

NOTICE OF PROPOSED RULE

DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

DIVISION OF AGRICULTURAL ENVIRONMENTAL SERVICES

BUREAU OF ENTOMOLOGY AND PEST CONTROL

RULE CHAPTER TITLE:

RULE CHAPTER NO.:

Entomology –Pest Control Regulations

5E-14

RULE TITLE:

RULE NO.:

Enforcement and Penalties

5E-14.149

PURPOSE, EFFECT AND SUMMARY: The purpose of the rule amendment is to adopt the enforcement guidelines and penalties into rule. The Department’s purpose in applying these guidelines is to achieve compliance with Chapter 482, Florida Statutes (F.S.).

SUMMARY OF STATEMENT OF ESTIMATED REGULATORY COST: No SOERC has been prepared. Any person who wishes to provide information regarding the SOERC or to provide a proposal for a lower cost alternative must do so in writing within 21 days of this notice.

SPECIFIC AUTHORITY: 482.051, 482.163, and 482.165 F.S.

LAW IMPLEMENTED: 482.161, 482.163, and 482.165 F.S.

A RULE HEARING WILL BE HELD AT THE TIME, DATE AND PLACE SHOWN

BELOW:

TIME AND DATE: March 2, 2006 at 10:00 a.m. until conclusion.

PLACE: 1911 SW 34th Street, Doyle Conner Building Auditorium, Division of Plant Industry, Department of Agriculture and Consumer Services, Gainesville, Florida. Tel: 352-372-3505.

THE PERSON TO BE CONTACTED REGARDING THE PROPOSED RULE IS: Mr.

Steven Dwinell, Assistant Director, Department of Agriculture and Consumer Services, Room 130, 3125 Conner Blvd., Tallahassee, Florida 32399-1650.

THE FULL TEXT OF THE PROPOSED RULE IS:

5E-14.149 Enforcement and Penalties

(1) List of Penalties. The Department will apply one or more of the following penalties for violation of Chapter 482, F.S., or Chapter 5E-14, F.A.C., or as provided in Chapter 482.161, F.S.

(a) Denial of an application for licensure or license renewal and/or permits or refusal of a pest control registration, license, and/or permit.

(b) Revocation or Suspension of any license including permits.

(c) Warning Letter.

(d) Probation for a specified period of time not to exceed two years subject to conditions.

(e) Administrative fine not to exceed \$5,000 for each violation.

(f) Criminal prosecution by referral to the State Attorney under sections 775.082 and 775.083, F.S.

(g) Injunctive relief.

(h) Issuance of a Cease and Desist Order, Immediate Stop Use or Stop Work Orders.

(i) Institution of an action under Chapter 501, Part II, for violations involving deceptive and unfair trade practices where the legal remedies provided under Chapter 501, Part II, are needed to further protect consumers or recover damages associated with identified violations.

(2) Violation and Repeat Violation. Each and every breach of F.S. 482 and related rules, or part thereof, is a violation. A repeat violation is a violation for which the person has been previously disciplined within the last three (3) years.

(3) Category of Violations. Minor violations are all violations other than those classified as major

violations. Major violations are violations where:

(a) Death or serious bodily harm requiring medical attention to humans or veterinary attention to animals occurs as a result of misuse of a pesticide or mismanagement of another pest control method, and the injury or death is attributable to the misuse or mismanagement.

(b) Misuse of a highly toxic pesticide (Category I, Danger signal word) is documented and such a misuse could result in death or serious bodily harm to humans or animals, but where the death or injury did not occur.

(c) The licensee, certificate holder, permit holder or applicator causes serious harm to an ecological system, or contamination of water or soil requiring corrective action or monitoring to protect human or animal health or the environment as a result of misuse of a pesticide or mismanagement of another pest control method.

(d) The licensee, certificate holder, permit holder or applicator deliberately makes false or fraudulent claims with respect to pest control; deliberately misrepresents the effects of materials or methods used in pest control, or deliberately fails to use materials or methods suitable for the pest control undertaken.

(e) The licensee, certificate holder, permit holder or applicator performs pest control in a manner that is culpably careless or without prudent care; fails to comply with Section 5E-14.106 (6), (7), or (8); or uses a fumigant in a manner that is inconsistent with its label directions or the requirements of Sections 5E-14.108, 109, 110, 111, 112, or 113.

(f) The licensee, certificate holder, permit holder or applicator fails to give the Department or representative true information in response to a written request within 14 business days regarding methods and materials used, work performed, or other information essential to the administration of Chapter 482, F.S.

(g) The licensee, certificate holder, permit holder or applicator performs or causes fraudulent or misleading advertising relative to pest control or advertises in an unauthorized category of pest control.

(h) The licensee, certificate holder, permit holder or applicator misuses a pesticide, performs a faulty inspection for wood destroying organisms, or fails to comply with the terms of a wood destroying organism protection contract, and such action results in property damage exceeding \$2500.

(i) The licensee, certificate holder, permit holder or applicator violates any Immediate Final Order, Emergency Suspension Order, Stop Use, Stop Work, Settlement Agreement, Consent Order, Final Order, or any other order of the Department, issued under the authority of Chapters 120 or 482, F.S., or Chapters 5E-14, F.A.C.

(j) The licensee, certificate holder, permit holder or applicator commits fraud or deceptive trade practices.

(k) An individual or business performs pest control without holding a valid license from the Department.

(5) **Default.** A violator's failure to respond to an administrative complaint may result in a waiver of rights to a hearing and the Department may enter a Final Order imposing up to the maximum penalties as authorized by Florida law, including suspension of the violator's license and/or permit.

(6) **Denial.** The Department will deny application for licensure if:

(a) a person fails to comply with the licensing and/or permit requirements of Chapter 482, F.S., or Chapter 5E-14, F.A.C., or

(b) all outstanding fines owed to the Department are not paid in full, or

(c) a person has been convicted of any felony under state or federal law involving robbery, bribery,

extortion, embezzlement, grand larceny, burglary, arson, murder, rape, assault with intent to kill, assault that inflicts grievous bodily injury, kidnapping, prostitution, child abuse, child pornography, sexual assault or indecent exposure. If civil rights have been restored, the Department will not deny licensure based on conviction for these crimes.

(7) Warning Letters. For first time, non-major violations, the Department will issue a Warning Letter that is the equivalent of a Notice of Noncompliance. These will be automatically imposed if persons fail to respond to the administrative complaint issuing the warning letter.

(8) Fines. For repeat non-major violations, multiple violations including at least one major violation, and all major violations, including those violators who do not respond to an administrative complaint, the Department will impose an administrative fine not to exceed \$5,000 per violation plus any other penalty allowed by law including suspension or revocation. When imposing a fine, the Department will consider the degree and extent of harm, or potential harm, that was or could have been caused by the violation, the cost of rectifying the damage minus the actions taken by the licensee or certified operator or applicator to correct the violation or remedy complaints, whether the violation was committed willfully, the compliance record of the violator, and the costs to the Department of investigating the violation. The Department will use the attached Fine Guide to assist it in determining the appropriate amount of the fine.

(9) Suspension and Revocation. Suspension or Revocation, or probation subject to the provision of Section (10) below, will be imposed when:

(a) The violation results in death of humans or animals, or injury requiring hospitalization to humans.

(b) The violation results in serious harm to an ecological system, or contamination of water or soil requiring corrective action or monitoring to protect human health or the environment.

(c) The compliance record of the violator shows two or more prior violations for similar major violations within the last (3) years.

(d) It is necessary to prevent ongoing or future violations.

(e) It is necessary to protect the public health, safety or welfare.

(f) The licensee, certificate holder, permit holder or applicator has habitual intemperance or addiction to narcotics to the extent that it contributes substantially to the occurrence of violations of Chapter 482,F.S..

(g) The licensee, certificate holder, permit holder or applicator has obtained licensure under Chapter 482, F.S., and the Department subsequently determines that the licensee, certificate holder, permit holder or applicator is or has been convicted in any state or federal court of a felony involving robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, murder, rape, assault with intent to kill, assault that inflicts grievous bodily injury, kidnapping, prostitution, child abuse, child pornography, sexual assault or indecent exposure, unless civil rights have been restored .

(h) A licensee or certificate holder has been found by the Department to be in violation of Chapter 482.121, F.S.

(i) When a permit holder pursuant to Section 482.0815(4) or (6), F.S., meets the conditions therein.

(10) Probation. The Department will impose up to a two-year probation on a violator when suspension or revocation is indicated per Section (9) above, but the Department determines that suspension or revocation will be detrimental to the public, result in loss of wood destroying organisms protection contracts for which consumers have paid, or is unnecessarily harsh under the circumstances. Probation will include requiring the violator to do one or more of the following: pay

investigative costs, attend continuing education classes, demonstrate competency through a written or practical examination, provide prior notice of certain regulated actions, satisfy existing or future consumer complaints, or engage in other corrective measures..

(11) Investigative Costs. The Department will charge for investigative costs when probation is imposed and investigations that document major violations require more than one inspection, more than one inspector, or the use of Department staff outside of the Division of Agricultural Environmental Services, or when probation is imposed as per Section (10) of this part.

Investigative costs are comprised of the following: Inspectors time, Bureau personnel time, travel expenses, and other incidental expenditures related to the case.

(12) Quarterly List. All disciplinary actions taken by the department pursuant to Chapter 482, Florida Statutes or the rules adopted pursuant to it, shall be published in the next available quarterly list published as required in section 482.161 (9), F.S., and on the Department's website and shall include the identity of each individual or entity against which disciplinary action was taken, and a brief description of the offense and the disciplinary action, whether it was a warning letter, fine, probation, suspension or revocation. If the violator is other than a business licensee, the registered name of the business licensee that employed the violator at the time of the violation and the county or city in which the violator's business address is located will be listed. If the violator operated an unlicensed pest control business the name of the unlicensed business will also be listed.

(13) Resolution of Violations, Settlement, and Additional Enforcement Remedies. The Department and the violator may agree to resolve violations prior to administrative action, or to enter into settlement pursuant to section 120.57(4), F.S. The willingness of a violator to resolve

violations prior to initiation of administrative action, or to settle will be considered in determining the appropriate penalty because early resolution of violations furthers compliance and results in savings of time, costs, and expenses for the Department. The Department will enforce a failure to comply with an agreement to resolve violations or a settlement agreement with the penalties and remedies provided in the agreement and/or as authorized by law. These enforcement guidelines shall not be construed to limit the authority of the Department to resolve violations prior to or after initiation of any administrative action or to settle with any party. The Department may utilize all available remedies to ensure voluntary compliance including administrative action, civil actions, referrals for criminal prosecution, and deceptive and unfair trade practices actions pursuant to Chapter 501, Florida Statutes.

(14) Follow-Up Compliance Inspections. If the violator agrees to corrective actions and subsequent inspection reveals that corrective actions have not been taken or that good faith efforts to undertake these corrective actions have not been made, then the Department will enforce the penalties and remedies provided in the agreement and as authorized by law.

(15) Notification of Licensees, Certificate Holders, and Identification Card Holders of Complaint.

When the Department receives a written complaint from a consumer regarding a licensee, certificate holder, permit holder or applicator, the Department will send a notice to the responsible person and to the licensee, stating the complaint, identifying the complainant and requesting a written response within 10 working days.

(16) Fine Guide.

FINE GUIDE = A(B+C+D+E+F)G . This guide shall apply for each violation for which a fine is imposed. The maximum fine is \$5,000 per violation. The terms and values used in the fine guide

calculation shall be:

A = Degree & Extent of Harm -- Human, animal & environmental hazards occur as a result of pesticide misuse or mismanagement of another pest control method:

1 Human, animal or environmental harm not identified

5 Death of animals or injury to humans or animals requiring hospitalization, or serious harm to an ecological system, or contamination of water or soil requiring corrective action or monitoring to protect human health or the environment

7 Human death

B = Toxicity of the pesticide for which a pesticide misuse or violation of label directions which could result in human or animal hazards:

0 No pesticide involved in complaint

1 Category III or IV - Signal Word "Caution"

2 Category II - Signal Word "Warning"

3 Category I - Signal Word "Danger"

C = Estimated cost of rectifying the damage to consumer minus any mitigation provided by the violator

1 Unknown or under \$1,000

2 Over \$1,000 and under \$5,000

3 Over \$5,000 and under \$10,000

4 Over \$10,000

D = Whether the violation was committed deliberately

1 No evidence violation was committed deliberately

5 Evidence violation was committed deliberately

E = Compliance record of the violator

0 No prior violations

1 One prior violation for a dissimilar violation

2 Two or more prior violations dissimilar to current violation

3 One prior violation for a similar violation

4 Two or more prior violations for similar violations

F = Investigative Costs

0 Routine investigation or Payment of all investigative costs

2 Violation documented as a result of more than one inspection or requiring investigation by multiple inspectors, or by department personnel outside of the division of Agricultural Environmental Services

G =Entity Category

500 Business licensee responsible for violation, or person operating a pest control business without a valid business license

250 Certified Operator or Special Identification Cardholder responsible for violation

100 All others

Compliance record. The compliance record is established by prior disciplined violations, within the three (3) years preceding the date of the current violation, of Chapter 482, F.S., or of Chapters 5E-14, F.A.C., or of federal or other Florida law addressing pest control or pesticide use or disposal. Violations will be considered final on acceptance of the applicable penalty, or the date of final

agency action or the conclusion of any appeals thereof. Specific Authority 482.051, 482.163, 482.165, 570.07(23), F.S. Law Implemented 482.161, 482.163, 482.165, 570.07(36), F.S. History-New

NAME OF PERSON ORIGINATING PROPOSED RULE: Mr. Steven Dwinell, Department of Agriculture and Consumer Services, Room 130, 3125 Conner Blvd., Tallahassee, Florida 32399-1650.

NAME OF SUPERVISOR OR PERSON WHO APPROVED THE PROPOSED RULE: Dr. Joanne Brown, Deputy Commissioner, Department of Agriculture and Consumer Services.

DATE PROPOSED RULE APPROVED BY AGENCY HEAD: September 10, 2003.

DATE NOTICE OF PROPOSED RULE DEVELOPMENT PUBLISHED IN FAW: December 10, 2004 (Vol.30, No. 50) and July 15, 2005 (Vol.31, No. 28).