



# Oregon

Kate Brown, Governor

Department of Agriculture

635 Capitol St NE

Salem, OR 97301-2532

PESTICIDES PROGRAM

TEL: 503-986-4635



## PERSONAL SERVICE

September 25, 2015

Michael Applebee, registered agent for:  
Applebee Aviation, Inc.  
39495 NW Bledsoe Creek Lane  
Banks, Oregon 97106

Re: Notice of Proposed Imposition of Civil Penalty and Proposed/Final Order, and  
Order of Emergency License Suspension and Notice of Opportunity for a Hearing;  
ODA Pesticides Case No. 150406

The enclosed Notice and Order is based on a pesticide investigation performed by the Pesticides Program of the Oregon Department of Agriculture. By this order the Oregon Commercial Pesticide Operator (CPO) license of Applebee Aviation, Inc. is suspended effective immediately. This order addresses a serious danger to the public health or safety in Oregon, as well as activities violative of Oregon's State Pesticide Control Act, Oregon Revised Statutes (ORS) Chapter 634. The action is taken pursuant to statutory and regulatory provisions including but not limited to Oregon Revised Statutes (ORS) 183.430(2), ORS 561.305, ORS 634.322, and Oregon Administrative Rules (OAR) 137-003-0560.

Your CPO license will be reinstated after you pay the civil penalty and provide to the Department a written plan, to the Department's satisfaction, describing how you will set in place policies, protocols and training to prevent recurrences of the violative activities noted in the order. Details on what the Department requires are in the Notice and Order.

Read all of the order carefully.

If you request a hearing regarding the license suspension your request must be made in writing to the Oregon Department of Agriculture so that it is received by the Department within 90 (ninety) days of the date of service (when you receive the notice). If you do not request a hearing this order will remain effective by default.

If you request a hearing regarding the civil penalty your request for hearing must be made in writing to the Oregon Department of Agriculture so that it is received by the Department within 10 (ten) business days of the date of service. If you do not request a hearing this Notice will become the Final Order for the purpose of the Civil Penalty.

DALE L. MITCHELL, PESTICIDES COMPLIANCE PROGRAM MANAGER  
OREGON DEPARTMENT OF AGRICULTURE

STATE OF OREGON  
DEPARTMENT OF AGRICULTURE

Before The Director of The Department of Agriculture

In the Matter of:	)	NOTICE OF PROPOSED IMPOSITION OF CIVIL PENALTY,
	)	and PROPOSED/FINAL ORDER
	)	
Applebee Aviation, Inc.	)	for Violation of the State Pesticide Control Act, and
	)	
a Commercial Pesticide	)	ORDER OF EMERGENCY LICENSE SUSPENSION AND
Operator licensee	)	NOTICE OF OPPORTUNITY FOR A HEARING
	)	
	)	ODA Pesticides Case No. 150406

To: Applebee Aviation, Inc. (Applebee Aviation)

The Director of the Oregon Department of Agriculture (ODA or the Department) hereby proposes to assess a civil penalty in the amount of \$1,110.00 against Applebee Aviation, as authorized by statutory and regulatory provisions including, but not limited to, ORS 634.900 to ORS 634.915 and OAR 603-057-0500 to 603-057-0532. The findings and conclusions on which this determination is based, and the criteria used to calculate the penalty, are set out below.

Furthermore, in response to your performance of worker safety-related pesticide application activities in a faulty, careless or negligent manner, and effective immediately, by order of the Department your license to operate as a Commercial Pesticide Operator (CPO) in Oregon is hereby suspended today, September 25, 2015. Effective immediately you must stop providing pesticide application services, or applying pesticides onto the properties of others in Oregon until further order of the Department.

Following the emergency license suspension ODA may reinstate Applebee Aviation's CPO license upon satisfaction of terms provided herein.

This order immediately suspending your CPO license is made pursuant to Oregon Revised Statutes (ORS) 561.305, 634.322, and 183.430(2), which authorize the Department to enter an emergency suspension order when it finds and concludes that a licensee has violated Oregon's State Pesticide Control Act (ORS Chapter 634) and that the continued operation by the licensee presents a serious danger to the public health or safety. This order is also made pursuant to Oregon Administrative Rules (OAR) 137-003-0560, which implements ORS 183.430(2), and ORS 634.372(4), which prohibits certain pesticide application activities.

The Department finds and concludes that Applebee Aviation's CPO activities, performed contrary to the training received by its applicators, present a serious danger to Oregon's public health or safety, and have violated the State Pesticide Control Act, as described herein.

#### I. APPLICABLE LAW

1. The applicable law includes the following: Oregon Revised Statutes (ORS) Chapters 60 (corporations), 183 (administrative law), 561 (agriculture), and 634 (pesticides), Oregon Administrative Rules (OAR) Chapter 137, division 3; and OAR Chapter 603, division 57; Federal Insecticide, Fungicide, and Rodenticide Act, 7 United States Code (USC) §§ 136 *et seq.*; and 40 Code of Federal Regulations (CFR) Parts 152 through 180.

2. Oregon's pesticide control law is known as the State Pesticide Control Act and is codified in Oregon Revised Statutes (ORS) Chapter 634.

3. ORS 634.005 states: "The purpose of this chapter, which shall be known as the State Pesticide Control Act and shall be enforced by the State Department of Agriculture, is to regulate in the public interest the formulation, distribution, storage, transportation, application and use of pesticides. Many materials have been discovered or synthesized which are necessary and valuable for the control of insects, plant diseases and weeds. Many more pesticides will be discovered and needed. Such materials, however, may injure health, property, wildlife or environment by being distributed, stored, transported, applied or used in an improper or careless manner. The pesticide industry of this state has achieved and maintained high standards in its formulation and use of pesticides while at the same time experiencing a minimum of injury to persons, property or the environment. Currently updating the law to maintain this achievement and to consider future new pesticides and problems is necessary for the protection of persons, property, wildlife and environment of this state."

4. ORS 634.006(8) states: "Pesticide" includes: ...

- (a) 'Defoliant' which means any substance or mixture of substances intended for causing the leaves or foliage to drop from a plant with or without causing abscission;
- (b) 'Desiccant' which means any substance or mixture of substances intended for artificially accelerating the drying of plant tissue;
- (c) 'Fungicide' which means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any fungus;
- (d) 'Herbicide' which means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any weed;
- (e) 'Insecticide' which means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any insects which may be present in any environment whatsoever;
- (f) 'Nematocide' which means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating nematodes;
- (g) 'Plant regulator' which means any substance or mixture of substances intended, through physiological action, to accelerate or retard the rate of growth or rate of maturation or to otherwise alter the behavior of ornamental or crop plants or the produce thereof, but shall not include substances to the extent that they are intended as plant nutrients, trace elements, nutritional chemicals, plant inoculants or soil amendments; or
- (h) Any substance, or mixture of substances intended to be used for defoliating plants or for preventing, destroying, repelling or mitigating all insects, plant fungi, weeds, rodents, predatory animals or any other form of plant or animal life which is, or which the department may declare to be a pest, which may infest or be detrimental to vegetation, humans, animals, or be present in any environment thereof."

5. ORS 634.006(13) states: "Pesticide operator" means a person who owns or operates a business engaged in the application of pesticides upon the land or property of another."

6. ORS 634.006(9) states: "Pesticide applicator" or 'applicator' means a person who:

- (a) Is spraying or applying pesticides for others;
- (b) Is authorized to work for and is employed by a pesticide operator; and

- (c) Is in direct charge of or supervises the spraying or application of pesticides or operates, uses, drives or physically directs propulsion of equipment, apparatus or machinery, either on the ground or by aircraft in such activity."

7. ORS 634.122 states in part that "(2) An applicant for a pesticide applicator's license shall be required to demonstrate satisfactorily by written examination or any reexamination given by the department, an adequate knowledge of:

- (a) The characteristics of pesticides and the effect of their application to particular crops.
- (b) The practices of application of pesticides.
- (c) The conditions and times of application of pesticides and the precautions to be taken in connection therewith.
- (d) The applicable laws and rules relating to pesticides and their application in this state.
- (e) Integrated pest management techniques, as defined in ORS 634.650, for pest control.
- (f) Other requirements or procedures which will be of benefit to and protect the pesticide applicator, the persons who use the services of the pesticide applicator and the property of others."

8. OAR 603-057-0120 provides general standards of competence for commercial pesticide applicators; it establishes a system of written examination of applicator candidates, certification, recertification and renewal. Under these rules recertification may be obtained by re-examination or by attending training classes. OAR 603-057-0120 states, in part:

- (1) Competence in the use or handling of pesticides shall be determined on the basis of written examinations which, in addition to the requirements of OAR 603-057-0125, shall include the following general standards:
  - (a) Comprehension of labeling format, labeling terminology, and the labeled warnings and instructions;
  - (b) Knowledge of safety factors to be considered, including need and use of protective clothing, first aid procedures in the event of accidents, symptoms of various pesticide poisonings, and proper storage, transportation, handling, and disposal methods;
  - (c) Knowledge of potential consequences to the environment from the use or misuse of pesticides, as influenced by climate, topography, and existence of animal life;
  - (d) Knowledge of methods of use or application, including the various forms (dust, wettable powder, etc.) of pesticides, the compatibility of various pesticides, the types of application equipment or devices, and the times when various pesticide forms or equipment would be appropriately used; and
  - (e) Knowledge and comprehension of existing laws and rules governing pesticide use or application, including classifications of various pesticides (highly toxic, restricted use, or general). ...
- (3) An applicant for a pesticide applicator's license renewal shall be required to take a reexamination each fifth year after taking the original examination, and be subject to the provisions of this section and OAR 603-057-0125 in regard thereto. However, if the Department's records indicate the applicant for license renewal has complied with the provisions of OAR 603-057-0150, the written examination shall be waived ... ."

9. OAR 603-057-0150 provides for license renewal through attending recertification classes in lieu of reexamination.

10. ORS 634.372(4) states: "A person may not: ... Perform pesticide application activities in a faulty, careless or negligent manner."

11. ORS 561.305(2) states: "The department may refuse to issue, refuse to renew, revoke or suspend any license or application for license issued or which may be issued pursuant to any law under its jurisdiction where it finds that the licensee has violated any provision of such law or regulations promulgated thereunder. ..."

12. ORS 634.322 states: "In carrying out and enforcing the provisions of this chapter, the State Department of Agriculture is authorized: ...

(4) In accordance with the provisions of ORS chapter 183, to revoke, suspend or refuse to issue or renew any license or certificate if it determines that an applicant, licensee or certificate holder has violated any of the provisions of this chapter."

13. The Department has responsibility and authority for the Pesticides program and may make any rule necessary for enforcement of program requirements. ORS 561.020; ORS 561.190; ORS Chapter 634.

14. Oregon Administrative Rules (OAR) Chapter 603 Division 057 is entitled Pesticide Control and implements provisions of the State Pesticide Control Act, ORS Chapter 634.

15. ORS 634.900 authorizes the Department to impose Civil Penalties for violations of ORS Chapter 634.

16. ORS 634.915 states that: "(1) The State Department of Agriculture shall adopt by rule a schedule establishing the amount of civil penalty that may be imposed for a particular violation.

(2) In imposing the penalty pursuant to the schedule authorized by this section, the Director of Agriculture shall consider the following factors:

- (a) The past history of the person incurring a penalty in taking all feasible steps or procedures necessary or appropriate to correct any violation.
- (b) Any prior violations of statutes, rules or orders pertaining to pesticide application, sale or labeling.
- (c) The gravity and magnitude of the violation.
- (d) Whether the violation was repeated or continuous.
- (e) Whether the cause of the violation was an unavoidable accident, negligence or an intentional act.
- (f) The violator's cooperativeness and efforts to correct the violation.
- (g) The immediacy and extent to which the violation threatens the public health or safety."

17. OAR 603-057-0500 to 603-057-0532 provide rules for the implementation of the Department's authority to impose civil penalties under ORS 634.900 through 634.915.

18. ORS chapter 60 regulates corporations transacting business in Oregon.

## **II. FINDINGS OF FACT**

### **ODA Pesticides Case No. 150406**

1. This Notice and Order results from ODA's investigation of complaints and coordination with the Occupational Safety and Health Division of the Oregon Bureau of Labor and Industry (OR-OSHA) about Applebee Aviation's pesticide handling and application practices on and around forestlands in Douglas County, Oregon, during or about April of 2015. In this case ODA found that

some of Applebee Aviation's aerial herbicide application activities were performed in a faulty, careless or negligent manner. The workers involved in these activities include the handlers doing the mixing and loading of pesticide mixtures. Aspects of the activities include worker safety and training, use of equipment, and container control and disposal. The current or former representatives or employees of Applebee Aviation who were in contact with ODA during this investigation included Michael L. Applebee, Warren K. Howe, Brenda May, David A. McDaniel, Robert Taylor, and Darryl Ivy.

2. Applebee Aviation, Inc. (Applebee Aviation) is a domestic business corporation with a principal place of business at 22330 NW Fisher Road, Banks, Washington County, Oregon. Applebee Aviation provides custom or commercial aerial pesticide application services to foresters and agricultural growers.

3. Applebee Aviation is licensed by the Oregon Department of Agriculture as a Commercial Pesticide Operator; license number AG-1005130CPO. The several categories on this license include Forestry; it was originally issued in June of 2008.

4. Applebee Aviation uses or employs various agents or employees, some of them as pesticide applicators (pilots), others as handlers. These persons include or have included David A. McDaniel as pilot, and Robert Taylor and Darryl Ivy as handlers.

5. David A. McDaniel is licensed by ODA as a Commercial Pesticide Applicator (CPA), license number AG-L0066182CPA. The several categories on this license include Forestry; it was originally issued during October of 1991.

6. During or about April of 2015, through various agents or employees, including Mr. Taylor and Mr. Ivy, Applebee Aviation handled various herbicide products as it prepared mixtures and loaded mixtures onto a helicopter for application. These various pesticide application activities may be referred to herein as the application activities. The Applebee Aviation agents or employees performing the application activities may be referred to herein as the crew or crew members.

7. During the application activities the crew handled various pesticides, including:

Velossa Selective Herbicide, EPA Reg. No. 5905-579, active ingredient hexazinone, Helena Chemical Company, Collierville, Tennessee  
Clean Slate Selective Herbicide, EPA Reg. No. 228-491, a.i. clopyralid, Nufarm Americas Inc., Burr Ridge, Illinois  
Transline Specialty Herbicide, EPA Reg. No. 62719-259, a.i. clopyralid, Dow AgroSciences LLC, Indianapolis, Indiana  
Element 4 herbicide, EPA Reg. No. 62719-40, a.i. triclopyr, Dow AgroSciences LLC, Indianapolis, Indiana  
Agri Star 2,4-D LV6 Low Volatile Herbicide, EPA Reg. No. 42750-20, a.i. 2,4-D, Albaugh, Inc., Ankeny, Iowa  
Weedone LV6 EC Broadleaf Herbicide, EPA Reg. No. 71368-11, a.i. 2,4-D, Nufarm, Inc. Burr Ridge, Illinois  
Atrazine 4L Flowable Herbicide, EPA Reg. No. 35915-4-60063, a.i. atrazine, Sipcam Agro USA, Inc., Durham, North Carolina  
Atrazine 4L Herbicide, EPA Reg. No. 66222-36, a.i. atrazine, Makhteshim Agan of North America, Inc., Raleigh, North Carolina  
Drexel Atrazine 4L Herbicide, EPA Reg. No. 19713-11, a.i. atrazine, Drexel Chemical Company, Memphis, Tennessee

The product labels for all of these pesticide products, under DIRECTIONS FOR USE, state:

Do not apply this product in a way that will contact workers or other persons, either directly or through drift. Only protected handlers may be in the area during application.

Each of the product labels also has an AGRICULTURAL USE REQUIREMENTS box, which includes the following statements:

Use this product only in accordance with its labeling and with the Worker Protection Standard, 40 CFR Part 170. This Standard contains requirements for the protection of agricultural workers on farms, forests, nurseries, and greenhouses, and handlers of agricultural pesticides. It contains requirements for training, decontamination, notification, and emergency assistance. It also contains specific instructions and exceptions pertaining to the statements on this label about personal protective equipment (PPE) and restricted-entry interval/s. The requirements in this box only apply to uses of this product that are covered by the Worker Protection Standard.

All of the Atrazine products are Restricted Use Pesticides (RUP), due to ground and surface water concerns. These pesticide applications may be referred to collectively as the herbicide applications.

8. During application activities in April 2015, some of the crew did not wear all of the Personal Protective Equipment (PPE) required by the product labels of the pesticide products they were applying or handling. In some of these cases, Applebee Aviation had not provided the crew with the required PPE.

9. During application activities in April 2015, Applebee Aviation did not provide the crew with water or other decontamination materials, such as could be used in the event of exposure to a pesticide.

10. During application activities in April 2015, Applebee Aviation did not provide the crew with training on how to minimize hazards to their safety and health whilst working around pesticides.

11. During application activities in April 2015, Applebee Aviation used a pesticide mixture tank that had a defective seal on the top hatch.

12. On April 26, 2015, Mr. Ivy went to Mercy Medical Center in Roseburg, Oregon, complaining of adverse health impacts that he attributed to his exposure to herbicides during the herbicide applications. On April 27, 2015 ODA and the Pesticide Analytical and Response Center (PARC) received an Oregon Emergency Response System (OERS) report on this incident.

13. On April 29, 2015, ODA and OR-OSHA met with and interviewed Mr. Applebee about the herbicide applications and Applebee Aviation's worker safety protocols.

14. On May 20, 2015, ODA and OR-OSHA met with and interviewed Mr. Taylor about the herbicide applications and Applebee Aviation's worker safety protocols.

15. On May 27, 2015, ODA and OR-OSHA met with and interviewed Mr. McDaniel about the herbicide applications he performed as pilot and Applebee Aviation's worker safety protocols.

16. On May 29, 2015, ODA and OR-OSHA met with and interviewed Mr. Ivy about the herbicide applications and Applebee Aviation's worker safety protocols.

17. Before or about August 7, 2015 an additional Applebee Aviation employee contacted OR-OSHA and said that Applebee Aviation was conducting aerial pesticide applications in Washington State, and continuing to fail to comply with worker safety requirements. On or about August 7, 2015 OR-OSHA referred these concerns to the Washington State Department of Agriculture,

18. On September 8, 2015 ODA received from Applebee Aviation copies of their pesticide application records for all of the pesticide applications they had made while Mr. Ivy was in their employ. These records documented Applebee Aviation's applications of the products listed in Paragraph II-7.

19. On September 11, 2015, ODA received from OR-OSHA their record of their inspection of Applebee Aviation's worker safety practices.

20. On or about September 15, 2015 ODA became aware of an additional employee of Applebee Aviation who was alleging that they were still performing aerial pesticide application activities without due regard to pesticide-related worker safety requirements.

### III. ULTIMATE FINDINGS OF FACT

1. During April of 2015 Applebee Aviation, Inc. was a Commercial Pesticide Operator, providing aerial pesticide application services to forestland and agricultural owners in Oregon.

2. During April of 2015 Applebee Aviation applied herbicides, including some RUPs, to forest sites in Douglas County, Oregon.

3. The pesticides Applebee Aviation applied bore labels that prohibited any application such as would contact people, directly or through drift, and permitted only protected handlers in the treatment area.

4. During the herbicide applications Applebee Aviation's agents or employees handled pesticide products and spray mixtures as they mixed loads and loaded the helicopter used to make the applications. The agents or employees had not been provided with pesticide safety training prior to these activities, nor were they, during the application activities, consistently provided with water or other decontamination materials. This training and provision of materials were required by the pesticide product labels, through their Agricultural Use Requirements boxes, which require compliance with the Worker Protection Standard; 40 CFR 170. Also during these activities the agents or employees were not consistently provided with, and did not consistently wear, the PPE required by the pesticide product labels. During these activities Applebee Aviation used a pesticide mixture tank with a defective hatch seal, which presented the handlers with additional potential for exposure to pesticide mixtures. As of September 2015 Applebee Aviation is still not complying with these worker safety requirements.

5. The failure to follow label requirements, provide sufficient safety materials, equipment and training, using workers without required PPE, and having workers use improperly securable equipment, seriously endanger worker/handler's and thus the public's health or safety. These failures are also considered to be performing pesticide application activities in a faulty, careless or negligent manner.

All of these ultimate findings of fact are based on the findings of fact.

#### IV. CONCLUSION OF LAW

The Oregon Department of Agriculture determines that Applebee Aviation, Inc. violated Oregon Revised Statutes (ORS) Chapter 634 as follows:

##### VIOLATION NO. 1

Applebee Aviation, Inc. violated **ORS 634.372(4)**, which states **A person may not: ... Perform pesticide application activities in a faulty, careless or negligent manner.** During or about April of 2015 Applebee Aviation used a crew or crews of its agents or employees to support and perform aerial (helicopter) pesticide applications onto forestlands in Douglas County, Oregon. During these application activities the crew handled various pesticides, including:

- Velossa Selective Herbicide, EPA Reg. No. 5905-579
- Clean Slate Selective Herbicide, EPA Reg. No. 228-491
- Transline Specialty Herbicide, EPA Reg. No. 62719-259
- Element 4 herbicide, EPA Reg. No. 62719-40, a.i. triclopyr
- Agri Star 2,4-D LV6 Low Volatile Herbicide, EPA Reg. No. 42750-20
- Weedone LV6 EC Broadleaf Herbicide, EPA Reg. No. 71368-11
- Atrazine 4L Flowable Herbicide, EPA Reg. No. 35915-4-60063 (a Restricted Use Pesticide)
- Atrazine 4L Herbicide, EPA Reg. No. 66222-36 (RUP)
- Drexel Atrazine 4L Herbicide, EPA Reg. No. 19713-11 (RUP)

The product labels for all of these pesticide products state: "Do not apply this product in a way that will contact workers or other persons, either directly or through drift. Only protected handlers may be in the area during application." Further, each of these labels also has an AGRICULTURAL USE REQUIREMENTS box, which adopts the Worker Protection Standard requirements for protection of forest workers and handlers of pesticides. This standard requires that handlers be provided with training and decontamination materials.

During the pesticide application activities the agents or employees mixed the pesticides into loads and loaded the loads into the helicopter used to make the applications. The agents or employees had not been provided with pesticide safety training prior to these activities, nor were they, during the application activities, consistently provided with water or other decontamination materials. Also during these activities the agents or employees were not consistently provided with, and did not consistently wear, the PPE required by the pesticide product labels. The handlers also faced potential for pesticide exposure due to a defective hatch seal on a pesticide mixture tank. As of September 2015, according to a complaint to OR-OSHA, Applebee Aviation is still not complying with these worker safety requirements.

Performing, and continuing to perform, these pesticide application activities with a crew that had not been given the all the safety training and decontamination materials required by the Worker Protection Standard, and hence, by the pesticide product labels, and when the crew had not been given and did not consistently wear the Personal Protective Equipment required by the product labels, was pesticide application activity performed in a faulty, careless or negligent manner, in violation of ORS 634.372(4), and the continuation thereof seriously endangers the public's health or safety.

This conclusion is based on the findings of fact and ultimate findings of fact.

## **V. PENALTY and DEPARTMENT ACTION**

Effective immediately, Applebee Aviation's CPO license is suspended. This license will be reinstated upon ODA's satisfaction that the conditions noted herein have been met. Also, the Department hereby proposes to issue a civil penalty to Applebee Aviation

### **LICENSE SUSPENSION**

Also in response to Violation No. 1, the Commercial Pesticide Operator license of Applebee Aviation, Inc., (AG-L1005130CPO), is immediately suspended. The license will be reinstated upon ODA's satisfaction with Applebee Aviation's compliance with the terms of the Final Order for license reinstatement. The terms of the Final Order for license reinstatement are that Applebee Aviation:

1. Pay the Civil Penalty imposed by this or another Final Order resulting from this case.
2. Provide to the Department a written plan, to the Department's satisfaction, describing how it will set in place policies, protocols and training to prevent recurrences of the violative activities noted in this order. This written plan will:

Explain how Applebee Aviation will keep worker compartments, such as the crew cabs of its trucks, as clean and sanitary as reasonably possible, and for decontaminating them at the end of each work day or as reasonably needed.

Explain how Applebee Aviation will decontaminate vehicle exteriors at the end of each work day or as reasonably needed.

Explain how Applebee Aviation will handle pesticide containers, from mixing, recapping of containers for transport to the rinsing site, through the appropriate rinsing and disposition of rinsate.

Explain how Applebee Aviation will have its employees, when at public or remote locations, launder their work cloths so as to prevent contamination of the cloths of others who might follow them in using public-use laundry facilities.

Provide training protocols for training handlers prior to pesticide application activities (such as ensuring that they read the pesticide labels), and show how handlers who are not licensed Commercial Pesticide Applicators will be trained (such as by watching handler training videos). This training will cover proper work practices, PPE, emergency procedures, prevention or minimization of tracking pesticide residues into crew cabs, and physical and health effects of pesticides used by the handlers.

Explain how Applebee Aviation will document safety related problems and corrective actions, review and summarize them annually, and post the summaries where employees may read them.

Explain how Applebee Aviation will conduct and document monthly safety inspections of worksites, vehicles, machines, equipment, and work practices.

Explain how Applebee Aviation will use OSHA 300, 300-A and DCBS Form 801, or equivalent forms, to document recordable illnesses and injuries.

3. Provide to its employees at all work sites clean and operable PPE as required by the labels of the pesticides handled by the employees, and make reasonable assurance that employees will properly use the PPE. This PPE will include, but shall not be limited to, proper gloves, eye protection, and chemical resistant aprons.

4. Provide to its employees at all work sites all of the decontamination equipment and supplies required by federal regulations for pesticide handlers; 40 CFR 170.250(a). Provide employees at remote locations with relevant Safety Data Sheets (SDS).

5. Install and maintain a properly functioning eyewash station on each truck that carries any pesticide labeled with the "Danger" signal word.

#### CIVIL PENALTY

The total civil penalty for Violation No. 1 is \$1,110.00. The penalty is determined using the criteria in ORS 634.900 to 634.915 and OAR 603-057-0500 to 603-057-0530.

$$\begin{aligned} & \text{NB} + [(0.1 \times \text{NB}) (\text{P}+\text{H}+\text{R}+\text{C})] \\ & 2 \times \$370.00 + [(0.1 \times 2 \times \$370.00) (0+0+7-2)] = \$1,110.00 \\ & \$740.00 + [(\$74.00) (5)] = \$1,110.00 \\ & \$1,110.00 \times 1 \text{ violation} = \$1,110.00 \end{aligned}$$

1. N, the number of related violations within a period of three years prior to and including the date of the current violative act, is 2; OAR 603-057-0530(1)(a). On December 31, 2014 Applebee Aviation was found to have violated ORS 634.372(4), after some pesticide spray mixture applied during April of 2014 in Douglas County, Oregon was found off the treatment site (ODA Pesticides Case No. 140286).

2. B, the base penalty is \$370.00; OAR 603-057-0530(1)(b). The base penalty was determined as follows:

- a. The MAGNITUDE is CATEGORY I (MAJOR) under OAR 603-057-0525(2)(a)(E).
- b. The GRAVITY is HIGH LEVEL because the pesticides applied were used over wide areas of application; 603-057-0525(3)(a)(D)(i), and some of them were Restricted Use Pesticides 603-057-0525(3)(a)(C)(i).

3. P, the past occurrence of unrelated violations is 0 (zero) because ODA has not yet found any unrelated violative activities within the previous three years; OAR 603-057-0530(1)(c)(A).

4. H, the history of taking steps to correct a violation is 0 (zero) because there is insufficient information on which to base a finding; OAR 603-057-0530(1)(d)(B).

5. R, preventability of the violation and the presence of negligence or misconduct is 7 because the actions by Applebee Aviation determined to be violative were flagrant; OAR 603-057-0530(1)(e)(D). As an experienced operator, Applebee Aviation knew or should have known to provide its employees with appropriate PPE, training, and decontamination materials.

6. C, cooperativeness is -2 (negative two). Applebee Aviation was cooperative with ODA in this investigation; OAR 603-057-0532(1)(e), OAR 603-057-0530(1)(f)(A).

## VI. RIGHT TO A HEARING, NOTICE OF RIGHTS

### Regarding the License Suspension:

You have the right to a formal hearing to contest this suspension order. In order to have a hearing, you must request one in writing. You may send the request for hearing to:

Michael Babbitt  
Pesticides Program  
Oregon Department of Agriculture  
635 Capitol Street NE  
Salem, Oregon 97301-2532  
Fax: 503-986-4735  
[mbabbitt@oda.state.or.us](mailto:mbabbitt@oda.state.or.us)

If requested, such a hearing will be held pursuant to the Administrative Procedures Act (ORS Chapter 183) and OAR 137-003-0501 *et seq.* Your written request for a hearing must be received by ODA within 90 days from the date this order was served on you or your right to a hearing will be waived and this order will remain effective by default.

If you request a hearing, this order will remain effective pending the hearing. You have a right to demand that the hearing be held as soon as practicable after ODA receives your written request. The hearing will be held by an administrative law judge from the Office of Administrative Hearings, as required by ORS 183.635. You will be notified of the date, time and place of the hearing. If you are a natural person, you may hire an attorney to represent you at the hearing. If you are a corporation, LLC, partnership, unincorporated association or similar entity you must be represented during the hearing process by an attorney, and your attorney must ratify your request for a hearing within 28 days of ODA's receipt of the request. (OAR 137-003-0550) The state will not provide legal counsel in administrative cases such as this, but private legal aid organizations may be able to assist a person with limited financial resources. At the hearing you have the right to respond to, and to present evidence and argument, on all issues. After the hearing, an order confirming, altering or revoking this suspension order will be issued.

### Regarding the Civil Penalty:

You are entitled to a contested case hearing as provided by statutes and rules including, but not limited to: ORS Chapter 183 (the Administrative Procedures Act), including 183.413 to 183.470, and ORS 183.745; OAR Chapter 137, division 3, including OAR 137-003-0501 to 137-003-0700; ORS 634.905; and OAR chapter 603, division 57. **If you want a hearing regarding the Civil Penalty your request must be made in writing to the Department within ten business days of the date that you receive the NOTICE; OAR 603-057-0510(4)(f).**

Any request for a hearing should be made to the attention of:

Michael Babbitt  
Pesticides Program  
Oregon Department of Agriculture  
635 Capitol Street NE  
Salem, Oregon 97301-2532  
Fax: 503-986-4735  
[mbabbitt@oda.state.or.us](mailto:mbabbitt@oda.state.or.us)

If you make a timely request for a hearing you will be notified of the date, time and place of such hearing. You will also be given information on the procedures, right of representation and other rights of parties relating to the conduct of the hearing before commencement of the hearing. An administrative law judge from the Office of Administrative Hearings will preside at any hearing, assigned as required by ORS 183.635. The Director of the Department has authority to issue the final order.

If the recipient of the enforcement notice is a corporation, partnership, limited liability company, unincorporated association, trust, or other entity that is not a natural person or individual, it must be represented in the contested case process by an attorney unless otherwise authorized by law. Furthermore, the attorney representing such a corporation or other entity must ratify the request for hearing, in writing, within 28 days of the date that the request is received by the agency; OAR 137-003-0550. This provision does not, however, require any entity to be represented by an attorney at any informal conference. Individuals may but are not required to be represented by counsel. The state will not provide legal counsel in administrative cases such as this, but private legal aid organizations may be able to assist a person with limited financial resources.

## VII. FINAL ORDER

Effective immediately your CPO license is suspended, subject to your meeting the conditions outlined herein or in a contrary judgment following your request for a hearing.

If you do not make a timely request for a hearing, you will waive your right to request a hearing, the emergency suspension order will remain final and effective by default, and the order regarding the civil penalty will become final and effective by default; OAR 137-003-0672(2). If you request a hearing but later fail to appear at the hearing, withdraw the request for a hearing, or notify the agency or administrative law judge that you will not appear at the hearing and it is not rescheduled, you will waive your right to a hearing and this order will remain or become final; OAR 137-003-0672(3). In these circumstances, the Department will mail you a notice stating when this order became final. The Department has designated the relevant portions of its files on the subject of this matter, including all materials that you have submitted relating to this matter, as the record in this case for the purpose of proving a *prima facie* case upon default.


If the order regarding the civil penalty becomes final, the Department will issue a judgment against you and a civil penalty in the amount set out in this Notice will become due and payable 70 (seventy) days after the order becomes final. ORS 183.745. Your check or money order should be made payable to the Oregon Department of Agriculture and sent to:

Oregon Department of Agriculture  
635 Capitol Street NE  
Salem, Oregon 97301-2532

The final order regarding this Notice will become a part of Applebee Aviation's history for a period of three years. Any future violations of ORS Chapter 634 or OAR Chapter 603, division 057 within the next three years will subject Applebee Aviation to additional enforcement actions including, but not limited to, civil penalties, product seizure, or license revocation.

If this order, or any part of it, becomes or remains final you will have the right to appeal it to the Oregon Court of Appeals pursuant to ORS 183.482. To appeal you must file a petition for judicial review with the Court of Appeals within 60 days from the date the order becomes final. If you do not file a petition for judicial review within this time period you will lose your right to appeal.

DATED this 25<sup>th</sup> day of September, 2015

  
KATY COBA  
DIRECTOR  
OREGON DEPT. OF AGRICULTURE

NOTE: Copies of the Department's investigation report will be provided upon request. The request must be made in writing. There may be a monetary charge for some reports. The written request should be made to: Oregon Department of Agriculture, Pesticides Program, ATTN: SUNNY JONES, 635 Capitol Street NE, Salem, Oregon 97301-2532.

NOTICE TO ACTIVE DUTY SERVICEMEMBERS: Active duty servicemembers have a right to stay these proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 800-452-7500, or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>.

APPLEBEE AVIATION, INC.

Oregon Department of Agriculture, Pesticides Case No. 150406

Notice of Contested Case Rights and Procedures:

Pursuant to ORS 183.413(2), you are entitled to be informed of the following:

1. **Time and place of hearing.** The time and place of hearing is or will be set forth in the Notice of Hearing issued by the Administrative Law Judge (ALJ) after the prehearing conference.
2. **Issues to be considered at hearing.** The issues to be considered at hearing are those set forth in the Notice issued by the Oregon Department of Agriculture (ODA), entitled Notice of Proposed Imposition of Civil Penalty and Proposed/Final Order, and Order of Emergency License Suspension and Notice of Opportunity for a Hearing, dated Sept. 25, 2015, and those issues related thereto that are properly before the presiding officer to this proceeding.
3. **Law that applies.** The matter set for hearing is a contested case. The hearing will be conducted as provided in Chapters 183 and 634 of the Oregon Revised Statutes (ORS); the administrative rules of the ODA, OAR 603-057-0505 through 603-057-0515, and the Attorney General's Office of Administrative Hearing Rules, OAR 137-003-0501 to 137-003-0700, in particular 137-003-0560. Other laws involved include: ORS Chapters 561, 570, and 616; additional rules of ODA, OAR 603-057; Title 7, Chapter 6, Subchapter II of the United States Code; and Title 40, Parts 152, 156, and 180 of the Code of Federal Regulations.
4. **Right to attorney.** You may be represented by an attorney at the hearing. Most persons are represented by counsel for hearings involving ORS 634. You are not required to be represented by counsel, unless you are a corporation, partnership, or similar entity, in which case you are required to be represented by an attorney at the hearing, and more immediately, your request for a hearing must be ratified by an attorney within 28 days of the agency's receipt of the request, OAR 137-003-0550. If you are not represented at the hearing and during the hearing you determine that representation by an attorney is necessary, you may request a recess to allow you an opportunity to secure the services of an attorney. The hearing ALJ will decide whether to grant such a request. The ODA will be represented by an attorney. Legal aid organizations may be able to assist a party with limited financial resources.
5. **Administrative Law Judge.** The person presiding at the hearing is known as the administrative law judge (ALJ). The ALJ will rule on all matters that arise at the hearing, subject to agency consideration of matters transmitted for agency decision under OAR 137-003-0635 or matters subject to agency review under OAR 137-003-0640 or OAR 137-003-0570. The ALJ will be assigned by the Chief ALJ from the Office of Administrative Hearings (OAH). The OAH consists of employees of, and independent contractors with, the Chief ALJ. The ALJ does not have the authority to make the final decision in the case. The final determination will be made by the Director of the ODA.
6. **Discovery.** If the agency or the ALJ authorizes discovery, the agency or the ALJ shall control the methods, timing and extent of discovery. Discovery is permitted in this proceeding. Discovery is permitted as provided in OAR 137-003-0570, OAR 137-003-0572, and OAR 137-003-0573.
7. **Witnesses.** A witness must testify under oath or affirmation to tell the truth. The ODA or the ALJ will issue subpoenas for witnesses on your behalf upon a showing that their testimony is relevant to the case and is reasonably needed by you to establish your position. If you are represented by an attorney, your attorney may issue subpoenas for attendance of witnesses at hearing. Payment of witness fees and mileage to the person subpoenaed is your responsibility.
8. **Order of evidence.** A hearing is similar to a court proceeding but is less formal. Its general purpose is to determine the facts and whether the ODA's proposed action is appropriate. The order of presentation of evidence is normally as follows:
  - a. Testimony of witnesses and other evidence of the ODA in support of its proposed action.
  - b. Testimony of your witnesses and your other evidence.
  - c. Rebuttal evidence by the ODA and by you.
9. **Burden of presenting evidence.** The burden of presenting evidence to support an allegation or position rests upon the proponent of the allegation or position. If you have the burden of proof on an issue, or if you intend to present evidence on an issue in which the agency has the burden of proof, you should approach the hearing prepared to present the testimony of

witnesses, including yourself, and other evidence that will support your position. All witnesses are subject to cross-examination and also to questioning by ALJ.

10. **Admissible evidence.** Relevant evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs is admissible and will be received. Hearsay evidence is not automatically excluded. Rather, the fact that it is hearsay generally affects how much reliance the ALJ and the Director of the ODA will place on it in reaching a decision.

There are four kinds of evidence:

- a. Knowledge of the agency or ALJ. The agency or ALJ may take "official notice" of facts based on the agency's or ALJ's knowledge in a specialized field. This includes notice of general, technical or scientific facts. The agency or ALJ may also take "judicial notice" of a fact that is not subject to reasonable dispute in that it is generally known or is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. You will be informed if the agency or ALJ takes "official notice" or "judicial notice" of any fact and you will be given an opportunity to contest any facts so noticed.
- b. Testimony of witnesses. Testimony of witnesses, including you, who have knowledge of the facts may be received in evidence.
- c. Writings. Written documents including letters, maps, diagrams and other written material may be received in evidence.
- d. Experiments, demonstrations and similar means used to prove a fact. The results of experiments and demonstrations may be received in evidence.

11. **Objections to evidence.** Objections to the admissibility of evidence must be made at the time the evidence is offered. Objections are generally made on one of the following grounds:

- a. The evidence is unreliable;
- b. The evidence is irrelevant or immaterial and has no tendency to prove or disprove any issue involved in the case;
- c. The evidence is unduly repetitious and duplicates evidence already received.

12. **Continuances.** There are normally no continuances granted at the end of the hearing for you to present additional testimony or other evidence. However, if you can show that the record should remain open for additional evidence, the ALJ may grant you additional time to submit such evidence.

13. **Record.** A record will be made of the entire proceeding to preserve the testimony and other evidence for appeal. This may be done by use of a tape or digital recorder or court reporter. The record is generally not transcribed, unless there is an appeal to the Court of Appeals. However, you may obtain a copy of the tape recording upon payment of the costs of making a copy of the tape. If a court reporter is used, you may obtain a transcript or a copy of the court reporter's transcript upon payment of a transcription fee or other fee that the parties may agree upon.

14. **Proposed Order and Exceptions.** The ALJ will issue a proposed order in the form of findings of fact, conclusions of law and recommended agency action. You will be provided with a copy and you will be given an opportunity to make written objections, called "exceptions," to the ALJ's recommendations. You will be notified when exceptions to the proposed order must be filed. You will be notified when you may appear and make oral argument to the agency.

15. **Final Order.** The agency will render the final order in this case. The agency may modify the proposed order issued by the ALJ. If the agency modifies the proposed order in any substantial manner, the agency in its order will identify the modifications and will provide an explanation as to why the agency made the modifications. The agency may modify a proposed finding of "historical" fact only if the proposed finding is not supported by a preponderance of the evidence in the record.

16. **Appeal.** If you wish to appeal the final order, you must file a petition for judicial review with the Oregon Court of Appeals within 60 days after the final order is served upon you. See Oregon Revised Statutes 183.482.

17. **Notice to Active Duty Servicemembers.** Active duty servicemembers have a right to stay these proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 800-452-7500, or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>.