

# DEVELOPING AN EFFECTIVE, EFFICIENT SYSTEM TO ASSESS FINANCIAL PENALTIES FOR PESTICIDE LAW VIOLATIONS

by

Kyle L. Ellefson

Pesticides are highly regulated by state and federal agencies, with states having primary enforcement authority over pesticide use violations within their state. Federal regulations provide the basis for state regulation, but states supplement federal regulations with unique state regulations in order to effectively address pesticide misuse within their state. In this research, penalty assessment processes and practices in Wisconsin are compared to the processes and practices of other states. Wisconsin's current method to assess and collect financial penalties involves multiple steps, significant legal formality and requires a District Attorney to file legal documents for the Department, even in cases where the violators do not contest the violations or penalties. An analysis of other states revealed that the dollar amounts assessed for violating of Wisconsin's pesticide regulations falls generally in line with most of the states evaluated. However, no other state evaluated utilizes a penalty assessment system similar to Wisconsin's. Nearly all states evaluated in this research utilize an administrative method, as part of an overall program of compliance enforcement options, to assess and collect financial penalties for pesticide misuse without requiring formal court action. This research suggests Wisconsin maintain all current compliance options to address pesticide misuse, in addition to establishing an administrative system for assessing and collecting financial penalties.

DEVELOPING AN EFFECTIVE, EFFICIENT SYSTEM TO ASSESS FINANCIAL  
PENALTIES FOR PESTICIDE LAW VIOLATIONS

by

Kyle L. Ellefson

A Field Project Submitted  
In Partial Fulfillment of the Requirements  
For the Degree of

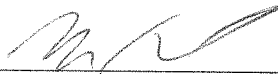
Master of Public Administration

at

The University of Wisconsin – Oshkosh  
Oshkosh WI 54901-8621

May 2015

COMMITTEE APPROVAL

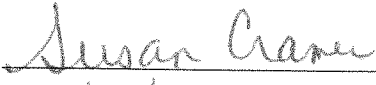
 Advisor

5/14/15 Date Approved

 Member


May 15, 2015 Date Approved

DEAN OF GRADUATE STUDENTS



5/15/2015 Date Approved

FORMAT APPROVAL



5/7/15  
Date Approved

## TABLE OF CONTENTS

CHAPTER I – TOPIC	1
CHAPTER II – OBJECTIVES	3
CHAPTER III – SCOPE	4
CHAPTER IV – SIGNIFICANCE	6
CHAPTER V – BACKGROUND	8
CHAPTER VI – METHODOLOGY	12
CHAPTER VII – LITERATURE REVIEW	14
CHAPTER VIII – REVIEW OF PROGRAMS IN OTHER STATES	20
CHAPTER IX – COMPARATIVE ANALYSIS	30
CHAPTER X – RECOMMENDATIONS	32
CHAPTER XI – CONSIDERATIONS AND IMPLICATIONS	37
REFERENCES	39

## CHAPTER I - TOPIC

More than a billion pounds of pesticides are produced each year for use in the United States (Redfield, 1984, p. 859). Pesticides are highly regulated by state and federal agencies, with most pesticide regulation and enforcement taken by each State individually. “While the basic concepts of the regulation of pesticides are derived from the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), much of the legislative initiative to control [pesticides] has evolved within the states and shows an impressive variety in approach” (Redfield, 1984, p. 859). The provision for each state to lead pesticide regulatory efforts in their state, in line with broad federal regulations, allows each state to serve as a laboratory, where the regulation of pesticides is accomplished by recognizing the unique circumstances of each state in developing individualized regulation and enforcement of federal pesticide regulation. In Wisconsin, the Department of Agriculture, Trade & Consumer Protection (DATCP) is responsible for regulating pesticide sale, distribution, handling, and use, as well as licensing and certifying the individuals and businesses involved in these activities. Each year hundreds of pesticide violations are documented, and many require formal enforcement action by the Department. The existing compliance structure set in place by State Statute involves a single stream financial penalty process involving administrative conferences, settlement negotiations, and multiple legal documents to obtain civil forfeitures for pesticide violations. The result of this compliance structure is that even the most routine violations

take months of preparation and processing before violations can be settled. Alleged violators, even when they readily acknowledge culpability and volunteer payment of a penalty, must go through the same lengthy process as those contesting their violations or financial penalties.

## CHAPTER II - OBJECTIVES

This research will document various compliance structures and practices related to assessing and collecting financial penalties for pesticide-related violations. The research will focus extensively on Wisconsin's current practices in this regard, and will ultimately yield suggestions for alternate or supplementary compliance programs. To further the research, several regional states will be evaluated for their pesticide compliance practices, including Illinois, Indiana, Iowa, Michigan, Minnesota, and Nebraska. Overall, at least 20% of the states in the United States will be evaluated for their compliance actions and penalties associated with pesticide regulation. Each compliance structure will be detailed, documented, and assessed with uniform criteria related to their respective compliance process, penalty levels, venue, and disposition of penalty funds. This research will evaluate the current state of pesticide compliance activities in Wisconsin, and explore existing statutory authority. The critically important result of this research are policy recommendations that can be implemented in whole or part to enhance the efficiency and effectiveness of the compliance structure as it relates to obtaining financial penalties for violating Wisconsin's Pesticide Law. Policy recommendations, which may require statutory or rule changes, will provide a blueprint for other state agencies to enhance their own compliance penalty procedures.

### CHAPTER III - SCOPE

To be broadly effective and readily useable, research boundaries must be clearly defined. This research, while in part evaluating and exploring enforcement programs from other states, will deal primarily with recommendations related to Wisconsin statutory and administrative law. Due to the complex nature of pesticide regulation and the relationship between state and federal regulatory responsibilities, the comparative analysis of specific pesticide regulation programs is limited to states within the United States of America. Each state contiguous to Wisconsin (Illinois, Iowa, Michigan and Minnesota) will be included in the evaluation, as will California, Indiana, Nebraska, Ohio and Virginia.

For this research, to the extent possible, definition of common terms will match current federal and state regulatory definitions. Civil forfeitures include any financial penalty paid to the state or local court system. Administrative forfeitures include any financial penalty paid directly to the regulatory agency or state government without first going through a state or local court system. Citation authority means the ability of a regulatory agency to directly file an action against an alleged violator with a state or local court, in order to levy a financial penalty. Funds received as a result of a penalty assessment will also be evaluated for the relationship between penalties and use of those funds.

This research is limited by several factors, and should be consumed with that reality in mind. Time is a limiting factor in that this research period which could span several years will only span several months, and will conclude once the research goals have been adequately accomplished. Since each state develops a unique blend of regulations, penalties and processes, this research will briefly describe the penalty process, levels, and methods for each state evaluated, it is important to recognize that state compliance programs are rich in complexity, and some nuance is likely missed in research at this broad level of diligence. This research is also limited in its reliance on multiple statutes, codes, laws, and regulations. The positive aspect of those legal references is they are facts, and they provide a legal framework for states to operate their pesticide penalty processes. Conversely, common and informal practices within each state may not be evident after a thorough review of the law, and may be overlooked by this outside research. Finally, quality research is often completed in a relative vacuum of influence and direction. Essentially, without invitation, research endeavors to develop solutions that may predate a perceived need, may interject proposed frameworks incompatible with existing practices, and may devote insignificant attention to political, commercial, and cultural realities. Furthermore, even the best, most promising research solutions are developed as theory, and are likely to struggle in transition from theory to practice. Success for this research cannot be benchmarked on what, if any, of the recommendations are adopted in time, but on discussions inspired, evaluations conducted, programs enhanced, or efficiencies realized.

## CHAPTER IV - SIGNIFICANCE

The statewide impact of any changes in the pesticide enforcement penalty process are arguably insignificant to most people and businesses across the state. Much of this regulatory work goes unnoticed by the general public, and the very success of the program may mean the program remains relatively anonymous. However, the lack of awareness of this program belies the importance of this research to the department, Wisconsin citizens and businesses, and other regulatory programs in Wisconsin and elsewhere. In the end, “Government wants a justice system where problems can be solved simply, quickly and affordably, achieving earlier solutions and faster justice” (British Columbia, n.d.). If this research develops efficiencies within this program, unrelated programs may find valuable tools and practices that they, in turn, can use to gain efficiency in their program area.

Governments need to find innovative solutions for delivering services that cut costs while delivering value, as budgets are increasingly challenged (Wisconsin Office of the Governor, n.d.). If the current system is inefficient, time, money and other resources are needlessly expended. Scott Walker, Wisconsin’s Governor, notes that if wasteful spending continues, “Wisconsin families would be paying thousands more than what they pay...to operate state government” (Wisconsin Office of the Governor, n.d.). Walker also recognized that by, “becoming more efficient and controlling the cost of state

government, it can be more nimble and have more resources to react to the future needs of the state” (Wisconsin Office of the Governor, n.d.).

## CHAPTER V - BACKGROUND

State primacy is an important concept to consider as it relates to the State of Wisconsin's pesticide regulation and enforcement practices. "States have primary enforcement responsibility for pesticide use/misuse violations under sections 26 and 27 of the Federal Insecticide, Rodenticide and Fungicide Act (FIFRA)" (United States Environmental Protection Agency, n.d.). FIFRA delegates states the authority to, "regulate the sale or use of any federally registered pesticide or device in the state," to the extent that the state must not allow any sale or use prohibited by FIFRA (United States, 2012, p. 89) FIFRA also states in part, "For the purposes of this Act, a state shall have primary enforcement responsibility for pesticide use violations" (United States, 2012, p. 94). Wisconsin, and each of the states evaluated in this research, has enforcement primacy for pesticide use violations occurring within each respective state.

Pesticide use violations in Wisconsin are addressed using a spectrum of enforcement techniques, broadly separated into compliance assistance, warnings, and formal enforcement (Wisconsin Department of Agriculture, Trade and Consumer Protection, 2009, p. 1-2). While this research focuses solely on formal enforcement practices, it is important to note that other enforcement options exist, and that formal enforcement is a portion of a larger compliance strategy. As previously detailed in Chapter III, the only formal enforcement actions considered here are the civil complaint

and forfeiture. Formal enforcement actions such as Administrative Complaints, Criminal Complaints, Special Orders, and other administrative actions remain unevaluated here.

When DATCP seeks civil financial penalties for pesticide-related violations occurring in Wisconsin, it must use the State of Wisconsin Circuit Court System. DATCP has no legal authority to collect financial penalties for pesticide violations directly, and must rely on a prosecutor from the County District Attorney's Office to process, file, and defend civil forfeiture cases. Civil Forfeiture funds are ultimately divided between the County of violation and State of Wisconsin education funds. DATCP, therefore, receives no direct or indirect revenue from any financial penalty obtained subsequent to a violation of DATCP regulations. Penalty provisions related to pesticide use violations are established by Wisconsin Statute 94, and include Civil Forfeiture penalties for first violations of between \$100 and \$500, and for second or subsequent violations occurring within five years, Civil Forfeiture penalties between \$200 and \$1,000 (Plant Industry, n.d.). Additionally, because the Civil Forfeitures are processed through the Circuit Court System, certain mandatory assessments are added on to the civil forfeiture, increasing the cost to the Defendant. For example, a Defendant paying a \$100 civil forfeiture for a pesticide use violation will pay an additional \$163.50 in fees and assessments, resulting in a total payment to the Clerk of Circuit Court of \$263.50 (Wisconsin Court System, 2014).

The process of obtaining a civil forfeiture can be potentially cumbersome and inefficient, requiring multiple steps be completed for even minor, uncontested

circumstances. Upon completing an investigation into alleged pesticide mis-use, DATCP evaluates all violations, and an enforcement determination is made. If formal enforcement action of the civil forfeiture variety is necessary, a compliance conference is scheduled with the Defendant or Defendants, either at the DATCP office in Madison, or when appropriate, at a location closer to the Defendant. DATCP compliance conferences are used to discuss the circumstances of an investigation and the details of the violations discovered. During the compliance conference, DATCP proposes a settlement offer including specific charges and a civil forfeiture amount. Once a voluntary agreement is reached, DATCP must then draft a Civil Forfeiture Complaint alleging the details of each charged violation, a Stipulation for Civil Forfeiture documenting the agreement to settle the case voluntarily for a specified civil forfeiture amount, and a Judgment and Order accepting the Complaint and Stipulation for signature by a Judge. Each of these documents are multiple pages in length, and demand significant legal review prior to being released for use. Once the legal documents are drafted and reviewed for legal sufficiency, they must be delivered to the Defendant, the Defendant's signature must be obtained, and often a payment in the name of the County Clerk of Circuit Court must be obtained by DATCP staff prior to the case being filed with the County District Attorney. Once the preceding steps are complete, DATCP contacts the District Attorney to schedule a meeting to discuss the case. When DATCP meets with the District Attorney, they explain the Department's authority, the case details, importance of the regulations violated, and the Defendant's agreement to the settlement. In the event DATCP is unable

to reach a voluntary settlement with a Defendant, the case and all violations are forwarded to the District Attorney for prosecution.

In 2014, out of 178 overall compliance actions, DATCP initiated formal enforcement action against 71 Defendants related to pesticide use violations. In each of these instances, DATCP sought civil forfeitures (Overman, 2015).

## CHAPTER VI - METHODOLOGY

This research utilizes multiple approaches to explore the issue of effective and efficient pesticide regulation. First, a review of existing literature will provide a summary of current views on administrative regulation. Next, information regarding similar regulatory programs in other states will be defined, evaluated, and compared. Finally, based on the accumulated information, a policy recommendation will be made, along with procedural details and additional considerations.

Because Literature review on such a precise policy area may struggle to find exceedingly relevant material, the type and focus of literature reviewed in this research is varied. Information for multiple federal regulatory programs are evaluated, in addition to a less significant representation of non-pesticide state programs, and a single source from Canada. Given the limited connection between the research subject and the available literature, this research will identify significant concepts within the literature, and correlate those concepts to the research at hand.

To develop a robust base for comparative analysis, a minimum of nine states are selected for description and evaluation. Each of the states contiguous to Wisconsin; Illinois, Iowa, Michigan, and Minnesota, were selected for analysis due to their proximity, geographic and cultural interrelationships. Three “regional” states contiguous to the states surrounding Wisconsin; Indiana, Nebraska and Ohio, were also selected. The final two states were chosen from outside of the Wisconsin region representing

distant regions of the United States, including California and Virginia. Research will consist of researching statutory and administrative laws in each state, reviewing government publications for relevant information, and corresponding with relevant program staff to gather information as necessary.

To propose a comprehensive compliance policy, this research is not encumbered by choosing entire programs or methods. Instead, this research will suggest a composite program and policy born from the best elements and components from pesticide enforcement programs across the country. In developing the policy recommendation, this research will be guided by overarching principles of consistency, fairness, legal protection, efficiency and effectiveness in the enforcement of pesticide use violations.

## CHAPTER VII - LITERATURE REVIEW

Existing literature provides perspective to this research, although little research deals with the specific circumstances existing here. Given the lack of direct research, research in other disciplines must be evaluated for relevance and applicability.

In 2012, Max Minzner published his research on the justification for regulatory punishment, as well as how penalty levels and processes influence violators and potential violators. Minzner establishes that by themselves regulatory agencies have no authority to collect financial penalties, unless and until the legislative bodies authorize an agency to do so. That recognition is as simple as it is important, because while an agency may have robust plans to regulate an industry with a financial penalty matrix, the authority lies outside of the agency's control. Minzner describes civil penalties as a middle ground, resting somewhere between warning letters and criminal penalties, enabling a tailored regulatory response. Minzner notes that regulatory punishment can serve one or more purposes, including deterrence, retribution, reimbursement, or disgorgement. Minzner discusses the utility of penalties to curb violations, and notes that some penalties are designed to raise the cost of misconduct higher than the cost of compliance, creating an economic incentive to comply. Minzner asserts that when considering civil penalty processes, violations should be expected whenever the potential gain or savings of a violation outweigh the civil penalties. Minzner further clarifies that in addition to the potential or expected gain and the amount of the penalty, the last remaining factor is the

probability that a violation is detected. So, even in compliance structures with significant penalty levels, the level of deterrence is limited by a lack of inspection or investigation efforts. Minzner proposes that in determining penalty levels, agencies should focus primarily on the likelihood of the violation being detected and the expected harm from a violation to determine the penalty amount. Minzner writes that violators must either bear the costs they have imposed, or at least be deprived of any gains they realize from misconduct (Minzner, 2012).

In 2008, the Province of British Columbia (BC) in Canada issued a discussion paper concerning the development of an administrative monetary penalty system in their Province, subtitled their paper, “A Framework for Earlier and More Effective Regulatory Compliance.” BC notes the need for effective regulatory enforcement tools, and suggests that administrative monetary penalties (AMPs) provide greater flexibility, efficiency, and effectiveness. When AMPs are used, the author argues those attributes result in higher levels of compliance for less serious violations, and as part of an overall compliance “tool box,” allows for a more nuanced approach to regulatory compliance efforts. By conserving legal and judicial resources by using an AMP system, those traditionally used resources are then available for the most serious cases of noncompliance. The discussion paper considered the risks associated with the lower legal protection provided to violators when using an AMP system, and suggested the following essential elements:

- “making a range of enforcement options available;

- clear indication of the amount of discretion and how to be exercise this discretion;
- limits on the penalty amount that can be levied;
- notice, including the amount, reasons, due date, any appeals or reviews;
- separation of inspection and enforcement roles;
- sentencing guidelines for criminal prosecution;
- communication of penalties to the regulated community at large;
- provisions for the penalization of directors and/or officers of corporations;
- provisions for appeals of AMPs to specialized agencies, if practical; and
- penalty funds collected should not be directed to the benefit of the regulator” (British Columbia, n.d.).

The author indicates that the overarching goal of an AMP system is to encourage and enhance compliance. That goal is achieved by using a system that incorporates responsiveness, proportionality, fairness, equity, deterrence, punishment, and reparation for damages. The paper recognized several benefits regarding reduced procedural and legal requirements in an AMP system, including reduced resolution timeframes, increased flexibility and penalty customization, reduced enforcement costs, and the lack of a public stigma for violators. The paper also noted that in narrow or specialized subject areas, traditional courts often lack specific program knowledge, fail to understand the relative importance of particular violations and industry norms, and often defer to the expertise of the regulatory agency. The authors noted that the AMP system is better

suited to address situations that create the potential for harm, since traditional criminal penalties are not imposed until harm has occurred. AMP systems can easily incorporate other elements of compliance action, such as compliance agreements requiring a violator to correct or improve something, since those compliance agreements may include contingencies that reduce the AMP based upon adherence to the compliance agreement. While this discussion paper is written for use and consideration in a Canadian Province, many of the elements appear to fit well with regulatory operations and due process protections within the United States (British Columbia, n.d.).

In 2013, the U.S. Environmental Protection Agency (EPA) Office of the Inspector General (OIG) published a report evaluating the agency's pesticide enforcement penalty policies and practices. The OIG report identified several compliance goals for the EPA enforcement efforts, including predictable enforcement responses, fair penalty assessments, swift resolution of environmental problems, and deterring future violations. OIG explored the EPA penalty determination process, and documented that when determining penalty assessments, and specifically the reductions given to violators, there was generally a lack of documentation and explanation regarding how reductions were determined, creating the possibility of inequitable treatment amongst regions. OIG also found that when violators were unable to pay penalties due to financial limitations, there was no consistent process in place to issue, track, and implement non-monetary penalties. Aside from the previously mentioned elements found in the report, the OIG recommendation was, "that the EPA provide adequate guidance for determining a good

faith reduction, develop a systematic approach to ensure that justifications for good faith reductions are documented, revise the EPA's ability to pay penalty policy and evaluate the individual violator model" (United States. Environmental Protection Agency. Office of the Inspector General, author, 2013, p. 3).

In 2005, Carolyn Abbot published a research paper concerning the enforcement of environmental laws in Australia. Abbot noted that government regulation is focused on controlling environmental pollution through complex regulations and standards. However, the existence of rules and regulations does not directly result in compliance from regulated entities unless there is an enforcement component that may result in punishment for violations. Abbot determined that regulators are increasingly effective in achieving compliance when the regulators have a range of sanctions and punishments. Particular to enforcing environmental laws, Abbot argues that civil and administrative penalties are more efficient than criminal penalties when dealing with less serious offenses. Abbot also describes an alternative method to criminal or civil penalties used in Australia, which,

"give the offending party the opportunity to discharge or compensate for the breach through the payment of a specified monetary amount. The main purpose of the penalty notices is to deal with one-off breaches that can be easily remedied. The level of penalty appropriate for any given offence will normally be laid down in the implementing legislation...Alternatively, the recipient of an infringement notice can elect to have the matter dealt with by a court, where the penalty payable is considerably higher than the maximum available under a penalty notice scheme" (Abbot, 2005, p. 167).

Using the alternate penalty scheme, only 50 of the thousands of violators elected to contest the penalties in court. Additionally, Abbot recognized that this alternate penalty

scheme reduced the burden on prosecutors, and reduced the cost to the criminal justice system. Abbot discounted the notion that the reduced financial penalty has an equivalent reduction in deterrence, by pointing out that the reduced burden associated with the alternate scheme makes it likely that more penalties will be issued. Drawbacks to the alternate penalty scheme include a concern that innocent people or companies may choose to pay a reduced penalty to avoid the risk and cost of challenging the government in court. Abbot also discusses the risk of using this alternate scheme excessively to the point that other compliance tools are underutilized, and compliance actions become routine regardless of the circumstances of a case. Finally, Abbot considers that by removing violators from traditional civil and criminal proceedings, the moral, social, and ethical stigma of breaking the law is effectively removed. While Abbot's research was based in Australia, the concepts seem substantially applicable to the enforcement agencies in the United States (Abbot, 2005).

## **CHAPTER VIII – REVIEW OF PROGRAMS IN OTHER STATES**

California regulates pesticide use through their Department of Pesticide Regulation, Structural Pest Control Board, and County Agricultural Commissioners. Administrative penalties include financial penalties of up to \$5,000, in addition to other administrative sanctions. Civil penalties are an additional enforcement option for The Department of Pesticide Regulation and Structural Pest Control Board, with two penalty levels ranging from \$1,000 to \$10,000 and \$1,000 to \$25,000. Administrative penalties are assessed by issuing a Notice of Proposed Action which offers an administrative financial penalty, and extends the invitation for a hearing on the matter. Violators may choose to submit a check and forgo to the hearing. Financial penalties obtained as a result of a pesticide violation ultimately return to the County Agricultural Commissioner in the County where the violation occurred. Once at the County level, the funds are handled by each County individually, with some Counties returning the funds to the County Agricultural Commissioner's budget, and other retaining the funds in the County's general fund. Civil penalties are formal actions taken in Superior Court for more serious violations, and are used less frequently. California does not have citation authority for pesticide violations (California Department of Pesticide Regulation, 2002).

Illinois Pesticide regulation is split between the Department of Public Health for structural pesticide applications, and the Department of Agriculture for outdoor and agricultural pesticide applications. The Department of Public Health utilizes a three

types of violation categories, with a penalty range for first, second, and subsequent offenses. Violation types cover different sections of regulation, with Type A violations adopting a variety of regulations, including Illinois Department of Agriculture pesticide regulations, and FIFRA. Different than Type B and Type C violations, Type A violations are further classified to differentiate between no harm, harm excluding humans, and harm including humans. Penalty levels range from \$100 to \$7,500. The Illinois Department of Agriculture, responsible for agricultural and outdoor pesticide regulation, uses a point accumulation method to determine administrative penalty values. In addition to accumulated point penalty levels, certain violations, such as applying pesticides commercially without a license or selling restricted-use products to an uncertified individual, have pre-established financial penalties associated with them. Until violators have accumulated between 13 and 16 violation points, they receive a non-financial penalty, such as a warning letter. After reaching the threshold for a financial penalty, the penalties amounts range between \$750 and \$10,000. The Illinois penalty process begins when the review of a completed investigation reveals violations meeting the penalty threshold. Utilizing the administrative penalty process, the alleged violator is sent a formal complaint and notice of hearing by certified mail, detailing the alleged violations, the penalties if found guilty, a date and time for an administrative hearing, and explanation of the alleged violators rights. The alleged violator has the option of accepting the charges and paying the penalty prior to the hearing. If a hearing is held, the Department and alleged violator provide evidence regarding the allegations, and an

Administrative Law Judge makes a determination of guilt or innocence. The money collected as a result of this administrative penalty, either without a hearing or after a hearing has found the alleged violator guilty, is collected by the Department, and used to fund activities related to pesticide regulation and enforcement in Illinois (Illinois Pesticide Act, n.d., Table A, n.d.).

Iowa's Department of Agriculture and Land Stewardship is authorized to assess civil penalties for violations committed by commercial applicators. To determine the penalty, the Department must consider the willfulness of the violation, actual or potential danger of injury or damage, actual or potential cost of the injury or damage, actual or potential cost incurred by the Department to enforce the regulations, remedial actions by the violator, and violator compliance history. Civil penalties are limited to \$500 for each offense. The Department utilizes a peer review panel to assess civil penalties, after the alleged violator is served a complaint specifying the details of the hearing, the statute or rule allegedly violated and information on the Department's facts. Prior to a hearing by the peer review panel, alleged violators may reach an informal settlement with the Department, which is not reviewable by the panel. Informal settlements are more common than appearance before the peer review panel. Penalties assessed by the Iowa Department of Agriculture and Land Stewardship are collected by the Department, and are then submitted to the state's General Fund (Pesticide Act of Iowa, n.d.).

Indiana regulates the use of pesticides through the Office of the Indiana State Chemist (OISC), housed at Purdue University. Indiana has authority to impose a civil

penalty for pesticide use violations within Indiana, and establishes a framework for establishing civil penalty levels, with maximum amounts limiting penalty amounts levied by the OISC. Indiana Administrative Code further lists more than 100 specific pesticide use violations, the civil penalty assessment for each violation based on first, second, third and subsequent violations. Civil penalties range from \$25 to \$250 for first violations, \$50 to \$500 for second violations, and \$75 to \$1,000 for third and subsequent violations. The Administrative Code establishes protections for violators and limitations for the OISC, by restricting how the number of penalties are determined, and establishing civil penalty mitigation criteria. Most civil penalty assessments may be mitigated by meeting a number of pre-established criteria, such as cooperation and history of compliance, but there are a handful of more serious, more willful violations that cannot be mitigated. After reviewing a completed investigation, the OISC evaluates what violations have been substantiated, and if the violations fit into the civil penalty matrix. After finding that a civil penalty is appropriate, the OISC sends the alleged violator a letter detailing the violations, as well as the civil penalty assessment. Violators have 10 days to respond to the OISC letter with payment for the violation, or a request an appeal hearing with the Indiana Pesticide Review Board. If violators do not respond to the letter with payment or request for an appeal, the civil penalties are entered against the violator, and penalty collection efforts are turned over to the University. In the event a violator fails to pay a civil penalty, licensure with the OISC may be withheld pending satisfaction of the civil penalty assessment. Civil penalties collected by the OISC for pesticide misuse are

directed to the Purdue University Cooperative Extension Service, and are restricted to be, “used solely for the purpose of providing education about pesticides” (Agriculture and Animals, 2014, Indiana Pesticide Review Board, n.d.).

The Michigan Department of Agriculture & Rural Development employs an administrative penalty process to handle their pesticide violations in accordance with the Michigan Administrative Procedures Act. The Department may impose administrative fines up to \$1,000 for each violation of pesticide regulations. Once the Department determines a financial penalty is appropriate, they send the alleged violator a notice of intent, providing information about the alleged violations and offering a financial penalty if the violator chooses to settle at this point of the process. Violators may request a conference to negotiate the settlement offer within 20 days of receiving the notice of intent. If the Department has not received a request for a negotiation conference or received payment from the violator, a second level of the penalty process is reached. The second letter, a notice of violation, realleges the violations, and offers a penalty settlement offer at a significantly higher dollar amount. Violators have 20 days to respond to the letter with payment or by requesting a negotiation conference. The notice of violation also offers the violator an opportunity to request a formal hearing before an Administrative Law Judge. If, after the second 20-day deadline has passed, the Department has still not heard from the alleged violator, the Department sends the violator a third and final letter. The third letter explains the dates and content of the first two letters sent to achieve a resolution, and makes a final offer to settle the matter at the

maximum penalty amount. If another 20 days passes with no response from the violator, the case is forwarded to the State's Treasurer for collection using a variety of specialized processes and tools. Most cases are handled with the first two attempts at achieving a resolution, and very few are passed to the State Treasurer for action. Funds collected during any of these penalty steps are submitted to the Department, and ultimately go to the Division operating the Michigan Pesticide Program, although not necessarily directly to the Pesticide Program. One funding exception is that if the State Treasurer must act to collect the penalty, the Treasurer keeps 20% of the penalty amount (Natural Resources & Environmental Protection Act, 1994).

The Minnesota Department of Agriculture (MDA) has a blend of options for obtaining civil financial penalties. When the MDA determines a violator's actions require a financial penalty, they send the violator a letter explaining the violations the MDA has documented, and informing the violator that the MDA intends to file a civil action in State District Court seeking a financial penalty, and asking the Court to award litigation costs and expenses to the MDA. The letter continues on, offering the violator an opportunity to settle prior to the case being filed in District Court. The MDA settlement offer requires the violator to pay the civil penalty amount to the MDA, to comply with MDA regulations moving forward, and to sign a document acknowledging responsibility for the violation and the right to contest the MDA findings. In accepting the settlement offer, the violator settles the matter without official court action, and avoids paying the MDA litigation costs and expenses. Penalties collected by the MDA

are, “deposited into the state treasury and credited to the appropriate pesticide or fertilizer regulatory account” (Agricultural Chemical Liability, 2014).

Nebraska uses a penalty point system used to reflect the gravity of harm and misconduct. The gravity of harm is measured on a five-point scale, with higher point values being associated with harm that is more serious. Harm is evaluated for human health, the environment, and how dangerous the pesticide in the violation is. The gravity of the misconduct is assessed for compliance history, culpability, remedial efforts, and financial gain. The misconduct gravity points range are on a scale from negative three to three, indicating that while some misconduct adds points to the gravity measurement, other actions, such as immediately self-reporting a violation to the agency can reduce the gravity measurement. Depending on which provision of law is violated, base fines for first violations range from \$1,000 to \$5,000, and base fines for subsequent violations range from \$2,000 to \$5,000. To determine the final financial penalty, the base fine is multiplied by a gravity adjustment value. If the gravity adjustment is 11 or more, the base penalty is assessed at full value. If the gravity adjustment falls into one of three lesser point ranges, the base penalty is adjusted to 25%, 50% or 75% of the base fine. Businesses may have fines further reduced based on the amount of their gross revenue, intended to create an adjustment for the size of the business. The penalty process begins with the case review process in Nebraska’s pesticide program, where it is reviewed by a program manager and division administrator to determine if financial penalties are warranted. If the program believes penalties are appropriate, the case and

recommendation are forwarded to Department legal council for final review. Once legal counsel concurs with the program, the alleged violator is sent a notice of hearing detailing the alleged violations, legal citations, and the proposed penalty. After the notice of hearing, the alleged violator may choose to proceed with the hearing, or meet with the department in a pre-hearing settlement conference. Pre-hearing settlement conferences give the department the opportunity to discuss the details of the case and present the alleged violator with settlement options. Nearly all pesticide violation cases settled with a pre-hearing settlement conference, with less than five formal hearings in the past twenty years. Penalties obtained by either of these administrative processes are paid to and collected by the Department, but are deposited in the state's education fund (Nebraska Department of Agriculture, n.d., Pesticide Regulations, 2013).

The Ohio Department of Agriculture's primary method of collecting financial penalties for pesticide use violations is through civil penalties. After completing an investigation and determining violations have occurred, Ohio has the authority to collect civil penalties based on actual salaries and expenses incurred by the Department. Civil penalties are capped at \$5,000 for first violations, and at \$10,000 for subsequent violations. Procedurally, the Department sends a letter to alleged violators notifying them of the Department's conclusions, explaining the civil penalty amount being assessed, and detailing the violator's opportunity for a hearing or appeal. If the violator does not respond within 10 days, the civil penalty is assessed, and payment becomes due. Violators remit payment to the Department based on the assessment, and the penalty

funds are used to reimburse the department for actual expenses and salaries the department incurred by conducting the investigation and documenting violations. It is worth noting that most of Ohio's penalties seek to make the department whole, at best, and do not have any provisions to penalize violators based upon their actions and impact of their violations. Ohio does have authority to assess punitive penalties when actual environmental damage or human exposure has occurred, up to triple the expenses incurred by the department during the investigation (Pesticides, n.d.).

Virginia's Department of Agricultural and Consumer Services utilizes a penalty point system, where violations are broadly categorized, and assigned a penalty point value ranging from zero to ten. Failing to comply with certification or licensure regulations accumulates one or two points, and more serious violations such as violating a lawful order or impersonating an official have a value of ten penalty points. Damage, or the potential for damage, also accumulates penalty points for violators. On a scale of zero to ten, with no penalty points for no actual or potential damage, five categories of increasing seriousness rank damage as slight (1-2), moderate, serious, very serious, or extremely serious. Virginia also assigns penalty points for culpability and a violator's history of violations. Penalty point reductions may be granted for good faith efforts to correct violations. The accumulated penalty points, after any reductions, are assigned to a predetermined base civil penalty. In less serious violations where there is no violation history, the penalty assessment may be reduced by 20 percent. Civil penalties are essentially limited by the number and severity of violations, but a chart Virginia attaches

to is enforcement guidelines shows a range of \$50 for a 1 point demerit, up to \$20,000 for 40 demerit points. The Virginia Pesticide Control Act allows the Virginia Department of Agriculture and Consumer Services to, “assess a penalty of not more than \$1,000 for a violation that is less than serious; not more than \$5,000 for a serious violation; and not more than \$20,000 for a repeat or knowing violation” (Virginia, 2003). Civil penalties are paid to a Pesticide Control Fund, and the Department’s Commissioner prescribes the procedures for payment of uncontested penalties. Violators have 15 days from the issuance of a civil penalty to request a fact-finding conference to challenge the alleged violations or the amount of the penalty assessment. The Pesticide Control Fund where penalty payments are directed was established for, and specifically limited to be, “used by the Department solely for carrying out the purposes of this chapter” (Pesticide Control, n.d.).

## CHAPTER IX - COMPARATIVE ANALYSIS

This research reinforces that, with each state operating within broad federal regulations, the states are indeed developing unique programs, methods, and solutions that fit their needs and culture. As a result, Wisconsin's method for assessing and collection financial penalties for pesticide use violations is unlike any of the other state programs evaluated here.

Each state evaluated in this research issues financial penalties for pesticide misuse violations. Penalty levels varied with each state, with a low minimum penalty of \$25 in Indiana to a high minimum financial penalty of \$1,000 in California and Nebraska. Wisconsin's statutory authority establishes a minimum \$100 forfeiture for first violations of the pesticide law. Wisconsin law also establishes a maximum financial penalty for subsequent offenses at \$1,000. Virginia regulations limit forfeitures to a maximum penalty of \$20,000, and California regulations allow for a \$25,000 maximum financial penalty. Ohio's program is the only program in this research that seeks reimbursement for the costs of conducting investigations and discovering violations, but penalties are limited to \$5,000 for first violations, and \$10,000 for subsequent violations.

Wisconsin is the only State of those evaluated that uses a civil forfeiture process involving compliance conferences between the Department and alleged violator, actively proposing and negotiating settlements, drafting legal documents, and relying on the local District Attorney to prosecute all settlements, including voluntary settlements. Nearly

every state evaluated has a method to assess financial penalties outside of a formal court process.

This research also observed that nearly every state evaluated, excluding Wisconsin, utilizes written communication with the violator to assess, and often collect, a financial penalty. The predominant structure involves sending a violator a letter detailing violations, assessing a penalty, providing information about due process and legal rights the violator has, and offering the violator an opportunity to pay the financial penalty directly, or to have a hearing on the violations.

The ultimate use of the assessed penalties varies among the states, but two categories capture nearly all of the fund uses. The first category of penalty fund use is the category currently used in Wisconsin. Penalty funds ultimately go into a general-use fund, or other non-program fund. Iowa and Nebraska also utilize the penalty funds for non-program purposes, with Nebraska penalty funds going to the state's education fund, and Iowa's penalty funds being sent to the state general fund. Most other states direct the penalty funds to the pesticide operational budget or to programs related to pesticide use. Ohio seeks reimbursement for actual costs, while the remaining states direct the money to a pesticide-related purpose. California is unique in that the County Agricultural Commissioners handle the financial penalties, and each County makes a determination on how the penalty funds will be used.

## CHAPTER X - RECOMMENDATIONS

To accomplish the Department's compliance objectives, a robust selection of regulatory and enforcement tools are necessary. This research speaks singularly to the assessment, processing, and collection of financial penalties for pesticide use violations. To supply the Department with an adequate amount of compliance implements, the program and policy suggested by this research must necessarily be supplemented by sanctions ranging from verbal warnings and education through substantial civil and criminal penalties for the most egregious violations. This program incorporates elements of Wisconsin's existing pesticide enforcement program, elements found in existing literature, and elements found in the pesticide enforcement programs of other states. The proposed compliance program establishes a system for collecting penalty funds administratively, suggests methods and limits for determining administrative penalties, develops due process and appeal rights, preserves existing civil and criminal penalties, and creates a plan to distribute funds collected by the administrative process.

Wisconsin's best opportunity to improve efficiency and enhance effectiveness is to implement an administrative penalty process to assess and collect penalties for pesticide use violations. This penalty assessment process will issue violators penalty assessment letters detailing the violation(s), relevant statute or administrative code language, penalty range and assessment, opportunity for an informal hearing and other due process protections. Letters may be issued directly to the violator with no conference

when circumstances are less complex, or violations have been acknowledged by the violator. Alternatively, letters may be delivered directly to the violator at a conference between the violator and the department, traditionally called a compliance conference. In the event the letter is delivered at a conference, that compliance conference may serve as the informal hearing on the matter. The penalty letter will offer the option of acknowledging the violation by signing a consent document and paying the assessed amount, or requesting an informal hearing with the department. Informal hearings will be conducted by program staff to explain the violations, discuss case circumstances, and answer questions regarding the case and penalty process.

Procedurally, program management staff will review completed investigations, and violations will be evaluated according to Uniform Enforcement Guide criteria. If the case review reveals violations meeting the criteria for financial penalties, the program manager will work with the Section Chief to develop a memo summarizing the violations, relevant circumstances, and proposing an administrative financial penalty. The case summary memo will be sent to the Bureau Director or Division Administrator for review and concurrence. Upon concurrence, the program manager will draft an administrative penalty letter for the violator, and present the letter to the Bureau Director or Division Administrator for signature. To accept the proposed penalty and avoid further proceedings, the violator will have to acknowledge the violations with a signature, and send the payment to the Department. If no compliance conference is necessary to discuss the violations, the signed letter will be sent to the violators address on file with

the department, including information regarding time limits as established by department policy. If an informal conference is requested, it will be held with program staff, with the purpose of reaching a settlement with the violator. If appropriate, management staff may conduct the informal conference. Program staff will coordinate the collection and processing of penalties, typically forwarding all penalty funds to the department's finance and accounting staff. The department should institute a policy regarding collection of outstanding assessments, and tying the payment of outstanding assessments to the violator's license and certification status, so the department has some recourse if the violator refuses to pay.

Given the length of time the existing penalties have been in place, there must be serious consideration to the relevance of the current penalty thresholds and limits. Comparison with other states show that Wisconsin's penalty levels are lower than most other states. That consideration, however, does not bear on this research. Base penalty levels will remain unchanged, with penalties for first violations ranging from \$100 to \$500, and subsequent violation occurring within 5 years carrying a penalty level of \$200 to \$1,000. Since the administrative penalty process does not utilize the circuit court system, violators will avoid court costs, and the overall cost for the violator will be less.

The administrative penalty process is added as an alternative to existing practices, but should remain a voluntary venue that requires consent from both the Department and the violator. If, after the department proposes an administrative penalty, the violator elects not to pay the administrative penalty, and fails to request an informal or

administrative hearing on the allegations, the Department retains the right to pursue the case with the District Attorney in Circuit Court. Informal hearings will be held by program staff to pursue a settlement, address objections from the violator, and resolve any outstanding issues. The violator can request an administrative hearing if they are unable to reach an agreement with the department. Administrative hearings will be held before an Administrative Law Judge, and will result in a ruling on the violator's guilt or innocence related to the Department's charges. Violators have an additional layer of due process protection, because in the event a hearing officer rules against the violator, they retain the right to appeal to the Circuit Court to remedy procedural or constitutional failures.

Under this proposed system, nothing in the current compliance penalty structure is eliminated. While adding options for a streamlined penalty process, the Department preserves the authority to pursue Civil Forfeitures and Criminal penalties through the District Attorneys in Circuit Court. It is, however, anticipated that the use of Civil Forfeitures and Criminal penalties will be the exception to the administrative penalty process, occurring infrequently. Additionally, all existing administrative penalties, such as the Department's ability to suspend, revoke, or deny a license remain in place.

Allocating penalty funds obtained as a result of the administrative penalty process can be contentious in terms of ethics, politics, and fairness. The mere thought that penalty funds will remain within the Department may strike some as an inappropriate conflict of interest. To alleviate that concern, funds collected by the Department will not

remain with the Department, instead being transferred in entirety to the State of Wisconsin Education fund, matching current practice. While arguments to utilize penalty funds for pesticide investigation, enforcement, or education seems like an appropriate use of the money, this research will stop with the suggestion that that particular policy area is ripe for additional research and evaluation.

## CHAPTER XI - CONSIDERATIONS AND IMPLICATIONS

Policy, statutory, and administrative code changes are proposed for their potentially transformative effect. In essence, adopting any solutions presented in this research will lead to change. It is worth noting that even if the Department does not change the process for assessing and collecting financial penalties, they cannot ensure that everything stays the same, because the industry, economy, and society will continue to change, and impact the inter-relationship between the Department and the world in general. Change can be seen as positive or negative, both, or neither, depending on a person's perspective.

When developing a program or policy recommendation, choices are made at the exclusion of other options, thereby creating policy winners and losers. There are several viable alternatives to the structure proposed in this work, but they were not incorporated into the final recommendation for a variety of reasons. Due to the complexity and limitations associated with issuing citations, they seemed a poor fit for an agency without sworn law enforcement staff that would typically issue citations. Additionally, citations simply bring the violations into court, where there is likely to be a lack of experience and expertise with pesticide violations. Benefits of resolving violations prior to reaching the Circuit Court system include relieving the District Attorneys and Circuit Courts of this unique and often highly technical area, rapid resolution of violations, violators forgo paying court costs, reducing their overall financial penalty, and shifting the funds to

purposes more likely to increase compliance, decrease violations, and support an environment of responsible, highly skilled and educated pesticide applicators.

It is important to recognize that this research focused on increasing the efficiency and effectiveness of the existing pesticide enforcement process. It is equally important to recognize that this research did not deeply evaluate the appropriateness of financial penalties and levels, or the most effective use of penalty funds collected with this process. This research addresses only a segment of the larger compliance structure, recognizing that incremental change is the most appropriate method of program improvement when there are not serious structural deficiencies. This research delivers an improved process for handling financial penalties without comingling multiple policy discussions or recommendations. In anticipation that further research and policy debate will determine what, if any, changes could further improve the process, this research.

## REFERENCES

- Abbot, C. (2005). The regulatory enforcement of pollution control laws: the Australian experience. *Journal of Environmental Law*, 17(2), 161-180.  
doi:10.1093/envlaw/eqi015
- Agricultural Chemical Liability, Min. Statute § 18D.
- Agriculture and Animals, Indiana Code § 15 (2014).
- British Columbia, Administrative Justice Office, Ministry of Attorney General. (n.d.).  
*Administrative monetary penalties: a framework for earlier and more effective regulatory compliance*. Retrieved from  
<http://www.ag.gov.bc.ca/dro/publications/reports/amps.pdf>
- California Department of Pesticide Regulation. (2002). *Enforcement and compliance options chart* (PR-ENF-072). Retrieved from  
<http://www.cdpr.ca.gov/docs/enforce/prenffrm/prenf072.pdf>
- Illinois Pesticide Act, Ill. Statute § 415 ILCS 60/ (n.d.).
- Indiana Pesticide Review Board, 357 IAC § 1 (n.d.).
- Minzner, M. (2012). Why agencies punish. *William & Mary Law Review*, 53(3), 853-918. Retrieved from <http://scholarship.law.wm.edu/wmlr/vol53/iss3/3>
- Natural Resources and Environmental Protection Act, 451 MCL § 324.8325 (1994).
- Nebraska Department of Agriculture, Animal & Plant Health Protection. (n.d.). *The pesticide enforcement process*. Retrieved from  
[http://www.nda.nebraska.gov/pesticide/enforcement\\_process.pdf](http://www.nda.nebraska.gov/pesticide/enforcement_process.pdf).

Overman, M. (2015). *Compliance actions taken in 2014*. Wisconsin Department of Agriculture, Trade and Consumer protection.

Pesticide Act of Iowa, Iowa Code § 206 (n.d.).

Pesticide Control, Virginia Code § 206 (n.d.).

Pesticide Regulations, 25 Neb. Admin Code § 2 (2013).

Pesticides, Ohio Admin. Code § 901:5-11 (n.d.).

Plant Industry, Wis. Statute § 94 (n.d.).

Redfield, S. E. (1984). Agricultural Law Symposium: chemical trespass? -- an overview of statutory and regulatory efforts to control pesticide drift.

*Kentucky Law Journal*, 73, 855-918. Retrieved from

<http://www.lexisnexis.com/www.remote.uwosh.edu/lnacui2api/api/version1/getDocCui?lni=3S3T-X740-00CW-51CW&csi=7409&hl=t&hv=t&hnsd=f&hns=t&hgn=t&oc=00240&perma=true>

Table A Schedule of Administrative Civil Fines, 77 Ill. Admin. Code § 830 (n.d.).

The National Strategy for Trusted Identities in Cyberspace. (n.d.). NISTIC, Making Government More Effective and Efficient Online. Retrieved March 17, 2015, from <http://www.nist.gov/nstic/government.html>

United States. Environmental Protection Agency. Office of the Inspector General, author. (2013). *EPA needs to update its pesticide and chemical enforcement*

*penalty policies and practices* (13-P-0431). Retrieved from  
<http://www.epa.gov/oig/reports/2013/20130926-13-P-0431.pdf>

United States. Environmental Protection Agency. (n.d.). Federal Insecticide,  
 Fungicide and Rodenticide Act State Primacy | Compliance | US EPA.  
 Retrieved from <http://www2.epa.gov/compliance/federal-insecticide-fungicide-and-rodenticide-act-state-primacy>

United States. (2012). *An Act to Reauthorize the Federal Insecticide, Fungicide, and Rodenticide Act*. Washington, DC: U.S. G.P.O.

Virginia Department of Agriculture and Consumer Services. (2003). *Guidelines for enforcement of the Virginia pesticide control act: civil penalty assessment decision matrix*. Retrieved from <http://pesticidesearch.vadacs.com/enfmatrix.pdf>

Wildfire, C. (2012). Mine safety: penalty structure and enforcement mechanisms of the mine act in the wake of the upper big branch explosion. *Administrative Law Review*, 64(2), 441-469. Retrieved from  
<http://www.lexisnexis.com.wwww.remote.uwosh.edu/lnacui2api/api/version1/getDocCui?lni=57CB-7T30-0050-H0BN&csi=169908&hl=t&hv=t&hnsd=f&hns=t&hgn=t&oc=00240&perma=true>

Wisconsin Court System. (2014). *Wisconsin circuit court fee, forfeiture, fine and surcharge table*. Retrieved from

<https://www.wicourts.gov/courts/circuit/docs/fees.pdf>

Wisconsin Department of Agriculture, Trade and Consumer Protection. (2009).

*Uniform enforcement guide*. Madison, WI.

Wisconsin Office of the Governor. (n.d.). Reforming Government. Retrieved March

17, 2015, from [walker.wi.gov/wisconsin-priority/reforming-government](http://walker.wi.gov/wisconsin-priority/reforming-government)