

Title 2. Agriculture

Chapter II. State Plant Board, Department of Agriculture

Subchapter A. Generally

Part 36. Arkansas Department of Agriculture Produce Safety Enforcement Response Rules

Codification Notes. This part as promulgated prior to codification into the Code of Arkansas Rules provided as follows:

"III. LEGAL AUTHORITY

A. "The Arkansas Plant Act" A.C.A. 2-16-203 et. seq. and Rules."

Subpart 1. Generally

2 CAR § 36-101. Statement of purpose.

(a)(1) Produce safety is valuable to Arkansas's agricultural production and the protection of people from microbial contaminants attained during the growing, harvesting, packing, and holding of produce for human consumption.

(2) It is essential to the public health and welfare that produce be handled properly to prevent adverse microbial effects on individuals.

(b) The purpose of this part is to provide a fair and consistent mechanism by which compliance with the Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, 21 C.F.R. pt. 112, also known as the Produce Safety Rule (PSR), as amended, and the rules written pursuant thereto can be achieved.

Authority. Arkansas Code § 2-16-207.

2 CAR § 36-102. Definitions.

As used in this part:

(1) "Base civil penalty" means the midpoint of a civil penalty range;

Example:

The civil penalty range for a minor violation (first level of enforcement) is one hundred dollars (\$100) to five hundred dollars (\$500). The base penalty is three hundred dollars (\$300).

(2)(A) "Covered produce" means produce that is subject to the requirements of 21 C.F.R. pt. 112, in accordance with 21 C.F.R. §§ 112.1 and 112.2.

(B) The term "covered produce" refers to the harvestable or harvested part of the crop, see 21 C.F.R. § 112.3;

(3) "Covered produce farm" means any farm engaged in the growing, harvesting, packing, or holding of produce for human consumption which is subject to the requirements of the United States Food and Drug Administration Food Safety Modernization Act Produce Safety Rule, 21 C.F.R. pt. 112;

(4)(A) "Level of enforcement" means a category by which a violative incident is considered a first, second, third, or fourth offense.

(B) For a violation to be considered as a second or subsequent offense, it must be a repeat of a violation for which a previous enforcement action has been taken by the Department of Agriculture.

(C) The previous violation or violations must have occurred within the past three (3) years;

(5) "Level 1 violation" means a violative incident which does not involve human health and/or safety, e.g., conditions that will not cause contamination of covered produce, or other incidents of noncompliance which do not create a competitive disadvantage for covered farms in full compliance;

(6) "Level 2 violation" means a violative incident which affects human health and/or safety, e.g., conditions that may cause contamination of covered produce if

conditions or practices continue, or other incidents of noncompliance which create a competitive advantage over covered farms in full compliance, or a history of repetitive violative incidents;

(7) "Level 3 violation" means a violative incident involving a practice, condition, or situation on a covered farm that is reasonably likely to lead to:

(A) Serious adverse health consequences or death from the consumption of or exposure to covered produce; and

(B) An imminent public health hazard is posed if corrective action is not taken immediately;

Example:

Edible portions of produce contacting a potential source of contamination.

(8)(A) "Produce" means any fruit or vegetable (including mixes of intact fruits and vegetables) and includes:

- (i) Mushrooms;
- (ii) Sprouts (irrespective of seed source);
- (iii) Peanuts;
- (iv) Tree nuts; and
- (v) Herbs.

(B) A fruit is the edible reproductive body of a seed plant or tree nut (such as apple, orange, and almond) such that "fruit" means the harvestable or harvested part of a plant developed from a flower.

(C) A vegetable is the edible part of an herbaceous plant (such as cabbage or potato) or fleshy fruiting body of a fungus (such as white button or shiitake) grown for an edible part such that "vegetable" means the harvestable or harvested part of any plant or fungus whose fruit, fleshy fruiting bodies, seeds, roots, tubers, bulbs, stems, leaves, or flower parts are used as food and includes:

- (i) Mushrooms;

- (ii) Sprouts; and
- (iii) Herbs (such as basil or cilantro).

(D)(i) Produce does not include food grains, meaning the small, hard fruits or seeds of arable crops, or the crops bearing these fruits or seeds, that are primarily grown and processed for use as meal, flour, baked goods, cereals, and oils rather than for direct consumption as small, hard fruits or seeds (including cereal grains, pseudocereals, oilseeds, and other plants used in the same fashion).

(ii) Examples of food grains include:

- (a) Barley;
- (b) Dent corn or flint corn;
- (c) Sorghum;
- (d) Oats;
- (e) Rice;
- (f) Rye;
- (g) Wheat;
- (h) Amaranth;
- (i) Quinoa;
- (j) Buckwheat; and
- (k) Oilseeds (e.g., cotton seed, flax seed, rapeseed, soybean, and sunflower seed); and

(9) "Respondent" means a covered produce farm charged with a violation of the Arkansas Produce Safety Law, as amended, and the rules written pursuant thereto.

Authority. Arkansas Code § 2-16-207.

Codification Notes. The reference to the Arkansas Produce Safety Law in this section includes the Arkansas Plant Act of 1917, Arkansas Code § 2-16-201 et seq., and the Arkansas Emergency Plant Act of 1921, Arkansas Code § 2-16-301 et seq.

2 CAR § 36-103. Enforcement actions.

(a) Under the preceding Arkansas Codes, the Department of Agriculture has several options for enforcement action.

(b) These are:

(1)(A) Warning letter.

(B)(i) For a Level 1 violation, first level of enforcement violations, the Department of Agriculture will issue a notice of warning (NOW) letter.

(ii) The letter will cite the specific violation.

(iii) The letter will also identify any corrective action that may be needed and notify the respondent that further violations will result in more severe enforcement action;

(2)(A) Stop use/stop sale.

(B) The use or sale of contaminated covered produce, practices that will pose a significant risk to human health and/or safety, or at the request of the United States Food and Drug Administration, etc., will remain in effect until the violation is corrected;

(3)(A) Informal agreement.

(B)(i) When a violation has been alleged, the respondent has the option of an informal hearing or a State Plant Board/Food Safety Committee hearing.

(ii) The purpose of the informal hearing is to resolve a complaint or incident.

(C)(i) A hearing officer will meet jointly with the respondent and the Department of Agriculture staff.

(ii) The group will seek consensus on an appropriate enforcement action for recommendation to the board.

(iii) Enforcement action based on the Penalty Matrix, Appendix A, will include civil penalty and/or further legal action.

(D) The full board acts on all recommendations resulting from the informal hearing.

(E) Excluding Level 3 violations;

(4)(A) Board/committee hearing.

(B) If the respondent chooses to bypass the informal agreement process, or if an agreement cannot be reached during the informal hearing, a hearing will be held by the committee.

(C) Enforcement action will include civil penalty and/or further legal action.

(D)(i) Following the committee hearing, a written finding of fact, conclusion of law, and recommendation will be submitted to the board.

(ii) The board will act on all recommendations of the committee;

(5)(A) Injunction.

(B) The board may apply for an injunction to any court of competent jurisdiction for violations of the Produce Safety Law.

(C) The court, upon hearing and for cause, has the option of a temporary or permanent injunction restraining any person from violating any provisions of the Arkansas Produce Safety Law and rules; and

(6)(A) Referral to the prosecuting attorney.

(B) The board has the option of referring violations of the Arkansas Produce Safety Law to the prosecuting attorney.

Authority. Arkansas Code § 2-16-207.

Codification Notes. The reference to the Arkansas Produce Safety Law in this section includes the Arkansas Plant Act of 1917, Arkansas Code § 2-16-201 et seq., and the Arkansas Emergency Plant Act of 1921, Arkansas Code § 2-16-301 et seq.

2 CAR § 36-104. Incident investigation.

(a) An incident investigation will be initiated when:

(1) Routine compliance monitoring indicates a violation has occurred; or

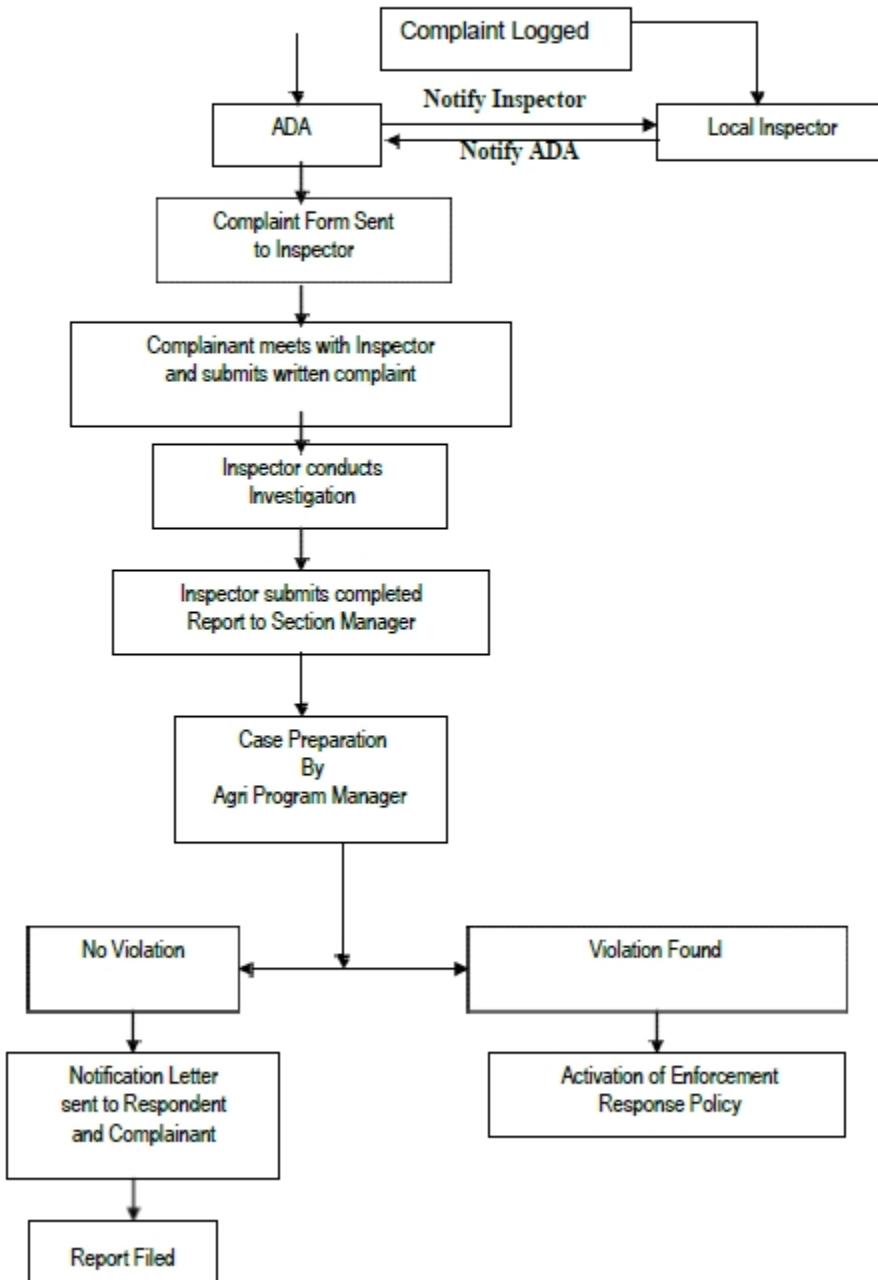
(2)(A) A formal complaint that an alleged violative incident has occurred (filing of a written form by a complainant).

(B) In cases of apparent immediate endangerment to the public health, the written notification may be waived, and the investigation of the alleged incident will begin immediately.

(b) The processing sequence for an incident investigation is outlined in Figure I.

FIGURE I

Processing Sequence



Authority. Arkansas Code § 2-16-207.

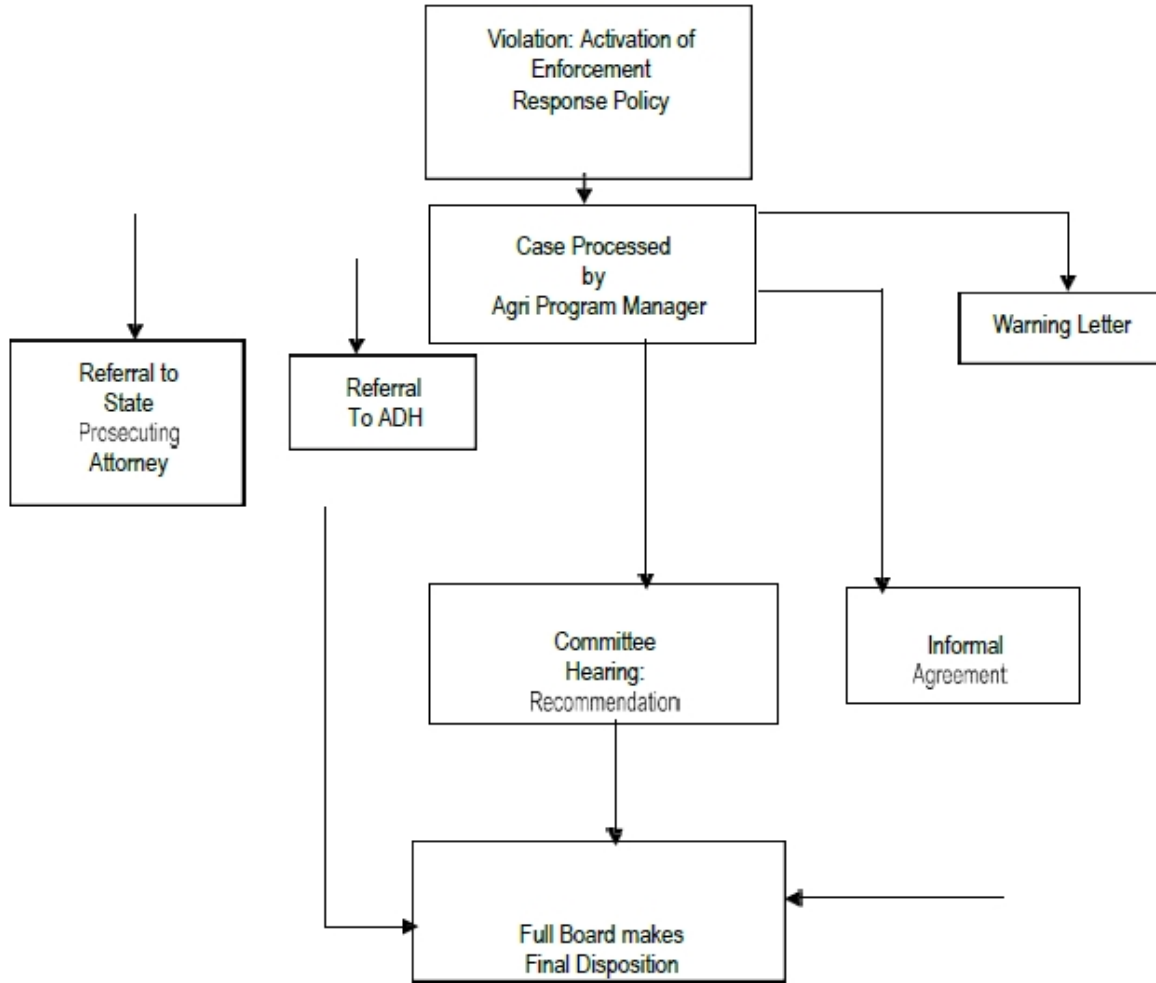
2 CAR § 36-105. Activation of enforcement response policy.

(a) An apparent violation of law and/or rule must be documented to initiate an enforcement action.

(b) Documentation must conform to the requirements of the Plant Industries Division of the Department of Agriculture.

(c) The sequence of events within the enforcement response policy is as outlined in Figure II.

FIGURE II



Authority. Arkansas Code § 2-16-207.

2 CAR § 36-106. Internal review.

(a) Staff will carefully review all documentation and records to determine:

- (1) That apparent violation or violations have occurred;
- (2) Whether the apparent violation or violations are Level 1, Level 2, and/or

Level 3 violations; and

(3) The correct level of enforcement based on the penalty matrix and the documented history of the respondent.

(b) Concurrence with the program's finding by the staff must be unanimous before further action can be taken on the case.

Authority. Arkansas Code § 2-16-207.

Cross Reference. Penalty Matrix, 2 CAR pt. 36 app. A.

2 CAR § 36-107. Hearings.

(a) The informal hearing officer and/or the appropriate committee and/or the full State Plant Board will carefully review the documentation and hear cases of alleged violations.

(b) Should it be determined a violation or violations have occurred, the severity and level of enforcement of each violation will be determined by the three (3) factors in 2 CAR § 36-106, as they are applied to the Penalty Matrix, see Appendix A.

(c)(1) If a violation is determined in this sequence, the following factors will be considered:

(A) Cooperation of the respondent; and

(B) Other extenuating/mitigating circumstances.

(2)(A) The hearing officer/committee/board may use these factors to accelerate or mitigate enforcement action.

(B)(i) When a civil penalty is the preferred action, the base penalty may be increased or decreased based on these factors.

(ii) The civil penalty will not be more or less than the range for the specific violation listed in Appendix A.

(d) The full board will take action to determine the final disposition of the case.

Authority. Arkansas Code § 2-16-207.

2 CAR § 36-108. Right of appeal.

Any person aggrieved by any action of the full State Plant Board may obtain a review thereof, by filing in circuit court within thirty (30) days of notice of the action, a written petition praying that the action of the full board be set aside.

Authority. Arkansas Code § 2-16-207.

Appendix A. Penalty Matrix

Link:

<https://CodeOfARRules.arkansas.gov/docs/CARCodeAppendices/Appendices/8/2CARpt.36AppendixA.pdf>