

**WASHINGTON STATE DEPARTMENT OF AGRICULTURE'S
RULE-MAKING PROCESS:
AN EVALUATION OF A PROPOSED
PESTICIDE SPRAY DRIFT NOTIFICATION RULE**

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This study examines the Washington State Department of Agriculture's (WSDA) rule-making process for modifications to WAC 16-228-1220(4) by evaluating WSDA's adherence to the Washington State Administrative Procedure Act (WSAPA) rule-making procedures and conformance to two applicable rule-making best practices – use of science and integration of public participation. The proposed rule, if adopted, would have required an applicator to provide notification of application of certain pesticides near schools, hospitals, nursing homes and adult and child day care centers. Information gained from this study will contribute to understanding the effectiveness of future rule-making processes.

WSDA's performance during this rule-making process was acceptable by legal standards. WSDA even engaged in some actions beyond the minimum statutory requirements with the expectation of creating a better rule. But ultimately, a two year process ended with no rule and almost all stakeholders disappointed. Upon evaluation of WSDA's performance during this rule-making process, this study found that WSDA's use of science was inadequate and their integration of public participation was not ideal.

What could WSDA have done differently to make this rule-making process successful? And was it even possible? While not an exhaustive list, this study discusses some actions to be considered in future WSDA rule-making processes.

- WSDA should modify their enforcement system to better measure the extent of pesticide exposures.
- Any science used as a basis for discussion about or language of the proposed rule should be made understandable and should be agreed upon by members of a negotiated rule-making process.
- An independent, unbiased, professional facilitator should be used for negotiated rule-making when the controversy is high.
- A proposed rule should reflect that which is discussed by a temporary advisory committee.
- WSDA should consider providing incentives for stakeholders who do not have the resources to participate on temporary advisory committees.
- WSDA should consider educating key stakeholders on the need for and the benefits of participating in rule-making processes.
- If expertise for developing surveys is not available within the agency, WSDA should consider consulting an expert when designing and conducting surveys.

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ABBREVIATIONS AND ACRONYMS

AAPCO	American Association of Pesticide Control Officials
APA	Administrative Procedure Act
DOH	Washington State Department of Health
MSAPA	Model State Administrative Procedure Act
NCCUSL	National Conference of Commissioners on Uniform State Laws
OEHS	DOH Office of Environmental Health and Safety
OFM	Washington State Office of Financial Management
PAB	Pesticide Advisory Board
RCW	Revised Code of Washington
SBEIS	Small Business Economic Impact Statement
WAC	Washington Administrative Code
WEA	Washington Education Association
WSAPA	Washington State's Administrative Procedure Act
WSDA	Washington State Department of Agriculture
WSHA	Washington State Horticultural Association
WSR	Washington State Register
USEPA	United States Environmental Protection Agency

INTRODUCTION

Over the past 60 to 70 years with the growth of state governments and their increasing workload, state legislatures have increasingly delegated policymaking authority to administrative agencies.¹ Today, the Washington State legislature authorizes the Washington State Department of Agriculture (WSDA) to issue rules regulating pesticides in Washington State under the Washington Pesticide Control Act RCW 15.58.010 *et seq.*, Washington Pesticide Application Act RCW 17.21.010 *et seq.*, and Administrative Procedure Act 34.05.001 *et seq.*

WSDA's mission states that "WSDA serves the people of Washington State by supporting the agricultural community and promoting consumer and environmental protection." This is an important charge considering that the Washington State agriculture industry is the State's largest employer.² And the Washington State tree fruit industry alone contributes over \$5 billion annually to the State's economy.³ Part of supporting agriculture entails WSDA ensuring that pesticides are used in a safe and legal manner.⁴ And as the population in rural communities continues to grow, there is a growing concern about human exposure to pesticides.⁵ Thus, it becomes increasingly important for WSDA to ensure that pesticides are used in a safe manner not only to protect consumers, but also to protect residents of communities around where pesticides are applied.

Under legislative authority to regulate pesticides, WSDA is often faced with the difficulties of balancing the rights and desires of industry, organizations, and individuals with the responsibility of reducing the risk of adverse effects to human health and the environment. Achieving these outcomes to their maximum potential often is not possible. And because the determination of a "good" rule is highly dependent on the desires or opinion of whoever is evaluating the rule – a specific industry, organization, or individual – it is necessary to have a sound rule-making process that most effectively takes into account all desirable outcomes and balances them with an adequate reduction of risk.

¹ Arthur E. Bonfield, *State Administrative Rule Making* (Boston, MA: Little Brown & Co., 1986).

² WSDA, "About WSDA", <http://agr.wa.gov/AboutWSDA/default.htm> (accessed April 30, 2006).

³ William S. Jensen, "Economic Impact of the Tree Fruit Industry in Washington State and the Northwest," (report for Washington State Horticultural Association and Washington Tree Fruit Research Commission, August 2004).

⁴ WSDA, "Welcome to the Department of Agriculture," <http://agr.wa.gov/AboutWSDA/default.htm> (accessed April 30, 2006).

⁵ Sharon Lee et al, "Community Exposures to Airborne Agricultural Pesticides in California: Ranking of Inhalation Risks," *Environmental Health Perspectives* 10 (December 2002).

The purpose of this study is to help the public, policy makers, advocates, and analysts further understand influential factors that contributed to the development of a proposed rule concerning further modifications to WAC 16-228-1220(4), and the proposed rule's subsequent withdrawal. This study addresses the rule-making process undertaken by the Washington State Department of Agriculture between January 2004 and December 2005. The proposed rule, if adopted, would have enacted notification of application of certain pesticides near schools, hospitals, nursing homes and similar establishments. Major factors that influenced this rule-making process include scientific uncertainty and the political and social environment. Information gained from this study will contribute to understanding the effectiveness of future rule-making processes.

RESEARCH METHODOLOGY

This study examines WSDA's rule-making process for modifications to WAC 16-228-1220(4) by evaluating WSDA's adherence to the Washington State Administrative Procedure Act (WSAPA) rule-making procedures and conformance to rule-making best practices. The proposed rule, if adopted, would have required an applicator to provide notification of application of certain pesticides near schools, hospitals, nursing homes and adult and child day care centers.

2.1 SCOPE

This study evaluates the effectiveness of the rule-making *process* undertaken by WSDA between January 2004 and December 2005, with the premise that an effective rule-making process increases the probability of an effective rule, though not guaranteeing it. While development of this study included collecting and reporting of information on the predicted effectiveness of the subject rule, no judgment is made on the proposed rule substance or content.

2.2 RESEARCH

This study used information gathered from online, book, and journal literature; from the subject rule's public rule-making file; and from semi-structured interviews with stakeholders involved in the subject rule-making process. For the purpose of this study, stakeholders are WSDA employees and members of the temporary technical advisory committee, which was created by WSDA for the purpose of soliciting information from a wide range of interested parties prior to issuance of the proposed rule. Advisory committee members included WSDA staff and representatives for farm workers, pesticide manufacturers, pesticide applicators, teachers, long-term care providers, community members, farm workers, academic institutions, and the Washington State Department of Health. Interviews were conducted with available advisory committee members and WSDA administrators who participated in the subject rule-making process. Members of the temporary advisory committee who did not respond to requests for interviews, were unavailable, and participated in fewer than two meetings were not interviewed (Appendix A: Stakeholders). Interviews were conducted via phone. Consent forms were signed by the researcher and interviewees (Appendix B: Sample Consent Form).

Due to the semi-structured nature of the interviews, the questions varied. However, all interviews explored the following four questions:

1. What was the nature of your involvement in the subject rule-making process?
2. To what extent did science and political, economic, and social factors contribute to the development of the proposed rule?
3. To what extent did this rule-making process relate to rule-making regulations and best practices?
4. What lessons can be learned from this process?

2.2.1 WSAPA Rule-Making Procedures

Rule-making procedures included in RCW 34.05, Part III, are divided into 24 sections. Because the subject rule was withdrawn, sections outlining requirements for the final adoption of a rule, information on invalidity of adopted rules or on contesting an adopted rule, and qualifications for exemptions or special provisions of a rule are not applicable to this study and therefore, not discussed. In addition, RCW 34.05.328 (Significant legislative rules, other selected rules) was excluded because WSDA is not a listed agency within this section. A discussion of the 11 applicable sections is included in Chapter Four: Statutory Procedures.

2.2.1.1 Applicable sections

- §34.05.310 (Prenotice inquiry – Negotiated and pilot rules)
- §34.05.312 (Rules Coordinator)
- §34.05.313 (Feasibility studies – Pilot projects)
- §34.05.314 (Rules development agenda)
- §34.05.315 (Rule-making docket)
- §34.05.320 (Notice of proposed rule – Contents – Distribution by agency – Institutions of higher education)
- §34.05.322 (Scope of rule-making authority)
- §34.05.325 (Public participation – Concise explanatory statement)
- §34.05.330 (Petition for adoption, amendment, repeal – Agency action – Appeal)
- §34.05.335 (Withdrawal of proposal – Time and manner of adoption)
- §34.05.370 (Rule-making file)

2.2.1.2 Non-applicable sections

Requirements for the final adoption of a rule

- §34.05.340 (Variance between proposed and final rule)
- §34.05.360 (Order adopting rule, contents),
- §34.05.362 (Postadoption notice),
- §34.05.365 (Incorporation by reference),
- §34.05.375 (Substantial compliance with procedures),
- §34.05.380 (Filing with code reviser – Register – Effective dates)

- §34.05.385 (Rules for rule making),
- §34.05.390 (Style, format, and numbering – Agency compliance)
- §34.05.395 (Format and style of amendatory and new sections – Failure to comply)

Information on invalidity of adopted rules or on contesting an adopted rule, and

- §34.05.345 (Failure to give twenty days notice of intended action – Effect),

Qualifications for exemptions or special provisions of a rule

- §34.05.350 (Emergency rules and amendments)
- §34.05.353 (Expedited rule making)

WSDA is not a listed agency

- §34.05.328 (Significant legislative rules, other selected rules)

2.3 STUDY OVERVIEW

Chapter Three: WSDA’s Proposed Rule presents an overview of WSDA’s rule-making process. The chapter begins with a discussion of precipitating events, and then summarizes five public documents filed by WSDA for publication in the Washington State Register. The remainder of the chapter discusses WSDA’s actions and public participation in the rule-making process, including the formation of a temporary advisory committee, holding of public hearings, and performance of a phone survey.

Chapter Four: Statutory Procedures presents a summary and discussion of the required statutory procedures for rule-making under WSAPA and WSDA’s adherence to each of these procedures. Chapter Five: Best Practices presents a description of two applicable best practices for this rule-making process – use of science and integration of public participation – and evaluates WSDA’s conformance to them. Best practices are actions shown to lead to a better rule through research and empirical studies.

Chapter Six: Conclusions summarizes the findings of this study concerning WSDA’s performance in this rule-making process in the context of influencing factors and presents actions to be considered in future rule-making procedures.

WSDA'S PROPOSED RULE

3.1 AUTHORITY

WSDA has the authority to issue rules regulating pesticides in Washington State under the Washington Pesticide Control Act, RCW 15.58.010 *et seq.*, Washington Pesticide Application Act, RCW 17.21.010 *et seq.*, and Administrative Procedure Act RCW 34.05.001 *et seq.* Adopted rules pertaining to pesticides are recorded in the General Pesticides Rules, WAC 16-228.

WSDA's statutory authority for the subject proposed rule was identified as RCW 17.21.030(1)(a). RCW 17.21.030(1)(a) declares that the director of WSDA may adopt rules governing the loading, mixing, application and use, or prohibiting the loading, mixing, application, or use of any pesticide.

3.2 PRECIPITATING EVENTS

This rule-making process did not develop unexpectedly. Social events and political controversies were influencing factors in WSDA's decision to undertake a rule-making process for the subject of pesticide spray drift. WSDA's review of agency rules under the Governor's executive order number 97-02, created an opportunity where WSDA could examine current rules dealing with this subject.

3.2.1 Social Environment

On May 31, 2001, Elena Dominguez, a 12 year old middle school student in Wenatchee, was admitted to the emergency room for systemic symptoms of pesticide exposure. In June, 2001, WSDA determined that the illness was due to exposure to pesticide drift. The violator was issued a fine of \$3,300 and a 15-day license suspension.⁶ This incident has become a focusing event for community exposure to pesticide spray drift, especially with regard to schools. Local newspapers have covered the story and community protection advocacy groups have increased their attention to spray drift concerns.⁷ In addition, Elena and her father have spoken publicly about their support for increased protection from pesticide exposure.⁸

3.2.2 Political Controversy

In August 2003, a WSDA pesticide inspector, David Zamora, was removed from his job and was investigated by WSDA, after orchardists accused him of violating

⁶ WSDA, "WSDA Cases – Schools, Hospitals, Nursing Homes, or Similar Establishments and School Buses, 1999-2003, 2004 to 8/31/04," document in proposed rule's public file (reviewed February 13, 2006)

⁷ Information obtained from stakeholder interviews

⁸ Elena and her father, John Dominguez testified at a public hearing for the proposed rule. John Dominguez also attended a temporary advisory committee meeting for the proposed rule.

procedures and state lawmakers said he was too aggressive. Mr. Zamora worked for five years in WSDA's Wenatchee office investigating complaints about illegal pesticide use in Chelan, Douglas, and Grant counties. He was subsequently cleared of allegations that he abused his investigative power. However, he has been permanently removed from his position of investigating agriculture's regulatory compliance.⁹ Bob Arrington, assistant director of WSDA's pesticide management program, was quoted in an article published in the Wenatchee World newspaper in January 2004, as stating that "this is not an environment in which Dave or any other investigator should have to work. Additionally, this is an emotionally charged issue and I am concerned with Dave's safety."¹⁰ Following the Zamora events, the Wenatchee World newspaper ran a weekly series between May 16 and June 13, 2005 that looked into political action and pesticides.

3.2.3 Governor's Executive Order

In 1997, the Office of the Governor issued an executive order 97-02 for regulatory improvement, which stated that "agencies shall determine if their rules should be (a) retained in their current form, or (b) amended or repealed, if they do not meet the review criteria specified in this executive order." Under this order, WSDA reviewed all agency rules, including WAC 16-228, General Pesticides Rules. During the review process, WSDA requested that stakeholders comment on rule language and potential amendments. A considerable number of comments were received in 2003 during public hearings for the amendment to WAC 16-228 that declared that the language in WAC 16-228-1220(4) was not restrictive enough to protect public health from pesticide spray drift. In October, 2003, WSDA adopted the current amendments, but agreed to reopen the section to possible further modifications or additions. In November 2003, the amendments to WAC 16-228-1220(4) resulting from the executive order became effective and read:

What are the restrictions applying to any person holding, handling, using, or disposing of pesticides and their containers?

(4) No pesticides shall be applied by aircraft or airblast sprayers to property abutting and adjacent to occupied schools in session, hospitals, nursing homes or other similar establishments under conditions that may result in contamination of these establishments or their premises.

⁹ James Pitkin, "Agriculture inspector taken off pesticide job: Move appears to be retaliatory, some say." *Wenatchee World*, section A, November 20, 2003, final edition.

¹⁰ James Pitkin. "Ag inspector did his job right – but he still won't be allowed to return to it." *Wenatchee World*, section A, January 11, 2004, final edition.

3.3 WASHINGTON STATE REGISTER FILINGS

As agreed in November 2003, WSDA began a new rule-making process by submitting a preproposal statement of inquiry (CR-101) on January 7, 2004 to the code reviser for publication in the Washington State Register (WSR). Throughout this rule-making process and in accordance with RCW 34.05.001 *et seq.*, WSDA filed five documents with the code reviser for publication in the WSR, with the final document being the rule withdrawal (see Appendix C: Washington State Register Filings). A summary of each of the five documents is discussed below. A discussion of WSDA's actions throughout the rule-making process is presented in subsequent sections.

3.3.1 First Preproposal Statement of Inquiry

This statement, which was submitted on January 7, 2004, identified WSDA's intent to determine rule language pertaining to applications relating to WAC 16-228-1220(4) – *What are the restrictions applying to any person holding, handling, using or disposing of pesticides and their containers, application by airblast sprayers or aircraft near schools, hospitals or similar establishments?*

3.3.2 Second Preproposal Statement of Inquiry

On May 11, 2005, WSDA filed with the code reviser a second preproposal statement of inquiry (CR-101). This statement redefined WSDA's intent by allowing the scope of rule-making to extend beyond just aerial and airblast applications and included day care centers as establishments that must be notified.

3.3.3 Notice of Proposed Rule-Making

On September 6, 2005, WSDA filed with the code reviser a notice of proposed rule-making (CR-102). The notice included the proposed rule language (see Appendix D: Proposed Rule). The proposed rule modifications included:

1. Adding a new section WAC 16-228-1221, *Must an applicator notify schools, hospitals, nursing homes and day care centers prior to an application of certain pesticides?* This section would require a pesticide applicator to provide notification 48 hours in advance of application for certain applications of specified pesticides near schools, hospitals, nursing homes and adult and child day care centers.
2. Add a definition of “responsible person” to WAC 16-228-1010.
3. Modify the definition of “fumigant” to be consistent with RCW 17.10.020(20)

3.3.4 Continuance of Notice of Proposed Rule-Making

On November 30, 2005, WSDA filed with the code reviser a continuance to the notice of proposed rule-making (continuance for CR-102). The continuance extended the

intended date of adoption for the proposed rule from November 29, 2005 to December 30, 2005.

3.3.5 Withdrawal of Proposed Rule

On December 30, 2005, WSDA filed with the code reviser a letter indicating that WSDA was withdrawing the original notice of proposed WAC rule amending 16-228-1220(4) and the notice of continuance of adoption date.

3.4 TEMPORARY ADVISORY COMMITTEE

Between May and December 2004, following the first preproposal statement of inquiry, WSDA formed a temporary advisory committee and held three meetings with the committee to advise WSDA on possible further actions regarding WAC 16-228. Below is a summary of the meetings.

3.4.1 Committee Membership

Between May and July 2004, WSDA secured stakeholders' membership on the temporary advisory committee. Members of the committee were either chosen by WSDA or requested to participate on the committee. Representatives from the Washington Education Association (WEA), Farm Worker Pesticide Project, and Washington Toxics Coalition requested membership and WSDA agreed to include them on the committee. WSDA recruited representatives from the other stakeholder groups, including pesticide applicators, growers, the research/education/medical community, potentially affected establishments (schools, hospitals, and nursing homes), and the Washington Department of Health.

The final committee roster included 19 members (see Table 3-1)¹¹. Seven of the 19 members did not attend the first meeting. Four of the 19 members had a scientific background; of those four members, one attended zero meetings and two attended only the last meeting. In addition, WSDA encountered difficulty recruiting representatives for some stakeholders, especially schools and hospitals.¹² Thus, school and hospitals were underrepresented on the committee.

¹¹ WSDA, "Air/Airblast Sprayer Temporary Advisory Committee Members," Attachment to letter to committee members, February 4, 2005.

¹² WSDA, "Pesticide Rules Hearing Technical Report," document in proposed rule's public file (reviewed February 13, 2006).

Table 3-1. Temporary Advisory Committee Attendance

Affiliation	# of Meetings Attended
<i>Affected Parties</i>	
Farm Worker Pesticide Project (farm worker rights advocate)	3*
Olympic Education Service District	1 (via phone)
Public Citizen/Teacher	1
Regional Long-Term Care Ombudsman	2*
Washington Education Association/Teacher	3*
Washington State Long-Term Care Ombudsman	0
Washington Toxics Coalition (community health advocate)	2
<i>Pesticide Applicators & Growers</i>	
Orchardist	2*
Passmore Aviation (pesticide applicator)	3*
Washington Apple Growers Marketing Association	1*
Washington Farm Bureau	3*
Washington Friends of Farm and Forests	2*
Washington Growers Clearinghouse	3*
<i>Research/Education/Medical Community</i>	
University of Washington, Department of Environmental and Occupational Health Sciences, Toxicologist	0 ⁺
Washington State University, Pesticide Education Specialist	1 ⁺
Washington Tree Fruit Research Commission	2 ⁺
<i>State Agency Representatives</i>	
WSDA, Pesticide Program Development Manager/ Committee Contact	3*
Washington State Department of Health, Eastern Washington Investigator	2*
Washington State Department of Health, Pesticide Program Manager	1 ⁺

* Attended first meeting

⁺ Stakeholder with scientific background

3.4.2 Purpose and Scope of Discussion

Several times during the meetings, the facilitator, and Ann Wick, manager of WSDA's Pesticide Program Development division, described the objective for the committee as determining if the current state regulation is sufficient to do enforcement work and deter people from making further violations.

Current State Regulation ~ WAC 16-228-1220(4):

What are the restrictions applying to any person holding, handling, using, or disposing of pesticides and their containers?

(4) No pesticides shall be applied by aircraft or airblast sprayers to property abutting and adjacent to occupied schools in session, hospitals, nursing homes or other similar establishments under conditions that may result in contamination of these establishments or their premises.

During the first meeting (July 22, 2004), WSDA indicated that language including restrictions on application methods other than aerial and airblast also were out of scope of the current preproposal statement of inquiry (CR-101). Thus, the discussion of whether to include methods other than aerial and airblast in the language of the proposed rule was out of the scope of the committee. WSDA also declared that day care centers are not considered a "similar establishment," in the context of the current rule. However, after the second meeting, it was determined that day cares are considered a "similar establishment" and were within the scope of the current CR-101.

During the second meeting (October 1, 2004), a committee member commented that a potentially more appropriate question for the committee to address is whether the rule protects human and environmental health. Following this comment, the facilitator asked the group to think about how they wanted to pursue the issue from this point forward. Ann Wick stated that WSDA was open to looking at solutions for health protections, but a new CR-101 would need to be filed to allow amendments including specifications for day care centers and restrictions for additional application methods.

During the third meeting (December 13, 2004), committee members were discussing notification options, when the focus of the conversation shifted briefly to day care centers again. A member of the committee asked about where the discussion was going and what the focus should be to reach their objectives for the day. The facilitator responded that the best outcome for the day would be to reach consensus on whether to change the regulation or not. No consensus was reached. Also, the facilitator indicated that any option must be do-able, enforceable, and pass a Small Business Economic Impact Statement (SBEIS). Any rule that has a significant economic impact on small businesses is less likely to pass (i.e. to be acceptable to the public or WSDA).

3.4.3 Meeting Structure and Summary

A WSDA employee from outside WSDA's Pesticide Management division served as a facilitator for the committee meetings. The locations of Yakima, Wenatchee, and Ellensburg were chosen to be practical for stakeholders that would be most affected by the proposed rule (Eastern Washington members).¹³ The meetings were held during business hours on weekdays.

3.4.3.1 First Meeting – July 22, 2004

The first meeting began with a process of members educating other members about the subject matter. Proposals for specific ideas were not recorded until after WSDA determined that the education discussion was complete. The second half of the meeting involved brainstorming ideas for a proposed rule.

3.4.3.2 Second Meeting – October 1, 2004

During the second meeting, the committee discussed potential voluntary and regulatory solutions. Based on meeting minutes, ideas and concerns discussed include:

- Status quo
- Buffers around the edge of agricultural land
- Notification by sprayer – voluntary or required
- Technique ideas included application techniques, pesticide alternatives, banning applications during school hours, and air monitoring
- Further research of other potential alternatives and costs of alternatives

3.4.3.3 Follow-up Letter to Second Meeting – October 15, 2004

After the second meeting, WSDA mailed a follow-up letter to the committee members. The letter outlined items on which WSDA felt the committee agreed:

- Everyone's best interest is to maintain family farms.
- Agricultural operations close to schools, hospitals, nursing homes, or similar establishments have a higher potential to impact sensitive populations than operations in other areas.
- Pesticides applied as liquids or dust has the potential to move off target.
- Pesticides applied by air or airblast method have a higher potential to drift than other methods of application, but drift can be controlled.
- The toxicity, possible health, and/or environmental effects of different pesticides vary.
- Pest populations must be controlled for growers to market their produce.

¹³ WSDA, "Pesticide Rules Hearing Technical Report."

The letter also indicated that it was not in the committee's interest to "argue about possible health effects and the need for changing the rules." The agenda for the next meeting was to discuss possible solutions. WSDA compiled an extensive list of 70 "possibilities to discuss" gathered from review of other states and international policies and seven "questions to be answered, if needed." Most of the items within WSDA regulatory authority included buffer zones and notification rules.

3.4.3.4 *Third Meeting – December 13, 2004*

At the beginning of the third meeting Carol Ramsay, a pesticide education specialist from WSU, presented topics discussed at a Pesticide Drift conference held in October. Carol Ramsay was a member of the committee, although this was the first meeting she had attended. Ms. Ramsay indicated that the conference was aimed at educators and policy makers; however, no community or farm workers attended and only two state agency groups attended. The largest sponsors of the conference were U.S. government and nozzle manufacturers. Other sponsors included four chemical manufacturers, WSU, University of Queensland, U.S. Forest Service, and U.S. Conservation Reserve Program (voluntary program for agricultural landowners).¹⁴

The conference began by looking at human health and environmental factors affecting off-target movement, then presentations were held on different application technologies and current research directions. Also, the conference covered issues related to educating applicators about best management practices. Carol said she left the conference feeling challenged to continue working with the National Agricultural Aviation Association on adjustments to address off-target movement.

During the remainder of the meeting, the discussion consisted mostly of the option for a notification rule, as well as discussions on options for buffer zones and air monitoring. The committee also discussed levels and types of pesticides that should be regulated within the proposed rule. Discussion of these alternatives is summarized in the Committee Consensus on Alternatives section below.

3.4.4 *Committee Consensus on Alternatives*

WSDA stated on several occasions that they believed the current rule is sufficient, but that they engaged in this process because of public concerns. The implication was that WSDA believed that the problem was the public's perception of risk to pesticide exposure, rather than an actual problem with the rule. Among the committee members, there was no consensus. Even if the members had agreed that the regulation should be changed, there was no consensus on what the new regulation would include, especially

¹⁴ WSDA, "Third Meeting of the Air/Airblast Sprayer Temporary Work Group," document in proposed rule's public file (reviewed February 13, 2006).

with regard to which party the burden should fall. For example, should the pesticide applicator be responsible for notifying sensitive populations or should the populations be responsible for taking precautions against pesticide drift? Options for notification and buffer zones were discussed, but some members expressed interest in discussing other alternatives and requested additional meetings to do this. Options discussed during the meetings and the committee's opinions are summarized below.

3.4.4.1 Buffer Zones

The discussion on buffer zones was brief because the option was quickly dismissed by some committee members. The facilitator indicated that the option of buffer zones would not pass the SBEIS factor, meaning that the economic impact to small farms would be too great. Some members felt that evidence to support this claim was not available in these meetings. No formal SBEIS was prepared for the proposed rule.

Carol Ramsay, from WSU, strongly disagreed with buffer zones. She said that buffers are a one-size-fits all solution that inhibits technological advancements. Carol Dansereau, an advocate for farm workers rights, argued that buffers provide a minimum safety net protection, but would still provide opportunities for technological advances. Ms. Ramsay also said that buffers would infuriate the agriculture community, because they would have to rip out rows of orchards. However, the committee then discussed that there are alternative ways to spray trees within a buffer zone that could reduce drift. A grower on the committee indicated that he could use a more expensive, but less dangerous product in the outer rows.

Ann Wick stated that at the last AAPCO meeting, state agencies that regulated using buffer zones indicated that they were not working. Also, states that have policies for buffers are not regulating tree fruit agriculture. Some members indicated that more information was needed from other states before passing judgment that buffer zones did not work. For example, the committee should look at how and when the policy was implemented and the cost implications.

3.4.4.2 Notification

The committee discussed different scenarios for notification, such as notification only if the establishment requested it versus notification of all sensitive establishments within a certain radius. The committee disagreed about under what circumstances notification would be required, such as the application distance from the establishment and how far in advance of spraying the notification would be issued. Many members outlined issues they had with the feasibility of the notification option. For example, there is a potential burden of too much paperwork if the list of establishments is large or if an applicator is spraying everyday, in the case of fruit fly season. The committee

also discussed what kind and how much information should be included in the notification, such as the name of and information about the pesticides.

3.4.4.3 Air Monitoring

WSDA stated that they have no authority to perform air monitoring, but that they could support establishments performing it themselves.

3.4.5 Information on Quantity of Exposures

At the first meeting, some committee members inquired about the quantity of pesticide exposures. WSDA's records indicated only two to three cases of pesticide spray drift exposures in the past year. However, WSDA's cases on pesticide spray drift are recorded by incident, whereas DOH records cases by each individual exposed. In other words, some WSDA cases may contain no human exposures, whereas other cases may contain numerous human exposures. Without analyzing each WSDA case file, the number of human exposures within any time period cannot be determined. The committee also discussed that WSDA's enforcement is complaint-driven. Thus, because incidents are investigated only if they are reported to WSDA, the quantity recorded may underrepresent the actual number of incidents. Ann Wick also indicated that in many of the cases, the exposure is so widespread that it is difficult to identify the violator, thus no violation can be recorded.

WSDA and DOH stated that they share information on exposure incidents. However, when WSDA receives a complaint, they look at whether a rule or law has been violated, whereas when DOH looks a case, they look at the health effects on an individual. The Washington State Department of Health's Office of Environmental Health and Safety (OEHS) investigates reports of acute adverse health effects resulting from exposure to pesticides.¹⁵ Based on 2002-2003 data from DOH's Pesticide Illness Monitoring Program (PIRT) presented to the temporary advisory committee by a DOH representative, there were 357 cases (297 incidents¹⁶) definitely, probably, or possibly (DPP) due to pesticide exposure. Pesticide drift was the cause of 95 of the 357 cases, 42 of which involved agricultural pesticide applications.

3.4.6 Information on Health Risks Associated with Exposure

After the first meeting, one committee member mailed scientific studies on health risks of pesticide exposure to WSDA and committee members. At the second meeting, the committee discussed their knowledge on health effects from pesticide exposure. Also, they discussed the uncertainty of exposure impacts depending on type of application,

¹⁵ DOH: OEHS, "Pesticide Program: Illness Monitoring and Prevention," <http://www.doh.wa.gov/ehp/ts/Pest/pest-illness-data.htm> (accessed April 30, 2006).

¹⁶ Incidents may involve multiple cases (people)

climatic conditions, and level of exposure. Overall, based on interviews with stakeholders and review of the meeting minutes, the research studies were discussed sparingly.

3.4.7 Committee Feedback

On February 4, 2005, WSDA sent a letter with draft language for the proposed rule and requested that temporary advisory committee members submit any comments on the draft language before the end of February. Most committee members that responded did so by phone call to Ann Wick.¹⁷ Many committee members requested that WSDA hold another meeting where experts would be present to answer the committee's outstanding questions. Some committee members thought that the concept of notification was a good idea, but had reservations about how it would be implemented and its feasibility. For example, growers may be overburdened with unnecessary paperwork. Also, there were concerns that a grower could not realistically notify an establishment 48 hours in advance because sometimes he or she doesn't know themselves that far in advance that they need to spray.¹⁸

In addition, this letter to the committee members did not include subsection (1)(c), which stipulated that pesticide applications not within ½ mile of the property boundary did not require notification.

3.5 PESTICIDE ADVISORY BOARD

On February 16, 2005, WSDA brought the proposed rule, which included subsection (1)(c) – the ½-mile provision, before the Pesticide Advisory Board¹⁹ for consultation. Ann Wick presented an overview of the history of the issue and a summary of the three temporary advisory committee meetings. Ms. Wick asked the PAB if they felt the committee should meet again. Some PAB members felt that the committee should meet again and continue exploring options. Other PAB members felt that there would be no more significant data and that the public hearings would provide another opportunity for stakeholders to comment on the proposed language. The PAB voted ten in favor, two opposed, that WSDA should continue with the proposed notification rule, and that no additional temporary advisory committee meetings should be held.

¹⁷ Ann Wick, interview, May 1, 2006.

¹⁸ Based on information obtained during stakeholder interviews.

¹⁹ The Pesticide Advisory Board is created under RCW 17.21.230 and given authorization to advise the director on any or all problems relating to the use and application of pesticides in the state under RCW 17.21.250

3.6 PHONE SURVEY

In March 2005, because schools, hospitals, or nursing homes were not adequately represented on the temporary advisory committee, WSDA performed a phone survey of 59 establishments, representing categories of establishments (schools, hospitals, and nursing homes) that would be affected by the proposed rule.²⁰ Forty-one of the 59 establishments contacted were schools, ten of the 59 were hospitals, and eight of the 59 were nursing homes. The surveyor first gave a brief overview of the proposed rule and WSDA's process. Then the surveyor asked the following questions:

1. Would you be interested in being notified if an applicator is applying one of these pesticides near your location?
2. If you would like to be notified, is two days before the application enough time?
3. If you do not care to be notified, what would be the reason?
4. Do you have agriculture bordering your school property? Forestry or Nurseries? Do you know the crop?

A copy of the survey guide is presented in Appendix E: Phone Survey.

Nineteen of the 59 respondents (15 schools, 2 hospitals, and 2 nursing homes) indicated that they have agricultural property adjacent to their property. Fifteen (13 schools and 2 nursing homes) of the 19 respondents that indicated that they have adjacent agricultural properties answered yes to the question: Would you be interested in being notified if an applicator is applying one of these pesticides near your location?

Some respondents did not indicate the type of agricultural land adjacent to their property. Because air/airblast spraying is used only on certain types of agriculture, it is unclear if all the establishments with adjacent agricultural property would be affected by a rule restricting air/airblast spraying.

3.7 PUBLIC COMMENTS

WSDA received written comments in the form of letters and emails from hundreds of individuals, organizations, and industries. In addition, four public hearings were held between November 2 and November 14, 2005. Two were held in Wenatchee (one in the afternoon and one in the evening), one in Yakima, and one in Olympia. Locations in northwest Washington and the Columbia Basin also were considered, but WSDA determined that the number of affected growers and applicators in these areas would be minimal so no hearings were held in these locations. During the public hearings, some

²⁰ WSDA, "Table 1," spreadsheet in proposed rule's public file, October 18, 2005, (reviewed February 13, 2006).

participants made oral presentations. Also, some participants submitted written comments during the meetings. A summary of the comments in favor and against the proposed rule is presented below.

3.7.1 Opposition to Proposed Rule

Written and oral comments opposing the proposed rule included concerns about the feasibility of implementation, the lack of scientific basis, the economic impact to farms, and an unnecessary increase in bureaucracy.

Feasibility

- Day cares are difficult to identify, especially adult day cares, and are more likely to change locations, thus making it difficult for applicators to notify these establishments.
- 48 hours notice is unfeasible because a grower sometimes needs to spray quickly to hold down an infestation. If an infestation occurs, it could cause a grower to lose their entire crop if he or she doesn't spray fast enough. Also, spraying is dependent on weather conditions, and the weather could change dramatically in 48 hours.
- Including the product name, active ingredient EPA registration number, type of pesticide, intended date, information statement and contact information all on the notification is over the top.

Science

- No scientific assessment of the rule's adequacy was performed.
- WSDA did not take into account current state of knowledge with regard to drift.
- The ½ mile provision was not based on science and the language is confusing.

Economic Impact

- There would be a huge impact on small businesses.
- No formal analysis was performed on the economic impact to agricultural producers.

Increased Bureaucracy

- The current rule already says no drift is allowed.
- It is common sense to not drift and talk to your neighbors.
- Notification when the application has to be rescheduled is too burdensome.

3.7.2 In Favor of Proposed Rule

Written and oral comments in favor of the proposed rule included:

- People have a right to know when they will be potentially exposed so that they can protect themselves.

- Enforcement of the current rule is inadequate.
- People are exposed to pesticide spray drift.
- Incidents of drift occur more frequently than the number of complaints.
- In favor, but the rule should be more restrictive to protect public health.

3.8 STAKEHOLDER MAILINGS

In September 2005, WSDA mailed a letter to potentially affected school districts, hospitals, and nursing homes. WSDA reportedly sent the letter to 297 school districts, 117 hospitals, and 247 nursing homes. The letter included the proposed rule language and a request for comments. Ann Wick stated that only one district responded to the request.

3.9 PROPOSED RULE WITHDRAWAL

In addition to a letter filed with the code reviser, WSDA issued a press release regarding withdrawal of the proposed rule on December 30, 2005. Two factors reportedly influenced WSDA Director Valoria Loveland's decision to not adopt the rule. The press release stated that the first factor prompting the Director's decision was that "the rule-making process developed no proposals that met with general agreement, and those organizations that would receive notifications played little role in developing the proposed rule." Also, the follow-up phone survey "did not produce consensus about the value of the proposed rule."

The second factor stated in the press release was that "those that would receive this additional notification [school districts, nursing homes, or other entities] may be exposed to liability if they did not adequately pass on the information...WSDA has no enforcement authority or even ability to provide guidance...about their legal responsibilities under this proposed rule."

Figure 3-1. Proposed Rule Timeline

Statutory Actions	Timeline	Non-Statutory Actions
	2003	
Received comments on amendments to WAC 16-228-1220(4) resulting from the Governor's executive order	Sept to Oct	
Amendments to WAC 16-228-1220(4) adopted	Nov 28	
	2004	
Filed first preproposal statement of inquiry (CR-101)	Jan 7	
	May to July	Recruited members of temporary advisory committee.
	July 22 Oct 1 Dec 13	Held three temporary advisory committee meetings.
	2005	
	Feb 4	Sent draft language to temporary advisory committee for comment
	Feb 16	Pesticide Advisory Board voted for WSDA to proceed with rule but not hold more temporary advisory committee meetings
	March	Performed telephone survey of establishments (schools, hospitals, and nursing homes) that would be potentially affected by the proposed rule
Filed second preproposal statement of inquiry (CR-101)	May 11	
	June	Included Notice of preproposal in WSDA newsletter
Filed notice of proposed rule-making (CR-102)	Sept 6	
	September	Mailed proposed rule to school districts, hospitals, and nursing homes requesting comments
Held four public hearings	Nov 2 – 14	
Filed a continuance to notice of proposed rule-making (CR-102 continuance)	Nov 30	
Withdrew proposed rule	Dec 30	

STATUTORY PROCEDURES

The Washington State Administrative Procedure Act (WSAPA) outlines several procedures required by state administrative agencies during rule-making processes. This chapter includes a brief history of the WSAPA, a summary of the required statutory procedures for rule-making under WSAPA, and a discussion of WSDA's adherence to each of these procedures.

4.1 WASHINGTON STATE ADMINISTRATIVE PROCEDURE ACT

The National Conference of Commissioners on Uniform State Laws (NCCUSL) was established in 1892 to provide “states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of the law.”²¹

The NCCUSL adopted the first Model State Administrative Procedure Act in 1946 and a revised version in 1961. Between 1961 and the early 1980s, state administrative processes grew in size and complexity and many state legislatures had experimented with additional administrative requirements. Also in the early 1980s, efforts increased to return to the states the responsibility for matters previously under the national government's responsibility. This growth and experimentation, coupled with the political climate of the early 1980s, led to the NCCUSL's proposal for a new MSAPA in 1981. The 1981 MSAPA incorporated practical lessons learned by states since adoption of the 1961 MSAPA and reflected many legal, political, social, and economical changes that occurred in the United States during that time period.²²

After adoption of the 1981 MSAPA, a task force from the Washington State Bar Association began a study to evaluate whether the 1981 MSAPA best met the needs of the WSAPA (Andersen, 1989). Effective July 1, 1989, the Washington State Legislature adopted a new Administrative Procedure Act (RCW 34.05) largely patterned after the 1981 MSAPA.

4.2 RULE-MAKING PROCEDURES (RCW 34.05, PART III)

As discussed in Chapter Two: Research Methodology, there are 24 sections in RCW 34.05, Part III that outline rule-making procedures. Eleven of the 24 sections are applicable to the subject rule process. Below is a summary of the 11 applicable sections and WSDA's adherence to the applicable sections.

²¹ NCCUSL, “Introduction to the Organization,” <http://www.nccusl.org/> (accessed April 30, 2006).

²² Bonfield, “State Administrative Rule Making.”

4.2.1 Prenotice inquiry – Negotiated and pilot rules (RCW 34.05.310)

To provide public access to the rule-making process and promote consensus among public interest, an agency is required to file a statement of inquiry to solicit public opinion prior to filing a notice of proposed rule-making.

The statement must include, at a minimum:

- Identification of statutes that provide authorization to agency for adoption of rules on this subject
- Discussion of why the rules may be needed and what they seek to accomplish
- Identification of other state or federal agencies that regulate on this topic
- Discussion of the process by which the rule may be developed
- Specifies the process by which the public may effectively participate in decision-making before rule adoption

The statement of inquiry is published in the state register at least 30 days prior to issuance of the notice of proposed rule-making (Procedure 6. Notice of Proposed Rule).

While not required, an agency is encouraged to develop and use new procedures for reaching agreement among interested parties. The agency makes the determination of whether any process for generating participation among interested parties prior to rule development is appropriate. If a process is not provided by the agency, a written justification must be included in the rule-making file. Examples for this process are:

- Negotiated rule-making among agency representatives and representatives of parties that may be affected by the subject rule-making
- Pilot rule-making that tests the feasibility of complying with and administering of a draft new rule

WSDA's Adherence to RCW 34.05.310:

First Statement of Inquiry (CR-101) was filed with the code reviser on January 7, 2004. A new CR-101 that expanded the scope of inquiry was filed with the code reviser on May 11, 2005. The new statement included the following information as required by RCW34.05.310 (see Appendix C: Washington State Register Filings)

- Statutes authorizing the agency to adopt rules on this subject
- Reasons why rules on this subject may be needed and what they might accomplish
- Identification of other federal and state agencies that regulate this subject and the process coordinating the rule with these agencies
- Process for developing new rule (check box: Stakeholder technical advisory group)
- How interested parties can participate in the decision to adopt the new rule and formulation of the proposed rule before publication (included contact information for where to submit written comments and the stakeholder advisory group contact person)

A temporary advisory committee was created for the purpose of a process of negotiated rule-making. Negotiated rule-making is not specifically required, but if a process for generating participation among interested parties is not included in the overall rule-making process, a written justification must be provided.

4.2.2 Rules Coordinator (RCW 34.05.312)

A designated person, named the rules coordinator, should be knowledgeable of all rules being proposed or prepared. The rules coordinator is designated by the agency, but does not have to be an employee of the agency. The rules coordinator is responsible for maintaining the public record and responding to the public's inquiries about participation in the process.

WSDA's Adherence to RCW 34.05.312:

A designated rules coordinator is employed within WSDA's Administrative Regulations unit.

4.2.3 Feasibility studies – Pilot projects (RCW 34.05.313)

Although, not *required* by law, an agency *may* test the feasibility of complying with, administering, or identifying alternatives to a proposed rule. This may be done during the development or after adoption of the rule. The pilot process, if performed, must include:

- Notification of the public,

- Participation by volunteers that would be affected by the rule,
- A high level of involvement by agency management,
- Reasonable completion dates,
- A process by which parties may withdraw or the process may be terminated

WSDA's Adherence to RCW 34.05.313:

No pilot project was performed as part of this rule-making process. However, because a pilot project is not required by law, WSDA's actions adhered to the regulations. This regulation also specifies requirements for *implementation* of a pilot project, which are not discussed in this study.

4.2.4 Rules development agenda (RCW 34.05 314)

An agency prepares a semiannual agenda for rules under development. The agenda is filed with the code reviser for publication in the State Register. Copies of the agenda also are distributed to parties requesting copies and any other agencies that would be expected to have interest in the subject of the rules being developed.

WSDA's Adherence to RCW 34.05.314:

Stages in development of the subject rule were filed in the Washington State Register under WSR numbers: 04-03-005, 05-11-034, 05-18-060, 05-24-046, and 06-02-056

4.2.5 Rule-making docket (RCW 34.05 315)

An agency must maintain a current, public rule-making docket at all times. The docket should include:

- Subject matter of proposed rules under active consideration,
- Contact information for agency personnel involved with the proposed rule,
- Citations to notices relating to rule that have been published in the state register
- Place where written submissions concerning rule may be inspected
- Time duration within which written submissions must be received
- Timetable established for agency proceedings, including locations and times of any public hearings

WSDA's Adherence to RCW 34.05.315:

WSDA maintains a current, public rule-making docket

4.2.6 Notice of proposed rule – Contents – Distribution by agency – Institutions of higher education (RCW 34.05.320)

An agency must file a notice of the proposed rule adoption in the state register at least 20 days before the rule-making hearing in which the agency receives public comment

on the rule adoption. Within 3 days of publication, the agency must mail a copy of the notice to all persons that requested to be mailed a copy. The notice should include:

- An identifying title or description
- Citations to the agency's statutory authority
- An explanation of the rule, its purpose, anticipated effects, and a statement of the reasons supporting the proposed action
- Contact information for agency personnel involved with the proposed rule
- Name of the person or organization proposing the rule
- Agency comments or recommendations on statutory language
- Whether the rule results from a law or court action, and if so, a citation to such law or decision
- Place, time, and how public may submit their views on the proposed rule
- Intended date of adoption
- A copy of the small business economic impact statement or explanation for not preparing a statement
- Statement indicating that a preliminary cost-benefit analysis is available, depending on if RCW 34.05.328 applies²³

The agency must forward three copies to the review rules committee. And, an institution of higher education must publish a notice in a campus or standard newspaper at least seven days before any rule-making hearing.

²³ WSDA is not a listed agency under RCW 34.05.328(5)(a)(i). Therefore, no cost-benefit analysis is required for rule adoption.

WSDA's Adherence to RCW 34.05.320:

Notice of Proposed Rule Making (CR-102) was filed with the code reviser on September 6, 2005. The statement included the following information required by RCW34.05.320 (see Appendix C: Washington State Register Filings)

- Title of rule and other identifying information
- Citations for statutory authority for adoption and statute being implemented
- Purpose of the proposal and its anticipated effects, including any changes in existing rules, and reasons for supporting proposal
- Name and contact information for agency personnel responsible for drafting, implementation, and enforcement
- Name of proponent (Washington State Department of Agriculture)
- Agency comments or recommendations, including attachment with language of New Section and Amendatory Section
- Whether the rule results from a federal law, federal court decision, or state court decision
- Attachment with public hearing information
- Contact information for submitting written comments
- Date of intended adoption
- Explanation for why no small business economic impact statement was prepared
- Explanation for why no cost-benefit analysis was required

A Continuance for the Notice of Proposed Rule Making (CR-102) was filed with the code reviser on November 30, 2005. The continuance modified the date of intended adoption. Notices of public hearings were published in a newspaper in each hearing location.

4.2.7 Scope of rule-making authority (RCW 34.05.322)

An agency may not rely solely on sections of law stating a statute's intent or purpose for its statutory authority in adopting rules. Thus, an agency must comply with all provisions of relevant statutes when making rules.

WSDA's Adherence to RCW 34.05.322:

WSDA is aware of and compliant with all relevant statutes.²⁴

²⁴ Based on review of available rule-related information and conversations with WSDA representatives

4.2.8 Public participation – Concise explanatory statement (RCW 34.05.325)

The agency must hold a rule-making hearing to provide an opportunity for oral comment on the proposed rule. The rule proposed under RCW 34.05.320 (Notice of proposed rule – Contents – Distribution by agency – Institutions of higher education) should reflect the proposed rule presented and commented on during the public hearing. The rule-making hearing:

- Must be open to the public.
- Presided over by an agency head, a member of the agency head, or a presiding officer
- Should be reasonably conducted to afford interested parties the opportunity to present comments

The presiding official at the hearing shall prepare a memorandum for review by the agency head that summarizes the content of the presentations made at the rule-making hearing, unless the agency head was the presiding officer or was substantially present at all the hearings. Written comment that is received by a specified date also will be accepted.

WSDA's Adherence to RCW 34.05.325:

Four public hearings were held between November 2 and November 14, 2005 – two in Wenatchee, one in Yakima, and one in Olympia. A presiding official was present at each hearing. A memorandum summarizing the content of oral presentations was prepared for the Agency Director's review.

Because the subject proposed rule was not adopted, procedures for preparation and filing of the concise explanatory statement are not discussed in this study.

4.2.9 Petition for adoption, amendment, repeal – Agency action – Appeal (RCW 34.05.330)

Any person may petition the agency to adopt, amend, or repeal a rule. Within 60 days of receiving the petition, the agency should either deny the petition in writing or initiate rule-making proceedings in accordance with RCW 34.05.320 (Notice of proposed rule – Contents – Distribution by agency – Institutions of higher education)

WSDA's Adherence to RCW 34.05.330:

No petitions were filed for this rule.

4.2.10 Withdrawal of proposal – Time and manner of adoption (RCW 34.05.335)

An agency may withdraw a proposed rule anytime before adoption. After a rule is withdrawn it may not be adopted unless it is proposed again in accordance with RCW 34.05.320 (Notice of proposed rule -- Contents -- Distribution by agency -- Institutions of higher education).

WSDA's Adherence to RCW 34.05.335:

WSDA submitted a letter to the Office of the Coder Reviser on December 30, 2005, stating that the rule was withdrawn.

Because the rule was withdrawn, procedures for time and manner of adoption are not discussed in this study.

4.2.11 Rule-making file (RCW 34.05.370)

An agency must maintain an official rule-making file for all proposed rules published in the state register or adopted rules. The file should contain:

- Citations to notices relating to rule that have been published in the state register
- Copies of relevant portions of the public rule-making docket
- All written comments and other important written material on which the rule is based
- Any official transcript of oral presentations made on which the rule is based, and the memorandum prepared by the presiding official
- Any and all petitions
- Citations to data, studies, or reports on which the agency relies
- If applicable, the concise explanatory statement

WSDA's Adherence to RCW 34.05.370:

A rule-making file is available for public review at WSDA's headquarters in Olympia. This file contains the following information required by RCW 34.05.370:

- Citations to notices relating to rule that have been published in the state register
- Copies of relevant portions of the public rule-making docket
- All written comments and other important written material on which the rule is based
- Official transcript of oral presentations made on which the rule is based, and the memorandum prepared by the presiding official
- Citations and hard copies of data, studies, or reports

As described in the previous chapter, some procedures should be and are required for state administrative rule-making. This is evidenced in the creation of a Model State Administrative Procedure Act, and more relevant to Washington State, the Washington State Administrative Procedure Act (WSAPA). WSAPA requires an agency to provide an opportunity for interested parties to present information and their opinions during the rule-making process and requires that an agency consider the presented information and opinions before making a decision. It also requires that an agency explain their rationale for the decision – if and how they took the information or opinions into account.

The WSAPA, however, is a set of *minimum* requirements for a rule-making process. Following the WSAPA procedures does not guarantee that an agency will produce a “good” rule. There are several actions beyond statutory requirements that an agency could undertake that may improve a rule-making process. In fact, the Washington State legislature encourages “flexible approaches to developing administrative rules.”²⁵ Ultimately, the value added to a rule-making process by additional actions depends on which actions are sought by the agency and how successfully those actions are carried out. Two applicable best practices – actions shown to lead to a better rule through research and empirical studies – for environmental decision-making, and specifically this proposed rule, include:

1. using science, and
2. integrating public participation

This chapter presents a discussion of these best practices and WSDA’s conformance to them.

5.1 USE OF SCIENCE

5.1.1 Best practices

When a rule-making process involves reducing the risk to public health, it is important that an agency have a reasonable understanding²⁶ of the level of that risk. In order to better determine the need for and type of regulation to adequately reduce the risk to public health. Assessment of regulatory options is commonly performed using a benefit-cost analysis of benefits to society and costs to industry. If, through a needs

²⁵ RCW 34.05.310

²⁶ For the purpose of this study, an agency’s understanding is considered “reasonable” if the risk is measured using the best available science and methods.

assessment, it is determined that the current rule is sufficient to protect public health, then the focus of a process should be on informing and educating the public about their perception of risk. However, if it is determined that there is an unacceptable risk to public health, then the focus of the rule-making process should be developing a rule to adequately reduce the risk to public health.

In addition to increasing the understanding of measurable risk, the use of science in a rule-making process increases the legitimacy of an agency to regulate. If an agency decides in favor of the industry's interests, the affected community and the public may become concerned about an agency's "capture" by industry interests.²⁷ Thus, the public's perception of an agency's ability to fairly regulate is eroded. However, if an agency does not decide in favor of the industry's interests, the regulated industry could become concerned about political pressure from the community to protect health, no matter what the cost. To balance these competing interests and avoid the perception of bias, it is in an agency's best interest to use a scientific approach in making their decision. A scientific approach involves an agency's primary reliance on objective data, or the best available science. Using science in a rule-making process not only increases the potential for a technically sound rule, but it increases the potential for balancing competing interests and decreasing the perception of bias.

5.1.2 WSDA's Scientific Understanding

In the case of this proposed rule, WSDA implied that they believed that the problem was the public's perception of risk of exposure, as opposed to an actual unacceptable risk of exposure. However, based on information gathered during this study, WSDA does not have a reasonable understanding of the extent of exposure to pesticides, nor did they take into account the current state of knowledge with regard to health risk from pesticide spray drift.

5.1.2.1 Extent of Exposure

During the first meeting, WSDA indicated that exposure incidents were limited to a few cases a year. However, as discussed in Chapter Three: WSDA's Proposed Rule, WSDA's cases are recorded by the incident, not by the number of people exposed. WSDA and DOH stated that they share information on exposure incidents. However, prior to a committee member requesting exposure records from DOH during the committee meetings, WSDA representatives were unaware of the number of community members exposed.

²⁷ The term "capture" is used to describe the tendency for public regulators to begin to share and adopt the values of those that they regulate.

In addition, exposure incidents are recorded based on complaints to WSDA or DOH. The public is required to recognize symptoms of exposure and report the incident. Thus, it is likely that the reported incidents underrepresent the actual number of incidents. Regulatory enforcement based on complaints does not help to reduce the uncertainty with respect to the extent of exposure.

5.1.2.2 *Health Risk from Exposure*

WSDA did not take into account the current state of knowledge with regard to health risk from spray drift. Under RCW 34.05.370, any studies on which WSDA relies for its decision should be included in the public rule-making file. Several scientific studies were included in the file, however, the language in the proposed rule does not appear to represent this knowledge beyond the fact that pesticide drift occurs and it is a health risk. The proposed rule included an exemption for notification when spraying within a ½-mile of a property boundary. In other words, if a pesticide applicator was not applying pesticides within a ½ mile of the property boundary with the school, hospital, nursing home, or day care center, then notification was not required. However, the scientific basis for developing this provision is unclear. Dr. Allan Felsot, a professor of entomology and environmental toxicology at Washington State University, argues that “it is technically possible to set toxicologically relevant distances between application sites and vulnerable facilities.” Ann Wick stated that she looked at Dr. Felsot’s studies, and realizes that a ½-mile distance may be excessive, but it was a “compromise position”²⁸ among the temporary advisory committee. This implies that a distance of ½ mile might be too large. However, as discussed in Chapter Three: WSDA’s Proposed Rule, the ½-mile provision [subsection (1)(c) of the proposed rule] was not included in draft language reviewed by the temporary advisory committee.

5.1.3 *Economic Considerations*

It is possible that the actual extent and impacts of pesticide exposure could never be determined, given the difficulty of accurately diagnosing symptoms of pesticide exposure and the complaint-driven system of enforcement. If the extent of exposure cannot be measured, then the damages or costs resulting from this exposure cannot be quantified. Under RCW 34.05.328(5)(a)(i), WSDA is not required to perform a cost-benefit analysis. However, if WSDA had decided to prepare an analysis to help determine the need for additional regulation or assess the best type of regulation, the costs associated with adopting or not adopting a proposed rule could not be accurately determined.

²⁸ Ann Wick, “RE: notification rule,” email correspondence with Dr. Rich Fenske in proposed rule’s public file, November 2005 (reviewed February 13, 2006).

5.1.4 Competing Interests

An additional benefit to using science in a rule-making process is increasing the potential for balancing competing interests and decreasing the perception of agency bias. If the public believes that the proposed rule was based on the best available science, they will be more likely to accept it.

The controversy between the public and agriculture industry was high. Almost every member of the temporary advisory committee that was interviewed had an opinion about what “side” WSDA had taken. Members that felt the rule was not protective enough of public health said that WSDA was “captured” by industry interests. Members that said the rule was sufficient to protect public health often stated that they had compromised for the sake of trying to find an acceptable solution during the committee meetings, whereas they felt that the “other side” had not compromised at all. Members that felt the rule was too restrictive said that WSDA had given into political pressure.

As discussed above, WSDA did not have an adequate understanding of the risk associated with pesticide spray drift exposure. In addition, any understanding they did have of risk, was not adequately communicated to the committee, as evidenced by the committee’s reflections about WSDA’s bias in this process.

5.2 PUBLIC PARTICIPATION

As discussed, using science to better understand the risk to public health is important. However, scientists and the public understand and communicate risk in different ways. The public understands risk in the context of current culture and politics, whereas scientists regard risk in measurable and definable terms. Measurable health risks are best understood through science. But, it is also important for decision-makers to *manage* risk in a way that is economically and technologically feasible and socially and politically acceptable.

Public participation is an effective way of determining a rule’s acceptability.²⁹ The most common statutory requirement for public participation is the public hearing. However, studies have shown that public hearings are limited in value. Public hearings are held later in the rule-making process after the rule-making decision generally has been determined, thus limiting the actual amount of valuable input the public can

²⁹ Ann Bray, “Comment: Scientific Decision Making: A Barrier to Citizen Participation In Environmental Agency Decision Making,” *William Mitchell Law Review* 17 (1991): 1111-1158.

contribute to the process.³⁰ The Washington State legislature encourages additional approaches to public participation.³¹

Because this rule-making process began as a result of public comment, WSDA felt that it was necessary in some capacity to involve the public in this rule-making process, beyond the statutory requirements of a public hearing. WSDA integrated additional public participation into this rule-making process in three main ways. First, WSDA engaged in negotiated rule-making by forming a temporary advisory committee to advise the agency on possible further actions and to help develop proposed language for the rule. Second, WSDA performed a phone survey of potentially affected parties (schools, hospitals, and nursing homes) to help determine interest in the proposed rule. Lastly, WSDA performed additional outreach by mail to stakeholders regarding their interest and comment on the proposed rule.

While, a specific comprehensive prescription to integrating public participation into the rule-making process does not exist,³² there are several things, or best practice approaches, that should be considered when integrating public participation. This section includes a discussion of best practices for each of WSDA's actions undertaken to integrate public participation and WSDA's conformance to them.

5.2.1 Negotiated Rule-Making

Negotiated rulemaking emerged in the 1980s and has been an increasing trend in environmental decision-making, as represented at the federal level by the United States Environmental Protection Agency (USEPA). Negotiated rule-making involves bringing together agency representatives and stakeholders to prepare language for a proposed rule prior to submission of the rule to the formal rule-making process.

5.2.1.1 Best Practices

In Washington State, in accordance with the Governor's Executive Order (93-06) on Improving State Regulatory Activities, the Office of Financial Management (OFM) developed a Guide for Negotiated Rule-Making. The executive order stated that the purpose of the negotiated rule process is "to involve the regulated community and other affected groups and individuals at the early stages of rule development, thereby improving compliance and acceptance of the rule and reducing the potential for

³⁰ Bray.

³¹ RCW 34.05.310(1) To meet the intent of providing greater public access to administrative rule making and to promote consensus among interested parties, agencies shall solicit comments from the public on a subject of possible rule making.

³² Nancy Perkins Spyke, "Public Participation in Environmental Decisionmaking At the New Millennium: Structuring New Spheres of Public Influence," *Boston College Environmental Affairs Law Review* 26 (1999): 263-313.

litigation.” OFM’s guide offers several questions and topics to consider before and during a negotiated rule-making process. The following best practices are based on review of OFM’s guide and additional literature on negotiated rule-making.

Before engaging in negotiated rule-making, an agency should determine the appropriateness of the negotiated rule-making approach, specifically:

1. The benefits of negotiated rule-making should outweigh the associated costs.
2. If the level of controversy is high, negotiated rule-making may be needed to increase the level of compliance and reduce the likelihood of litigation.
3. Stakeholders should have a common interest in resolving the issue.
4. Stakeholders should have an equal commitment to resolving the issue.
5. The agency must be willing to allocate staff time and resources.

If it is determined that negotiated rule-making is an appropriate approach to integrating public participation, there are best practices that should be followed while carrying out the process:

6. When controversy is high, efforts should be taken to create a neutral environment to allow constructive negotiation.
7. All stakeholders should be represented on a negotiated rule-making committee. And, accommodations should be made for stakeholders that do not have sufficient organization and resources.
8. Information used should be understood and agreed upon by all stakeholders.
9. Purpose and scope of the negotiation should be clear and agreed upon by all stakeholders.
10. Participants’ consensus, if reached, should be reflected in the final decision

5.2.1.2 Temporary Advisory Committee

As a general practice, WSDA engages in some form of negotiated rule-making for most of their rule-making, even though it is not required by law.³³ During this rule-making process, WSDA created the temporary advisory committee to work with agency representatives to negotiate proposed language.

1. Benefits and Costs

Negotiated rule-making should only be undertaken if the agency determines that the benefits of the process will outweigh the costs. The benefits from a successful

³³ Although negotiated rule-making is not specifically required by law, if a process for generating participation among interested parties is not included in the overall rule-making process, a written justification must be provided.

negotiated rule-making process are vast, if the negotiated rule-making process is carried out successfully. The benefits include:³⁴

- an increase in citizen participation
- increased compliance
- reduced litigation
- improvement in the content of the proposed rule
- a shortened implementation time for the final rule

A person that is invited to participate in a decision-making process from the start will often be more likely to accept the final decision. Acceptance of the rule leads to better compliance, which leads to fewer resources needed by WSDA for enforcement. Fewer affected parties would engage in litigation if the rule was acceptable to them.

Information beyond that which was readily available to WSDA could be brought forth by stakeholders. This information would add to the understanding of the issue and improve the final rule content. If stakeholders are part of the planning process, WSDA would need less time to implement the rule because affected parties would already be familiar with its content.

The expected costs of negotiated rule-making are often short-term drains on resources for the agency and participants. WSDA and the participants must devote staff time and resources to coordination of and participation in the process. Also, the length of the overall rule-making process may be longer.

Overall WSDA considers their past experiences with negotiated rule-making to be successful. WSDA recognizes, however, that negotiated rule-making for pesticide regulation is generally more difficult because it involves more stakeholders with different interests.³⁵ Despite the potential difficulties of negotiating a rule concerning pesticide regulation, WSDA felt the potential benefits of negotiated rule-making made it worthwhile.

2. *Controversy*

When the level of controversy is high, negotiated rule-making may be needed to increase the level of compliance and reduce the likelihood of litigation. Controversy over this issue – WSDA’s role in regulating pesticide use to protect public health – is extremely high and is not a recent development. Some of the precipitating events to this controversy were discussed in Chapter Three: WSDA’s Proposed Rule. In reality, this rule-making process began *because* of controversy. During the previous rule-

³⁴ Matthew J. McKinney, “Negotiated Rulemaking: Involving Citizens in Public Decisions,” *Montana Law Review* 60 (1999): 499-540.

³⁵ Based on conversations with WSDA representatives

making process for this issue in 2003, WSDA and the agricultural community generally concluded that the language was more than sufficient, but the environmental community generally felt that the language was not protective enough. Emotions over this issue are charged. WSDA recognized the controversy over this issue, and in some respects WSDA's decision to engage in a negotiated rule-making process was to help alleviate the controversy.

3. Stakeholder Interests

For negotiated rule-making to be effective, stakeholders should have a common interest in resolving the issue. WSDA, however, encountered significant difficulty recruiting representatives for schools and hospitals,³⁶ implying that the interest of these groups is less than other stakeholders. Reportedly, WSDA and other committee members mailed letters and made phone calls to several representatives for these groups. Most of the representatives did not respond to the phone calls or letters. Some said that they did not have time or resources to commit to this issue or said that they would comment on any draft language once it was developed.

The knowledge of an issue and its potential impacts influences a participant's commitment to a process. Thus, the inadequate representation of schools, hospitals, and nursing homes on the committee may indicate that education regarding the issue (i.e. the risk to pesticide exposure and its health effects) is minimal or misunderstood.

4. Stakeholder Commitment

In addition to a common interest, stakeholders should have an equal commitment to resolving the issue. Members of the committee had a variety of experience in participating on advisory committees. Some of the committee members requested to participate, some members had a standing relationship with WSDA for work on regulatory issues, and some members were individual citizens – pesticide applicators, orchardists, teachers, or parents. Some committee members felt uncomfortable that because of some members' professional position – professional advocate for the community or agriculture – they were paid to participate on the committee, whereas some members took time away from their jobs to participate. One member indicated that they would have rather not participated, but felt that if they had not been there, the “other side” would have had more influence over WSDA. It is difficult to measure the level of commitment for each committee member. However, because advocacy members (both community and agriculture) have a level of professional accountability to a specific interest group, it is likely that they may be more committed to a specific type of outcome, as opposed to being committed to resolution of the issue.

³⁶ WSDA, “Pesticide Rules Hearing Technical Report.”

5. Allocation of Resources

An agency must be willing to allocate staff time and resources toward the process before deciding to engage in negotiated rule-making. WSDA clearly allocated staff time and resources to this process based purely on the fact that they engaged in it. As discussed above, WSDA considers their past experiences with negotiated rule-making to be successful, but also recognized that negotiation over pesticide rules would be more difficult than other rule-making processes. Whether the allocated time and resources were sufficient and efficient once the process was undertaken is discussed in subsequent sections.

6. Neutral Environment

If an agency decides to engage in a rule-making process and the level of controversy is high, a neutral environment is needed to increase the likelihood for constructive negotiation. If stakeholders feel that the negotiation is not constructive, they may consider the process a waste of time and their commitment decreases. Prior to the first meeting, most committee members had strong opinions one way or the other. And these opinions did not appear to change throughout the negotiation process. Ann Wick in a letter to the committee after the second committee meeting, stated that it was not in the committee's interest to "argue about possible health effects and the need for changing the rules," implying that the meeting environment was argumentative and unconstructive. One committee member even referred to the process as "trench warfare."

In attempt to create a neutral environment, WSDA chose to use an employee from within WSDA to serve as a facilitator during the meetings, as opposed to a professional facilitator. A professional facilitator likely would have been able to find common ground between the stakeholders and reduce the number of issues in dispute.

7. Stakeholder Representation

For a proposed rule to be representative of and acceptable to stakeholders, all stakeholders should be represented in the process. If some stakeholders do not have adequate organization or resources to participate on the committee, accommodations should be taken to address this.

Some committee members took time away from their jobs to participate. Thus, they were frustrated that the meetings were scheduled during the daytime and during the week. Some of the members felt that having all the meetings in central or eastern Washington was difficult. Also, as discussed above, schools and hospitals were not adequately represented on the committee. After WSDA mailed letters and made phone

calls to several representatives for these groups, some responded that they did not have time or resources to commit to this issue.

WSDA recognized that the committee should represent all stakeholders and is aware that stakeholders representing schools and hospitals were not adequately represented on the committee. However, it is unclear whether WSDA recognized the sacrifices that some stakeholders were making to participate and if that was taken into consideration when organizing the meetings. WSDA decided to hold the meetings during the week, as opposed to holding meetings over the weekend when it may have been more feasible for representatives for affected parties to attend. While evidence is not available to show that weekend meetings would have encouraged more school and hospital representation, there is no evidence to show that WSDA even considered the possibilities or the costs associated with them.

8. Information

One of the benefits of negotiated rule-making, as discussed above, is improvement in the content of the rule based on additional information brought forth by stakeholder members. For example, a committee may make an agency aware of the cultural and political consequences of agency regulations,³⁷ such as technological, economic, or social feasibility issues associated with proposed rule options. However, before a committee can constructively negotiate on different options, the members need to have a clear understanding of and agreement on the scientific information being used in the process. However, because the level of risk to public health was unclear, it should have been recognized that negotiation would be difficult.

Communication of knowledge is multi-directional – between stakeholders, from WSDA to stakeholders, and from stakeholders to WSDA. The sooner the relevant knowledge is agreed upon – in this case, the level of risk to public health – the more constructive the negotiation process will be. At the first meeting, WSDA set aside time for an educational discussion before specific ideas were discussed. The purpose of this discussion was to allow time for committee members to build a relationship and share knowledge of the issue. Some information that was brought forth by some members to help gain certainty on the level of risk was discussed reluctantly.³⁸ One member said that the science was not objective, that it was “emotional.” Another member said that committee members had no concept of what risk is – that most pesticides were innocuous. During this process, information was shared and discussed, but the areas of disagreement between committee members, specifically with respect to the extent of exposure and its health effects, did not narrow.

³⁷ Bray.

³⁸ Based on information obtained during stakeholder interviews

9. Purpose and Scope of Negotiation

The goal of negotiated rule-making is to reach consensus on the proposed rule. To do this it is necessary that the purpose and scope of negotiation be established, either by WSDA prior to the meeting or by the participants at the beginning of the meetings. If the purpose and scope is undefined, it will be difficult for WSDA to gather the appropriate advice and input and for the committee to reach consensus.

Most committee members stated that the objectives for the committee were outlined at the beginning of the meetings. However, one committee member stated that while the objectives were presented at the meetings, the objectives and subject of the discussion were vague. This is also evidenced in the committee meetings. At the first committee meeting Ann Wick was ascribed as stating that the purpose of each committee member may not be the department's purpose. And when committee members were asked about their perceptions on the process of the committee meetings, their responses suggest different objectives. Some committee members felt that the role of the meeting was to determine if the current rule was sufficient to prevent drift. The current rule states that "no pesticides shall be applied by aircraft or airblast sprayers to property abutting and adjacent to occupied schools in session, hospitals, nursing homes or other similar establishments under conditions that may result in contamination of these establishments or their premises." Other committee members, however, felt that the meetings were to determine if WSDA's rules were adequate in protecting public health from pesticide exposure. For example, they felt that the rule should protect affected parties beyond just schools, hospitals, nursing homes, and other similar establishments, and protect those affected parties from applications beyond just aerial and airblast. They also felt that the rule should include protection from more than just spray drift (e.g. risk of exposure from post-application volatilization). At the beginning of the negotiated rule-making process, WSDA resisted expanding the scope of the discussion. The fact that the scope was eventually broadened, such as expansion beyond schools, hospitals, and nursing homes; and aerial and airblast methods, is more evidence that the objectives and scope of the meetings were ambiguous.

10. Extent of Committee's Consensus Used

Much of a member's commitment to the process is dependent on the belief that their contributions to the process will be useful. If the efforts of a committee are not reflected in the final rule, the public's perception of WSDA's ability to create "good" rules will be eroded. After three day-long meetings, WSDA ended the negotiated rule-making process with a recommendation from the PAB and drafted language for the

proposed rule. According to WSDA, although the language does not represent a consensus of the committee, the language was a result of the committee's effort.³⁹

According to many committee members, however, the language was not representative of their discussions. Specifically, most committee members said that the ½-mile provision proposed under WAC 16-228-1221(1)(c), nor the inclusion of restrictions for overhead chemigation and fumigation application were discussed in a decisive manner during the meetings. Subsection (1)(c), the ½-mile provision stipulated that pesticide applications not within ½ mile of the property boundary did not require notification. The proposed rule included restrictions for chemigation and fumigation applications, while the current rule is limited to restrictions on aerial and airblast applications. This belief by many committee members is not unexpected, however, considering that the February 4, 2005, letter sent by WSDA to committee members, which included the draft rule language, did not include subsection (1)(c), the ½-mile provision. This provision, which is one of the main subjects of contention over the proposed language, was included in draft language presented in PAB on February 16, 2005, and the September 6, 2005, Notice of Proposed Rule-Making to the public.

5.2.2 Opinion Survey

One alternative to compensate for the under representation of stakeholders in public hearings and advisory committees, is that an agency can conduct a public opinion survey.

5.2.2.1 Best Practices

The obvious benefits from a survey are a representative view on the positions of the under represented stakeholders. There are, however, many obstacles to conducting a survey.⁴⁰ The collection of opinions must be conducted in a way that is useful. For example, the survey participants should be a representative sample of the population of the stakeholders (or the whole population) for the results to be statistically sound. Also, the questions need to be written to avoid ambiguity or bias. To create and conduct a survey that produces valid results takes a certain level of expertise, which is not always available within an agency. Hence, an agency may have to consult an expert. Because expert consultation is expensive, agencies most often conduct in house surveys that often produce results that are inconclusive.

³⁹ WSDA, *Proposed Rule-Making (CR-102)*, filed with code reviser on September 6, 2005.

⁴⁰ Thomas A. Heberlein, "Some Observations on Alternative Mechanisms for Public Involvement: The Hearing, Public Opinion Poll, The Workshop, and the Quasi-Experiment," *Natural Resources Journal* 16 (1976): 197-212

5.2.2.2 WSDA's Phone Survey

Because affected parties – schools, hospitals, and nursing homes – were not adequately represented on the committee, WSDA performed a phone survey of these establishments in March 2005 to determine their interest in the proposed rule. As discussed in Chapter Three: WSDA's Proposed Rule, the phone survey inquired about each establishment's interest in being notified about nearby pesticide application and if two days is an adequate amount of time.

Review of the survey results indicated that that the majority of surveyed establishments that had agriculture adjacent to their properties were interested in being notified if pesticides would be sprayed near their location.⁴¹ WSDA, however, concluded that the phone survey “did not produce consensus about the value of the proposed rule.”⁴² A WSDA spokesperson said that WSDA's misrepresentation of the results was unintentional and was caused by a breakdown in communication within the office.⁴³ In addition, based on a Wenatchee World newspaper article, Ann Wick, the survey drafter, indicated that the survey results were not statistically valid or professional – implying that the survey was not designed or conducted in a way that would produce useful information.

While, the results may not have been representative of all potentially affected schools, hospitals, and nursing homes, the results indicate that there was interest in the proposed rule among those surveyed. WSDA appropriated resources toward a phone survey to garner information from parties that were underrepresented on the temporary advisory committee. However, the survey was not designed to produce statistically sound results, and the results that were produced were misrepresented.

5.2.3 Stakeholder Mailings

To help achieve more participation among stakeholders, an agency can target specific groups by contacting them to request comments on the proposed rule.

5.2.3.1 Best Practices

Before targeting stakeholder groups, the agency should determine if receiving feedback from these groups is likely. A way to increase the likelihood of receiving feedback is to minimize the amount of time and effort required by the targeted party to respond. Also, the targeted stakeholder should be informed of their benefits in responding. If

⁴¹ The survey did not decipher whether the agriculture land adjacent to these properties is orchard or farm land. Establishments adjacent only to farmland would not be affected by this proposed rule.

⁴² WSDA, “WSDA Withdraws Proposed Rule on Pesticide Notification,” (press release, December 30, 2005), 1.

⁴³ Dan Wheat, “Ag. Dept. survey results misleading,” *Wenatchee World*, section A, February 12, 2006, final edition.

there are no apparent benefits to the individual, then an agency should consider providing incentives.

5.2.3.2 *Mailings to Affected Establishments*

In September 2005, WSDA mailed letters to potentially affected school districts, hospitals, and nursing homes. The letters included the proposed rule language and a request for comments. Ann Wick stated that only one district responded to the request. As discussed before, the targeted stakeholder's education regarding this issue (i.e. the risk to pesticide exposure and its health effects) may be minimal or misunderstood. Thus, the recognized benefits for commenting on the proposed rule may not be recognized. And while, providing incentives for responding may not be economically feasible, there is no evidence that WSDA considered providing incentives, or even acknowledged that the response rate of these stakeholders may be low before deciding to engage in the mailings effort.

CONCLUSIONS

6.1 THE DEPARTMENT AND ITS MISSION

WSDA's work is important for the people of Washington State. The agriculture industry is the largest Washington State employer.⁴⁴ The Washington State tree fruit industry contributes over \$5 billion annually to the Washington economy.⁴⁵

~WSDA's mission statement~
*WSDA serves the people of Washington State
 by supporting the agricultural community
 and promoting consumer and environmental protection.*

As represented in its mission, one of WSDA's main charges is to support the agriculture industry. WSDA also is charged with the responsibility of ensuring that pesticides are used in a safe manner.⁴⁶ The current social environment views these charges as competing mandates. WSDA has the burden of striking a balance at the risk of eroding its legitimacy.

6.2 WHAT HAPPENED?

WSDA's performance during this rule-making process was acceptable by legal standards. WSDA even engaged in some actions beyond the minimum statutory requirements with the expectation of creating a better rule. But ultimately, a two year process ended with no rule, almost all stakeholders disappointed, and a state government trying to pick up the pieces.⁴⁷

As discussed in the previous chapter, WSDA's use of science in this process was inadequate. WSDA did not have a clear understanding of the extent of risk of exposure, nor did they adequately use current scientific knowledge about spray drift when drafting the language. And without this understanding, WSDA was unable to defend their position that the current regulation is sufficient. In addition, the costs associated with adopting or not adopting the proposed rule could not be accurately

⁴⁴ WSDA, "About WSDA."

⁴⁵ Jensen.

⁴⁶ Under RCW 17.21.010 and RCW 17.21030: The application and the control of the use of various pesticides is important and vital to the maintenance of a high level of public health and welfare both immediate and future, and is hereby declared to be affected with the public interest. The provisions of this chapter [17.21] are enacted in the exercise of the police power of the state for the purpose of protecting the immediate and future health and welfare of the people of the state (RCW 17.21.010) and The director [of WSDA] shall administer and enforce the provisions of this chapter [17.21] and rules adopted under this chapter. (1) The director may adopt rules: (a) Governing the loading, mixing, application and use, or prohibiting the loading, mixing, application, or use of any pesticide (RCW 17 21-030).

⁴⁷ On January 16, 2006, 10 Washington State Senators sponsored a bill (SB 6607), that would require DOH to adopt a rule with similar language as WSDA's proposed rule.

determined. Any scientific understanding WSDA did have was not adequately communicated to the temporary advisory committee, as evidenced by the committee's reflections that the agency was biased.

Also, WSDA's integration of public participation was not ideal. The representation of schools and hospitals on the temporary advisory committee was inadequate. It is unclear whether WSDA took stakeholders' financial and time limitations into consideration when organizing the meetings. The facilitator's effectiveness of creating a neutral atmosphere was limited. Relevant information about risk was needed to negotiate towards consensus and it was never agreed upon. The purpose and scope for the committee's discussion were ambiguous in the eyes of some of the committee members. Many members felt that the proposed language did not accurately represent any consensus reached among the members. Additional efforts by WSDA to reach out to schools, hospitals, and nursing homes did not produce any additional information. And, the results from the phone survey were not statistically sound and the results that were produced were misrepresented.

6.3 LESSONS LEARNED

What could WSDA have done differently to make this rule-making process successful? And was it even possible? Obviously, the presence of controversy made this rule-making process more difficult than possibly any previous rule-making process in which WSDA had undertaken. WSDA recognized this controversy, and in some respects, engaged in this process in an attempt to alleviate it. However, WSDA's performance was not ideal. Several lessons can be learned from this process for future rule-making processes that are surrounded by controversy, deal with scientific uncertainty, and have inadequate stakeholder representation and interest. While not an exhaustive list, below are actions to be considered in future WSDA rule-making processes.

6.3.1 Controversy

First and foremost, a proposed rule should reflect that which is discussed in a negotiated rule-making process (i.e. the ½-mile provision should not have been added to the proposed rule without consulting with the advisory committee). If it does not, both sides of the controversy will be more likely to assume that the agency was biased toward the other side. This perception of bias is not only bad for the agency, but it is not useful in alleviating the controversy.

Second, an independent, unbiased, professional facilitator should be used for negotiated rule-making when the controversy is high. While the short-term costs may

be greater, meetings facilitated by a professional will likely be more constructive. Thus, the overall process will be shortened and improved.

Lastly, any science used as a basis for discussion or language for the proposed rule should be made understandable and should be agreed upon by members of a negotiated rule-making process. If the members cannot agree, then it is the agency's responsibility to outline the relevant information. A process spent debating the relevance of the data is not constructive.

6.3.2 Scientific Uncertainty

Developing a rule that adequately reduces the risk to public health from pesticide exposure is impossible without a reasonable understanding of the extent of risk. WSDA's current complaint-driven enforcement system for pesticide drift violations is unreliable in quantifying the extent of exposures. Thus, even if WSDA had engaged in a benefit-cost analysis, WSDA would not have been able to accurately determine the economic implications of any proposed rule. WSDA should modify their enforcement system to better measure the extent of pesticide exposures.

6.2.3 Stakeholders Representation and Interests

The inadequate representation of schools and hospitals on the advisory committee lead WSDA to allocate additional agency resources towards trying to acquire their perspectives and interest in the propose rule. It was in WSDA's best interest to have secured their presence on the committee from the beginning by addressing the reasons for their absence. It may have been determined that the reason was a lack of resources. In reality, however, their under representation was likely due to their lack of education or misunderstanding about risk of pesticide exposure. In the future, WSDA should consider providing incentives for stakeholders who do not have the resources to participate. Also, WSDA should consider educating stakeholders on the issue and the benefits of participating in a rule-making process.

If future phone surveys are performed, the collection of opinions should be conducted in a way that is statistically sound and the results must be interpreted accurately. If expertise for developing surveys is not available within the agency, WSDA should consider consulting an expert.

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STAKEHOLDERS

Members of WSDA and the temporary advisory committee that were interviewed:

1. Ms. Carol Dansereau, Farm Worker Pesticide Project
2. Mr. Chip Halverson, Washington Education Association/Teacher
3. Ms. Heather Hansen, Washington Friends of Farms and Forests
4. Ms. Dannie McQueen, WSDA, Regulatory Process Coordinator
5. Mr. Steve Passmore, Passmore Aviation
6. Ms. Angela Storey, Washington Toxics Coalition
7. Mr. John Stuhlmiller, Washington Farm Bureau
8. Mr. Brian Westerdahl, Orchardist
9. Ms. Ann Wick, WSDA, Pesticide Management's Program Development Manager

Members of the temporary advisory committee that were *NOT* interviewed:

1. Mr. Tom Auvil, Washington Tree Fruit Research Commission
2. Ms. Cynthia Dominguez, Public Citizen/Teacher
3. Mr. Bruce Grim, Washington Apple Growers Marketing Association
4. Ms. Kary Hyre, Washington State Long-Term Care Ombudsman
5. Ms. Wendy Jones, Olympic Education Service District
6. Mr. Matthew Kiefer, University of Washington, Department of Environmental and Occupational Health Sciences
7. Ms. Stacy Kellogg, Regional Long Term Care Ombudsman (Kittitas and Yakima Counties)
8. Mr. Kirk Mayer, Washington Growers Clearinghouse
9. Ms. Carol Ramsay, Washington State University, Pesticide Education Specialist
10. Mr. Luis (Tito) Rodriguez, Washington State Department of Health, Eastern Washington Investigator
11. Ms. Dorothy Tibbetts, Washington State Department of Health, Pesticide Program Manager

SAMPLE CONSENT FORM

**UNIVERSITY OF WASHINGTON
CONSENT FORM**

**Pesticide Spray Drift Notification Rule:
an Evaluation of the WA State Dept. of Agriculture’s Rule-Making Process**

Researchers:

Gretchen L. Snoey	Master’s Candidate	University of Washington
Phone:	e-mail:	School of Public Affairs

David Harrison-

Faculty Advisor, University of Washington, Daniel J. Evans School of Public Affairs

Researchers’ statement

We are asking you to be in a research study. The purpose of this consent form is to give you the information you will need to help you decide whether to be in the study or not. Please read the form carefully. You may ask questions about the purpose of the research, what we would ask you to do, the possible risks and benefits, your rights as a volunteer, and anything else about the research or this form that is not clear. When we have answered all your questions, you can decide if you want to be in the study or not. This process is called “informed consent.” We will give you a copy of this form for your records.

PURPOSE OF THE STUDY

The purpose of the research is to evaluate the rule-making process undertaken by the Washington State Department of Agriculture for the proposed rule concerning further modifications to WAC 16-228-1220(4), notification of application of certain pesticides near schools, hospitals, nursing homes and similar establishments. I will employ a case study method to further understand the factors involved in the development of the proposed rule. I will then use the results of the study to draw conclusions that may be applicable to future rule-making actions. You may not directly benefit from taking part in this research study; however, your opinion is valuable to me and I hope you will find participating in this study worthwhile, if not interesting or enjoyable.

STUDY PROCEDURES

If you choose to be in this study, I would like to interview you about your experiences as a stakeholder involved in the pesticide notification rule-making process. I am interested in your opinion about how different factors contributed to the making of the rule. During the interview, which will last about 30 minutes, I will ask you questions like:

“Please describe the exact nature of your involvement in the rule-making process,” “What factors were involved in the development of the proposed rule?” and “What lessons can be learned from this process?” You do not have to answer every question, and you do not have to provide a reason for declining to answer a question.

WASHINGTON STATE REGISTER FILINGS

PROPOSED RULE

New Section – WAC 16-228-1221

Must an applicator notify schools, hospitals, nursing homes and day care centers prior to an application of certain pesticides?

(1) Any person applying a pesticide with the signal words "Danger/Poison" must notify a designated manager of an adjacent school, hospital, nursing home or state licensed child or adult day care center in writing, at least two facility business days prior to the start of applications specified in (a) through (c) of this subsection. Facsimile or electronic mail can be used as a method of notification. Pesticides applied within buildings, structures, beehives or other enclosed sites are exempt from this notification requirement. For the purposes of this section, intervening roads or rights of way are considered as contiguous property and do not eliminate the requirement for notification.

This notification applies if:

- (a) The application method is by aircraft, airblast sprayer, fumigation or overhead chemigation; and
- (b) The application site is contiguous with the property boundary of the school, hospital, nursing home or state licensed day care center; and
- (c) The application is within one-half mile of the property boundary of the facility.

(2) If the school, school grounds or day care will not be in use the day of the application and for at least two consecutive days after the application, notification is not required.

(3)(a) Applicators must also notify the responsible person managing the application site at least forty-eight hours prior to the start of the application. The applicator does not need to notify the responsible person if the applicator is a direct employee of that responsible person.

(b) A responsible person other than the applicator may notify the school, hospital, nursing home or day care center if the responsible person has agreed in writing to do so prior to the application. The agreement for notification of a specific facility may be for all applications during a calendar year. Unless a direct employee, the applicator still must notify the responsible person at least two facility business days in advance of each application. Any written agreement with the responsible person that covers a calendar year must be renewed at least annually prior to the first application of the season.

(c) Applicators must retain the responsible person's written agreement for a period of one year. The director shall, upon request in writing, be furnished with the written agreement.

(4) Notification must include the following information:

- (a) The product name, active ingredient and EPA registration number of the pesticide(s).
- (b) The type of pesticide(s) being applied (i.e., herbicide, insecticide, fungicide, etc.).
- (c) The intended date and time of the application.
- (d) The statement "Information about the pesticide may be obtained from <http://extoxnet.orst.edu> or the National Pesticide Information Center (1-800-858-7378)."
- (e) The contact name and telephone number of the applicator or responsible person.

(5) If an application must be rescheduled, the facility must be contacted no later than the date the initial application in the written notice was scheduled. The facility shall be notified by the applicator or responsible person, as designated in subsection (3)(b) of this section, of the new date and time of the intended application. The notification requirement of subsection (1) of this section shall be considered as met. Notification for rescheduling must be in writing.

Amendatory Section - WAC 16-228-1010

What are the definitions that apply to this chapter?

(22) "Fumigant" means any ~~((substance))~~ pesticide product or combination of ((substances)) products that ((produce gas, fumes, vapors, or smoke, and is used to kill pests in some kind of enclosure)) is a vapor or gas or forms a vapor or gas on application and whose method of pesticidal action is through the gaseous state.

(31) "Responsible person" means an individual who has authority over or control of the property site such as the owner, manager or lessee.

PHONE SURVEY

(The following is a written guide for conducting the phone survey. A copy of this guide is included in the public rule-making file)

Good Morning/Afternoon

I am _____ from the Washington State Department of Agriculture. Do you have a minute to answer a few brief questions? (If not – when is a good time to call back?)

The Washington State Department of Agriculture is working on a possible change to our pesticide application rules. This change would require applicators to notify a school, hospital, nursing home, or day care center near the application site if they applied certain pesticides by aircraft, airblast sprayer, fumigation or overhead chemigation. The pesticides that would be covered by the proposed rule change have “danger/poison” on the label.

Examples if needed:

Soil fumigants – chloropicrin, methyl bromide, (Brom-Mean, Bromo-Gas)

Insecticides – azinphos-methyl, aldicarb, disulfoton, (Guthioin, Temik, Di-Syston)

Desiccant – paraquat, (Cyclone, Gramoxone)

Nematicides – Fenamiphos (Nemacur)

Would you be interested in being notified if an applicatory is applying one of these pesticides near your location?

If you would like to be notified, is two days before the application enough time?

If you do not care to be notified, what would be the reason?

Do you have agriculture bordering your school property? Forestry or Nurseries? Do you know the crop?

Any additional comments you would like to make or do you have any questions?

Contact name and phone number if they wish

(Contact names and phone numbers listed on original survey guide)

Thank you for your time