

FERTILIZER: Penalties under fertilizer law assessed on basis  
of monetary value of deficient nutrients. Treble  
AGRICULTURE: penalty cannot be assessed when penalty is paid  
to purchaser.

February 17, 1960



Honorable J. H. Longwell  
Director, Division of  
Agricultural Sciences  
College of Agriculture  
University of Missouri  
Columbia, Missouri

Dear Dean Longwell:

This is in response to your letter of September 28, 1959, in which you raise questions with respect to the Missouri Fertilizer laws, Sections 266.290 through 266.350, V.A.M.S., revised to August 29, 1959. We quote your questions:

"1. Does the law intend that penalties shall be assessed on the basis of percent deficiency of plant nutrients or on the basis of monetary value of the deficiency?"

"2. What disposal should be made of the money in excess of the 'actual value of the deficiency' - (266.347-1) when the assessed penalty is three times the total value (266.343-1a)?"

In answer to your first question, our interpretation of this statute must necessarily be based upon the intent of the statute made apparent by the wording of the statute in its entirety. It is our feeling that the law was intended to mean that penalties shall be assessed on the basis of a monetary value of the deficiency in the plant nutrients. In reaching our conclusion we would first bring your attention to the fact that before House Bill No. 236 became truly agreed to and finally passed by the 70th General Assembly, it was changed considerably with respect to the terminology used in referring to the basis for penalties. We quote Section 266.345 of House Bill No. 236 of the 70th General Assembly as it was introduced:

Honorable J. H. Longwell

"If any commercial fertilizer or fertilizer material offered for sale in this state shall upon official analysis prove deficient from its guarantee as stated on the bag or other container, to the extent of three per cent and not over five per cent, then the manufacturer of such commercial fertilizer or fertilizer materials or his agent shall be liable for the actual deficiency as shown by the official analysis. If the deficiency is over five per cent, then the penalty will be three times the amount of the total deficiency as found by the official analysis. The penalty shall apply only to the shipment sampled, and shall be assessed by and paid to the director."

You will note the differences in Section 266.340 as set forth above and Section 266.345 as set forth in House Bill No. 236, Truly Agreed To and Finally Passed. This is now Section 266.343, V.A.M.S., 1959, which we quote as follows:

"If any fertilizer offered for sale in this state shall upon official analysis prove deficient from its guarantee as stated on the bag or other container, penalties shall be assessed as follows:

(1) For a single ingredient fertilizer containing nitrogen or phosphate or potash:

(a) When the value of this ingredient is found to be deficient from the guarantee to the extent of 3% and not over 5%, the distributor shall be liable for the actual deficiency. When the deficiency exceeds 5% of the total value, the penalty shall be three times the actual value of the shortage.

(2) For multiple ingredient fertilizers containing two or more of the single ingredients: nitrogen or phosphate or potash, penalties shall be assessed according to (a) or (b) as herein stated. When a multiple ingredient fertilizer is subject to a penalty under both (a) and (b) only the larger penalty shall be assessed.

Honorable J. H. Longwell

(a) When the total combined values of the nitrogen or available phosphoric acid or potash is found to be deficient to the extent of 3% and not over 5%, the distributor shall be liable for the actual deficiency in total value. When the deficiency exceeds 5% of the total value, the penalty shall be three times the actual value of the shortage.

(b) When either the nitrogen, available phosphoric acid, or potash value is found deficient from the guarantee to the extent of 10% up to the maximum of two units, (2% plant food) the distributors shall be liable for the value of such shortages."

You will note that the final enactment was amended to incorporate the language of "values" and it distinguishes between penalties for single ingredient fertilizers and multiple ingredient fertilizers.

Unless the words "value" or "values" can be considered to mean monetary values, it would be our feeling that Subsection 1(a) of Section 266.343, above, would be inconsistent with Subsection 2(a). Subsection 1(a), in dealing with a single ingredient fertilizer, permits a deficiency of not more than three per cent. Under Subsection 2(a), which deals with multiple ingredient fertilizers, greater deficiencies in particular ingredients are possible under any construction of the law. However, in construing the values therein as monetary values, an over-all deficiency in monetary value in excess of three per cent is not permitted. So construed, Subsection 2(a) is consistent with Subsection 1(a) in that fertilizer which is sold must contain ingredients having a monetary value which is not more than three per cent less than the monetary value of the guaranteed ingredients. It is our belief that this new law has been enacted to protect the purchaser of such fertilizers from the sale of those materials which would be inconsistent with the tolerances allowed by this law. Therefore, it is our opinion that the law in question intends that penalties shall be assessed on the basis of the monetary value of the deficiency in the plant nutrients.

With respect to your second question, we set forth Section 266.347, V.A.M.S., 1959:

Honorable J. H. Longwell

"1. The penalties assessed by the director under Section 266.343 shall be paid by the distributor to the purchaser of such fertilizer, and in the event such purchaser cannot be ascertained, then said penalty shall be paid to the director and used for the purposes specified in section 266.320, except the maximum paid the purchaser will approximate the actual value of the deficiency.

"2. The director shall prepare a written certification of penalties assessed under section 266.343 addressed to the distributor. A copy of such certification of assessment shall be mailed to the distributor liable for the penalty.

"3. Any decision, finding, order or ruling of the director made pursuant to the provisions of Section 266.290 through 266.350 shall be subject to judicial review in the manner provided by Chapter 536, RSMo.

"4. If any distributor shall fail to pay any penalty assessed by the director after the time for judicial review has expired, or after any judgment or decree approving such assessment has become final, the person entitled to such penalty under the provisions of subsection 1 shall be entitled to bring a civil action to recover the same, and in such civil action such persons shall be entitled to recover from the distributor the amount of the penalty, a reasonable attorney's fee and costs of the action."

As above pointed out, by Section 266.343, under certain circumstances, the penalty to be imposed is three times the actual value of the shortage. However, under Section 266.347, when the identity of the purchaser is known, the penalty is to be paid to the purchaser, "except the maximum paid the purchaser will approximate the actual value of the deficiency." No provision is found for the disposition of the remainder of the penalty in such situation when a treble penalty is called for.

We presume that the absence of any express provision in this regard to have been an oversight on the part of the General Assembly. However, it is such an oversight as may not be supplied

Honorable J. H. Longwell

by either the director or this office, and must be remedied by the General Assembly alone. In the case of State v. Messner, 9 N.D. 186, 82 N.W. 737, the court stated: "If the legislature intends that penalties shall be recovered in a civil action, it must designate for whose benefit the recovery can be had. Failing in that, the penalty cannot be recovered." We feel that such conclusion is here applicable insofar as the Legislature has failed to provide for disposition of that portion of the penalty in excess of the value of the deficiency.

However, when the purchaser cannot be ascertained, the statute does make provision for disposition of the entire penalty by payment to the director. Therefore, the treble penalty should be assessed when called for in such circumstances.

Any lack of reason for the distinction between the two situations when the purchaser is known and when he is unknown does not require a different conclusion with respect to either of the situations. We merely construe the statute as written.

#### CONCLUSION

Therefore, it is the opinion of this office that:

(1) Penalties assessed under Section 266.343, V.A.M.S., are to be assessed on the basis of the monetary value of the deficiency of the plant nutrients;

(2) Penalties in excess of the actual value of the deficiency may not be assessed when the purchaser of the fertilizer is ascertained and the penalty paid to such purchaser.

The foregoing opinion, which was prepared by my Assistants, James B. Slusher and Robert R. Welborn, is hereby approved.

Yours very truly,

JOHN M. DALTON  
Attorney General

JBS:RRW:ml