exhibit 23, indicated as field 5). The pesticide Mustang does not contain Lambda.

Findings Regarding Disputed Facts

38. During the aerial application the Appellant's nozzles did not leak because the GPS system and nozzle system functioned properly and the Appellant did not experience a "hammerhead" effect that would have been created by a leaky, open, or clogged nozzle.
39. The Farm Workers wore clean clothing to perform work on August 27, 2014, and did not use pesticides containing Lambda near or around their homes or housing units prior to August 27, 2014.
40. The Farm Workers observed the Appellant's plane fly near the area where they were working, but not directly over their work location.
41. The gastrointestinal symptoms are not identified as a reaction to exposure to Mana Silencer or Oro WetCit.
42. The direction of the wind and the wind speed at the time of the pesticide application cannot be determined.
43. There is insufficient information in the record to determine whether either Mana Silencer or Oro WetCit has an identifiable odor when sprayed from an aerial applicator.
44. Investigator West followed the Department's investigative procedures and manuals when collecting samples, conducting interviews, obtaining records, and collecting evidence. (Appellant's Exhibit 18.)
45. Joel Kangiser and Tim Schultz followed the Department's case review protocol and reviewed the entirety of evidence from Investigator West's investigation before issuance of the April 28, 2015, Notice of Intent to Assess a Civil Penalty and to Suspend License and Request for Hearing ("Notice of Intent").

46. Department personnel handled, transported, and analyzed the samples collected by Investigator West in accordance with the Department's' procedures. There is no evidence of improper handling, tampering, or contamination of the samples.
47. The Appellant's samples were not collected or stored according to a particular protocol, but the testimony of Mr. Beirele is credible regarding his knowledge of and use of proper handling and storage of foliage samples such that the samples were properly preserved.
48. The quantity of Lambda detected in the samples from the Department and the Appellant is inconsistent due to sample usage and the sensitivity of laboratory equipment. As a result there is insufficient evidence for the fact finder to draw any conclusions as to the quantity of Lambda the farm workers were exposed to during the aerial application.

Jurisdiction

49. On April 28, 2015, the Department issued Appellant a Notice of Intent.
50. On May 21, 2015, the Appellant filed a Request for Hearing with the Department.
51. The Department referred the matter to the Office of Administrative Hearings on July 10, 2015.

7. CONCLUSIONS OF LAW

Based on the facts above, the Administrative Law Judge makes the following conclusions:

Jurisdiction

1. The Office of Administrative Hearings has jurisdiction over the persons and subject matter of this case under RCW 15.54, 15.58, 17.21 and 34.05.

Burden of Proof

2. The preponderance of the evidence standard is the applicable burden of proof in this matter. *Thompson v. State Dept. of Licensing*, 138 Wn.2d 783, 797, 982 P.2d 601 (1999). "Preponderance of the evidence means that evidence sufficient to incline a fair and impartial mind to one side of the issue rather than the other."

Mendoza v. Dept. of Agriculture, 2006 Wash.App.LEXIS 2363 (Ct. App.Wa.II, No. 34262-6-II) citing *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005).

3. Substantial evidence must be presented and must be "sufficient to persuade a fair-minded person of the truth or correctness of the matter." *Ongom v. Dept. of Health*, 124 Wn App. 935, 948-49, 104 P.3d 29 (2005), *reviewed on other grounds*, 155 Wn.2d 1001, 122 P.3d 185 (2005).

Applicable Law

4. The State of Washington regulates the formulation, distribution, storage, transportation, and disposal of pesticide and herbicide's via the Washington Pesticide Control Act, RCW 15.58. The State of Washington regulates the application of pesticide and herbicides through the Washington Pesticide Application Act, RCW 17.21.
5. "The application and the control of the use of various pesticides is important and vital to the maintenance of a high level of public health and welfare both immediate and future, and is hereby declared to be affected with the public interest." RCW 17.21.010.
6. A "Pesticide" is defined as, but is not limited to:
 - (a) Any substance or mixture of substances intended to prevent, destroy, control, repel, or mitigate any insect, rodent, snail, slug, fungus, weed, and any other form of plant or animal life or virus, except virus on or in a living person or other animal which is normally considered to be a pest or which the director may declare to be a pest; and
 - (b) Any substance or mixture of substance intended to be used as a plant regulator, defoliant or desiccant; and
 - (c) Any spray adjuvant.

RCW 15.58.030(31); *see also* RCW 17.21.020(36).

7. Both Mana Silencer and Oro WetCit are pesticides and the labeling for each of these products can be summarized as requiring the applicator to use extreme care to avoid contact with humans and to avoid drift.

8. The Department issues licenses to persons to act as "private applicators," meaning the individuals are:

certified applicator[s] who use or is in direct supervision of the use of any pesticide classified by the EPA or the director as a restricted use pesticide, for the purposes of producing any agricultural commodity and for any associate non-crop application on land owned or rented by the applicator or the applicator's employer or if applied without compensation other than trading of personal services between producers of agricultural commodities on the land of another person.

RCW 17.21.020(38); see RCW 17.21.126.

9. The Appellant had a valid pesticide applicator's license from the Department at all times relevant to this matter.
10. As per the Washington Pesticide Control Act, it is unlawful "for any person to use or cause to be used any pesticide contrary to label directions or to regulations of the director if those regulations differ from or further restrict the label directions: PROVIDED, the compliance to the term contrary to label directions is enforced by the director consistent with the intent of this chapter . . ." RCW 15.58.150(2)(c).
11. "No person shall handle, transport, store, display, apply, dispose of or distribute pesticides in such a manner as to endanger humans and their environment . . ." WAC 16-228-1200(1).
12. "No person shall transport, handle, store, load apply or dispose of any pesticide, pesticide container, or apparatus in such a manner as to . . . cause damage or injury to . . . humans . . ." WAC 16-228-1220(2).

Analysis

13. The salient issue presented by this case is whether the Appellant's pesticide application to the Target Field drifted to the Apple Orchard in such a manner that the Farm Workers suffered the effects of the application.¹

¹ The Department does not allege that the Appellant operated in a faulty, negligent or careless manner. WAC 16-228-1500(1) and RCW 17.21.150(4).

14. While it cannot be determined by the evidence presented how the aerial application resulted in a pesticide drift, the Department has presented substantial evidence such that a fair-minded person can be persuaded that it is more likely than not the Appellant's aerial application of Mana Silencer and Oro WetCit drifted off the Target Field to the Appel Orchard where the Farm Workers were located.
15. There are three important and undisputed facts that lend themselves to this conclusion. First, both the Department's and the Appellant's samples from the Apple Orchard showed the presence of Lambda which is present in Mana Silencer. Second, the Farm Workers' consistently testified, and the testimony was corroborated by documentation, that they suffered eye, throat and respiratory irritation, and headaches, which is an identified adverse effect of Mana Silencer and Oro WetCit. Third, the Appellant is the only individual who engaged in an application of a pesticide that contained Lambda, i.e. Mana Silencer, within a one mile radius of the Apple Orchard prior to August 27, 2014.
16. Because the Mana Silencer and Oro WetCit labels provide that an application must avoid contact with human skin and eyes, and be conducted under certain conditions to avoid drift, it is concluded that the Appellant conducted the aerial application "inconsistent with labeling" in violation of RCW 15.58.150(2)(c).
17. Also, given that the Appellant's aerial application of the pesticides directly impacted the Farm Workers in the Apple Orchard to the extent that the Farm Workers left work and sought either medical treatment or recovery time, it must be concluded that the Appellant applied pesticide ". . . in such a manner as to endanger humans and their environment . . ." in violation of WAC 16-228-1200(1) and ". . . caused damage or injury to . . . humans . . ." in violation of WAC 16-228-1220(2).
18. Based on the findings of fact and conclusions above, it is concluded that the Department has shown by a preponderance of the evidence that the Appellant violated RCW 15.58.150(2), WAC 16-228-1200(1) and WAC 16-228-1220(2), and the April 28, 2015, Notice of Intent should be affirmed.

Penalties

19. The Department may "impose a civil penalty and/or deny, suspend, or revoke any license, registration or permit . . . in any case in which the director finds there has been a failure or refusal to comply with the provisions of" Title 15, Chapter 58. RCW 15.58.260.

20. "Every person who fails to comply with this chapter or the rules adopted under it may be subjected to a civil penalty, as determined by the director, in an amount of not more than seven thousand five hundred dollars for every such violation. Each and every such violation shall be a separate and distinct offense. Every person who, through an act of commission or omission, procures, aids, or abets in the violation shall be considered to have violated this section and may be subject to the civil penalty herein provided." RCW 15.58.335; *see also* RCW 17.21.315.
21. A 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." WAC 16-228-1110(6).
22. The Department may revoke or suspend a private applicator license "for cause." RCW 17.21.130.
23. The Department "may deny, suspend, or revoke any provision of a license . . . issued under chapters 17.21 and 15.58 if it is found that the . . . holder of the license . . . has committed any of the following acts each of which is declared to be a violation: . . . (b) . . . used a pesticide inconsistent with the labeling." WAC 16-228-1500(1)(a).
24. "(2) Any regulatory action taken by the Department against any person who violate the provisions of chapter 17.21 RCW, chapter 15.58 RCW, and/or 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." WAC 16-228-1110.
25. The Department assesses penalties as per WAC 16-228-1120 and the Penalty Assignment Schedule in WAC 16-228-1130. Penalties are calculated depending on the level of violation, adverse effect, and aggravating or mitigating factors. WAC 16-228-1120 and 1130.
26. An "adverse effect" means that "the alleged activity actually causes, or creates the possibility of damage, injury or public health threat, to humans, animals, plants, property or the environment." WAC 16-228-1110(1).
27. "Probable" means that the violator's "conduct more likely than not would have an adverse effect." WAC 16-228-1110(4). "Not Probable" means that the violator's "conduct more likely than not would not have an adverse effect." *Id.* at (3).

28. Based on the findings and conclusions above, the Appellant's activity actually caused, and more likely than not would have caused, injury and public health threat to humans. Therefore, it is concluded that a probable and adverse effect is present in this case.
29. A ". . . 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." WAC 16-228-1120.
30. A "first violation," for purposes of penalty imposition for a violation of RCW 15.58 and 17.21, means "the alleged violator committed no prior incidents which resulted in a violation or violation within three years of committing the current alleged violation." WAC 16-228-1110(2)(a).
31. There is no dispute that the Appellant did not commit a prior incident which resulted in a violation within three years prior to the issuance of the Notice of Intent, and therefore the violation alleged is considered a first violation.
32. According to the penalty schedule of WAC 16-228-1130, the median penalty for a first time violation where there is a probable adverse effect is \$450.00 and a seven (7) day license suspension per violation.
33. The Department' has provided sufficient evidence that the Appellant is subject to the median penalty for a first time violation where there is a probable adverse effect.
34. If "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 the revocation of the license." WAC 16-228-1120(4).
35. Aggravating factors include, but are not limited to ". . .(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)." WAC 16-228-1120(3).

36. While the Department may increase a civil penalty, the Department may also decrease the penalty when mitigating factors are present, such as: "(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) voluntarily taking for remedial measures that will result in increased public protection, or that will result in a decreased likelihood that the violation will be repeated." WAC 16-228-1120(5) and (6).
37. The maximum penalty for a first time violation where probable adverse effects are present with one or more aggravating factors is a \$550.00 civil penalty and a nine (9) day license suspension per violation. The maximum penalty allowed by WAC 16-228-1130, RCW 15.58.335 and RCW 17.21.315, is a \$7,500.00 civil penalty and a ninety (90) day license suspension.
38. The Department argues that it properly assessed a \$7,500 civil penalty and a ninety (90) day license suspension because of the aggravating factor that a large number of farm workers were affected by the Appellant's actions and the high magnitude of the harm or potential harms to those workers.
39. However, the Department provided no evidence that it considered the following mitigating factors: 1) the Appellant voluntarily self-reported the incident and requested the investigation; 2) the low degree and magnitude of harm to the farm workers, i.e. scratchy eyes, throats, and respiratory complaints and headaches; and 3) the Department did not allege, and there is not sufficient evidence of, the Appellant operating in a faulty, careless, or negligent manner. Additionally, the offense is an isolated first time offense and not a repeated pattern of incidents.
40. While it is recognized that the Department may use its discretion when assessing a penalty, the Department may not disregard mitigating factors in favor of aggravating factors. Because the Department did not provide any evidence that it considered the mitigating circumstances presented in this case when calculating the penalty, it must be concluded that the Department abused its discretion in assessing the penalty.
41. Accounting for the aggravating factors, the mitigating factors, and the available penalties in WAC 16-228-1130, it is concluded that a maximum penalty for a first time violation is more appropriate in this case. Therefore, the Notice of Intent is modified to assess a civil penalty of \$550.00 and a nine (9) day license suspension.

42. The Appellant advocates for the reduction of the violations to a Notice of Correction. A "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." WAC 16-228-1110(7).
43. The Department may choose not to assess a penalty or suspension and issue a notice of correction, as well as negotiate a settlement, as the Department deems appropriate. WAC 16-228-1150; see RCW 43.05.100.
44. The Department "may issue a civil penalty provided for by law without first issuing a notice of correction [as per RCW 43.05.100] if: . . . (3) the violation has a probability of placing a person in danger of death or bodily harm . . ." WAC 16-228-1115(2); see RCW 43.05.110.
45. Issuing a Notice of Correction instead of a Notice of Intent is within the sound discretion of the Department. Here, there is no support for the proposition that the Department has any obligation to exercise its discretion and issue a Notice of Correction for the violations as the Notice of Intent is legally and factual sound and supported by the evidence presented. Additionally, the violation, as found above, had the probability of placing a person in danger of death or bodily harm, and therefore, the Department has no obligation to issue a Notice of Correction before issuing a Notice of Intent.
46. The Department's Notice of Intent asserts that the Appellant is not entitled to waiver of a "penalty for a period of correction as not correction of the violation is possible and the violation presents a direct danger to public health or poses a potentially significant threat to human health or poses a potentially significant threat to human health or the environment." RCW 34.05.110(3).
47. While the Department has incorrectly cited to subsections (3) and (4) of RCW 34.05.110 that apply to waivers of penalties for "first-time paperwork violations," RCW 34.05.110(1) provides for a period of correction of seven (7) days before imposing fines and penalties. In this case the period of correction is not possible because the Appellant's actions are not correctable and the Department is acting in response to a complaint made by a third party. Therefore the requirement of a period of correction would not apply and the Appellant is not entitled to relief under RCW 31.05.110(1).

8. INITIAL ORDER

1. The Department of Agriculture's Notice of Intent to Assess a Civil Penalty and to Suspend License and Notice of Rights and Opportunity for Hearing, No. PM-15-00005 is AFFIRMED as to the alleged violations.
2. The Department of Agriculture's Notice of Intent to Assess a Civil Penalty and to Suspend License and Notice of Rights and Opportunity for Hearing, No. PM-15-00005 is MODIFIED as to the penalty assessment. The Appellant is liable for a civil penalty of \$550 and a nine (9) day license suspension.

Signed and Issued from Tacoma, Washington on date of mailing.



Courtney Beebe
Administrative Law Judge
Office of Administrative Hearings

Certificate of Service Attached

Appeal Rights Initial Order

PETITION FOR REVIEW

Any party to this proceeding may file a Petition for Review of this initial order. The written petition for review must be mailed to the Department of Agriculture at:

Head Review Officer
Department of Agriculture
1111 Washington St. SE
PO Box 42560 (Mail Stop: 42560)
Olympia, WA 98504-2650

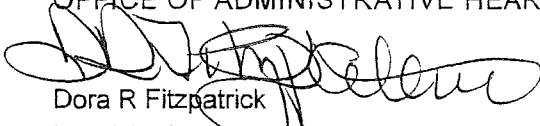
The petition for review must be **received** by the Department within **twenty (20) days** from the date this initial order was mailed to the parties. A copy of the petition for review must be sent to all parties of record. The petition for review must specify the portions of the initial order with which the party disagrees, and must refer to the evidence in the record which supports the party's position. The other party's reply must be **received** at the address above within **twenty (20) days** from the date the petition for review was mail.

CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 07-2015-AGR-00004

I certify that true copies of this document were served from Tacoma, Washington upon the following as indicated:

<p>Lenard Beierle Ag Air Flying Service Inc 101 Van Avenue Toppenish, WA 98948 Appellant</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Timothy M Coleman Attorney at Law 1030 N Center Parkway Ste 119 Kennewick, WA 99336 Appellant Representative</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Kristen Mitchell Agriculture and Health Division Office Of The Attorney General Po Box 40109 Olympia, WA 98504-0109 Department Representative</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Christopher P. Wright Office of the Attorney General 7141 Cleanwater Drive SW Olympia, WA 98504 Department Representative</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Tim Schultz, Case Review Officer Washington State Department of Agriculture PO Box 42589 Olympia, WA 98504-2650 Agency Contact</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Elizabeth McNagny, Head Review Officer Department of Agriculture 1111 Washington St. SE PO Box 42560 Olympia, WA 98504-2650 Agency Contact</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>

Date: Wednesday, April 27, 2016

OFFICE OF ADMINISTRATIVE HEARINGS

 Dora R Fitzpatrick
 Legal Assistant