

## WSR 18-13-013

- PERMANENT RULES
- DEPARTMENT OF AGRICULTURE
- [Filed June 7, 2018, 11:39 a.m., effective July 8, 2018]

Effective Date of Rule: Thirty-one days after filing.

Purpose: This rule-making order amends chapter 16-305 WAC, Industrial hemp research program, as follows:

- Adds language to address activities that are outside the scope of enforcement under chapter 16-305 WAC.

- Adds language to WAC 16-305-030 to include definitions for civil penalty, end use product, notice of correction, notice of intent, publicly marketable hemp product, unprocessed industrial hemp, and violation.

- Adds language to WAC 16-305-240 regarding scope of enforcement, to include monetary penalties for licensees and unlicensed persons for violations of chapter 15.120 RCW or 16-305 WAC.

- Adds language regarding enforcement actions being subject to availability of sufficient resources and funds.

- Adds language regarding the determination of civil penalties and license enforcement penalties.

- Adds a penalty matrix to address multiple categories of violations with aggravating and mitigating factors, including consideration of the status of a respondent as a small business as a potential mitigating factor.

- Adds penalty language for failure to follow industrial hemp destruction order.

- Adds language regarding other dispositions of alleged violations.

Citation of Rules Affected by this Order: New WAC 16-305-015, 16-305-242, 16-305-245, 16-305-251, 16-305-252, 16-305-253, 16-305-254, 16-305-255, 16-305-256 and 16-305-257; and amending WAC 16-305-030, 16-305-240, and 16-305-250.

Statutory Authority for Adoption: RCW 15.120.030, and 15.120.035.

Other Authority: Chapter 34.05 RCW.

Adopted under notice filed as WSR 18-09-115 on April 18, 2018.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 8, Amended 3, Repealed 0.

Number of Sections Adopted at the Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 3, Amended 1, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 1, Amended 1, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: June 7, 2018.

Derek I. Sandison

Director

NEW SECTION

**WAC 16-305-015 Activities outside the scope of enforcement.**

The following activities are not subject to regulatory sanctions or penalties under this chapter, except as provided under WAC 16-305-180, and except for the limitation of THC content under RCW 15.120.010:

- (1) Possessing, further processing, transporting, marketing and exchanging legally obtained publicly marketable hemp product;
- (2) Producing, possessing, further processing, transporting, marketing and exchanging end use products legally made with publicly marketable hemp product; and
- (3) Growing, producing, possessing, processing, marketing and exchanging marijuana as defined in RCW 69.50.101. Marijuana activities are regulated by the Washington state liquor and *Cannabis* board under chapters 69.50 RCW and 314-55 WAC.

AMENDATORY SECTION(Amending WSR 17-09-034, filed 4/13/17, effective 5/14/17)

### **WAC 16-305-030 Definitions.**

"Applicant" means a person who submits an application for a license to participate in the industrial hemp research program as required under this chapter.

"Approved seed" means a variety of industrial hemp seed that is approved by the department for growing industrial hemp.

"Authorized representative" means any person identified in writing by a licensee who may act as agent on behalf of the licensee for purposes of the license subject to any limitations stated in writing by the licensee. The licensee remains responsible for compliance with the license requirements irrespective of the acts or omissions of an authorized representative.

"Certified seed" means an industrial hemp seed variety that has been bred to comprise satisfactory genetic purity and varietal identity and has been accepted by Association of Seed Certifying Agencies (AOSCA), Organization for Economic Cooperation and Development (OECD) or other certifying entity as determined by the department.

"Civil penalty" under this chapter means a monetary penalty imposed by the department for violations of the industrial hemp laws, chapters 15.120 RCW and 16-305 WAC, and applicable sections of chapters 16-302 and 16-303 WAC.

"Contiguous land area" means a specific field with designated boundaries that is planted with industrial hemp. Separate parcels connected only by thin or narrow plantings of industrial hemp or separated by physical barriers such as ditches or roads are not considered contiguous for the purposes of this rule.

"Continuous licensing" means annual licenses renewed in such a way that the licensee is continuously operating under a valid license.

"DEA" means the federal Drug Enforcement Administration.

"Department" means the Washington state department of agriculture.

"Destroyed" means incinerated, tilled under the soil, made into compost, or another manner approved by the department.

"Devitalization" means the process of sterilizing viable industrial hemp seed in such a way that the seed is unable to grow into new plants. Devitalization may happen through steam sterilization, dehulling, pressing, or another method approved by the department. If using steam sterilization, the seeds must be steamed to one hundred eighty degrees Fahrenheit for at least fifteen minutes.

"End use product" means a product that contains publicly marketable hemp product and requires no further processing to be sold to a consumer. End use products include animal bedding, animal feed, beverages, biofuel, bioplastics, clothing, compost, construction materials, cosmetics, food, grain and grain products, insulation, seed oil, soil amendments and other products containing publicly marketable hemp products. End use products are subject to the limitations on the uses of industrial hemp under RCW [15.120.020](#).

"Field" means a contiguous land area, registered with the department, on which a licensee plans to grow industrial hemp.

"Grain" means any devitalized industrial hemp seeds that are not intended for replanting, but will be used for food, feed, fiber, oil or other products.

"Industrial hemp" means all parts and varieties of the genera *Cannabis*, cultivated or possessed by a grower, whether growing or not, containing a THC concentration of 0.3 percent or less by dry weight. Industrial hemp does not include plants of the genera *Cannabis* that meet the definition of "marijuana" as defined in RCW [69.50.101](#).

"Industrial hemp research program" means the department's "agricultural pilot program" established under chapter [15.120](#) RCW, this chapter, and the industrial hemp seed rules under chapters 16-302 and 16-303 WAC.

"Leadership position" means any board member, manager, or leader in a business or organization who will provide oversight and monitoring of subordinates.

"Licensee" means any person who holds a license from the department to grow, produce, possess, process, or exchange or sell industrial hemp. A licensee may be a person who is authorized to carry out department supervised research on the feasibility and desirability of industrial hemp production in Washington state.

"Notice of correction" means a document issued by the department to a licensee, consistent with RCW [43.05.100](#), that describes a condition or conduct that is not in compliance with chapter [15.120](#) RCW or the rules adopted thereunder and is not subject to civil penalties as provided for in RCW [43.05.110](#). A notice of correction is not a formal enforcement action, is not subject to appeal and is a public record. Violations of THC content are not subject to a notice of correction and will result in a notice of intent.

"Notice of intent" means a document issued by the department to an alleged violator that identifies specific violations of chapter [15.120](#) RCW or the rules adopted thereunder. A notice of intent states any proposed civil penalty or any intent to suspend, deny or revoke the alleged violator's industrial hemp license.

"Processing area" means any area, building, plant or facility registered with and approved by the department in which a licensee will make industrial hemp into a marketable product. For the purposes of this definition, a person's domicile, home or residence is not considered a processing area.

"Publicly marketable hemp product" means industrial hemp that has been processed in compliance with department regulations, or under an equivalent regulatory program recognized by the department, for which a processor or marketer license is not required. Publicly marketable hemp products include bare stalks that have been pressed or decorticated, bast fiber, hurd fiber, nonviable roots, nonviable seeds, seed oils and seed coats separated from the seed, and hemp plant extracts. Under RCW 15.120.020, only industrial hemp seed may be processed as "food, extract, oil, cake, concentrate, resin, or other preparation for topical use, oral consumption, or inhalation by humans."

"Registered land area" means a contiguous land area, including greenhouses, processing areas and storage areas registered with the department as a condition of licensing, on which a licensee will conduct licensed activities. A registered land area may include more than one field, greenhouse, processing area or storage area so long as those fields, greenhouses, processing areas or storage areas are at the same physical address.

"Report" means any data, statistics or information required to be provided to the department by a licensee under an industrial hemp license.

"Seed distributor" means any person licensed by the department to distribute or sell viable industrial hemp seed.

"Storage area" means any area, building, plant or facility registered with the department in which a licensee plans to store industrial hemp.

"THC concentration" means the percent of total tetrahydrocannabinol, which is the combined percent of delta-9 tetrahydrocannabinol and tetrahydrocannabinolic acid in any part of the genera *Cannabis*.

"Unprocessed industrial hemp" means any raw, unprocessed part of the industrial hemp plant, including viable seed, that has been harvested but has not been sufficiently processed to be transferred to an unlicensed person. Unprocessed industrial hemp includes industrial hemp that is green, dried, baled or pelletized, that is in the form of living hemp plants, viable seed, leaf materials, floral materials, and raw stalks.

"Violation" means any act or omission prohibited under chapter 15.120 RCW or the rules adopted thereunder.

"Volunteer plant" means an industrial hemp plant that results from a previous crop.

AMENDATORY SECTION(Amending WSR 17-09-034, filed 4/13/17, effective 5/14/17)

**WAC 16-305-240 Scope of enforcement.**

Licensees may be subject to monetary penalties and license suspension or revocation for violations of chapter 15.120 RCW or the rules adopted thereunder. Unlicensed persons may be subject to monetary penalties and denial of a license application for violations of chapter 15.120 RCW or the rules adopted thereunder.

NEW SECTION

**WAC 16-305-242 Enforcement actions subject to availability of funds.**

Any enforcement action considered by the department under this chapter is subject to the department's determination as to the availability of sufficient resources and funds.

NEW SECTION

**WAC 16-305-245 Determination of civil penalties and license enforcement penalties.**

(1) Penalty selection. The department will use the penalty assessment schedule tables listed in WAC 16-305-251 through 16-305-255 to determine appropriate monetary penalties and license enforcement penalties. The department will determine any penalty based on the type of violation at the time of the incident(s) giving rise to any violation. An applicable listed penalty will be used unless the department identifies aggravating or mitigating factors and how those factors change the assessed penalty. For violations not expressly included in any of the penalty category tables, the department will identify any penalty that it determines most closely approximates the seriousness of the violation in comparison with penalties expressly identified in the penalty tables.

(2) In addition to any penalties provided for under WAC 16-305-250 through 16-305-256, any industrial hemp crop or material, processed or unprocessed, containing a THC concentration greater than 0.3 percent by dry weight is subject to a destruction order, regardless of whether any other penalty is assessed.

(3) Adjustment of penalty.

(a) The department may increase or decrease any penalties for identified aggravating or mitigating circumstances, including circumstances where licensing action(s) as a deterrent are ineffective. Factors for increasing or decreasing penalties include the following:

(i) Violations by persons who are not licensed; and

(ii) Situations where a listed civil penalty assessed is not substantially equivalent to the violator's estimated economic benefit derived from the violation.

(b) The department may decrease the civil penalty and increase the licensing enforcement penalty when the department determines that the civil penalty is an inadequate enforcement option to respond to a violation, including to serve as a deterrent.

(4) Aggravating factors. The department may consider circumstances for increasing a penalty based on the seriousness of the violation. Aggravating factors include the following:

(a) The number of separate alleged violations contained within a single notice of intent;

(b) The similarity of the current alleged violation to previous violations committed within the last three years;

(c) The extent to which the alleged violation is part of a pattern of the same or substantially similar conduct;

(d) Violations benefiting the violator or license applicant economically that are expressly prohibited under chapter 15.120 RCW and the rules adopted thereunder. Such violations include conducting grower, processor, or distributor operations without a license; processing and marketing industrial hemp products in violation of the limitation under RCW 15.120.020; or importing viable industrial hemp seed or propagules without department authorization.

(5) When the department determines that one or more aggravating factors are present, the department may assess the penalty as listed within the type of violation or may, in its discretion, increase the penalty to a level greater than the listed penalty, including suspension, revocation or denial of a license.

(6) Mitigating factors. The department may consider circumstances for decreasing a penalty based upon the seriousness of the violation. Mitigating factors include the following:

(a) Voluntary disclosure of a violation;

(b) Voluntary taking of remedial measures that will result in a decreased likelihood that the violation will be repeated;

(c) The status of the alleged violator as a small business under chapter 19.85 RCW and any circumstances that justify decreasing a listed penalty based on the status as a small business.

(7) When the department determines that one or more mitigating factors are present, and that those factors outweigh any aggravating factors, the department may decrease the listed penalty.

(8) The department considers each violation to be a separate and distinct event. When a person has committed multiple violations, the violations are cumulative for purposes of calculating the appropriate penalty. Each notice of intent will identify all applicable alleged violations and penalties to be imposed.

(9) Violation(s) committed during a period when a licensee's license is suspended or revoked may be subject to the maximum civil penalty of fifteen thousand dollars for each violation and revocation or denial of a license for a period of up to three years.

AMENDATORY SECTION(Amending WSR 17-09-034, filed 4/13/17, effective 5/14/17)

**WAC 16-305-250 Monetary penalties, license denial, suspension or revocation, and right to adjudicative proceeding.**

Upon notice of intent by the department to an applicant to deny a license ; notice of intent to a licensee to suspend or revoke a license; notice of intent to impose a monetary penalty; or notice of intent for destruction of a hemp material or crop , a person may request an adjudicative proceeding under chapter 34.05 RCW, the Administrative Procedure Act, and chapter 16-08 WAC.

NEW SECTION

**WAC 16-305-251 Category 1 violations.**

Category 1 violations are considered the most serious because they compromise required conformance of the industrial hemp research program with the program's federal enabling authority, 7 U.S.C. Sec. 5940.

NEW SECTION

**WAC 16-305-252 Category 2 seed distributor violations.**

Category 2 violations are violations involving the manufacture, supply, processing, or distribution of viable industrial hemp seed by industrial hemp seed distributor licensees and prohibited practices between an industrial hemp seed distributor and grower or processor. Any industrial hemp seed in the possession of a licensed distributor that is not certified seed is subject to a destruction order, regardless of whether any other penalty is assessed. The department will not issue a notice of correction prior to issuing a destruction order.

NEW SECTION

**WAC 16-305-253 Category 3 grower or processor violations.**

Category 3 violations are violations involving the growing, manufacture, supply, processing, or distribution of industrial hemp or hemp seed by industrial hemp grower, processor, or combination licensees.

NEW SECTION

**WAC 16-305-254 Category 4 license violations.**

Category 4 violations are violations involving licensing requirements, license classification, and terms and conditions of industrial hemp licenses.

NEW SECTION

**WAC 16-305-255 Category 5 regulatory violations.**

Category 5 violations are violations involving general regulation and administration of industrial hemp licenses. Category 5 penalties imposed on a grower, processor, distributor, or combination licensee may include license suspension. Any industrial hemp crop may be subject to a destruction order during a license suspension.

NEW SECTION

**WAC 16-305-256 Penalty for failure to follow industrial hemp destruction order.**

The penalty for a licensee or unlicensed person who fails to follow a crop or hemp product destruction order issued by the department within five business days is five hundred dollars per day for each day the destruction is delayed beyond five business days from the date of the destruction order.

NEW SECTION

**WAC 16-305-257 Other dispositions of alleged violations that the department may choose.**

Nothing herein shall prevent the department from:

- (1) Choosing not to pursue a civil penalty, license suspension or license revocation.
- (2) Issuing a notice of correction in lieu of pursuing a civil penalty, license suspension or license revocation.
- (3) Negotiating settlement(s) of cases on such terms and for such reasons as it deems appropriate. Prior violation(s) covered by a prior settlement agreement may be used by the department for the purpose of determining the appropriate penalty for subsequent violation(s).
- (4) Referring violations or alleged violations to any federal, state or local government agency with jurisdiction over the activities in question including, but not limited to, the federal Drug Enforcement Administration (DEA) and the Washington state patrol (WSP).