NATIONAL HEMP ASSOCIATION

Official comments and recommendations on the USDA Interim Final Rule by the National Hemp Association. October 2020.

Administrator Bruce Summers
U.S. Department of Agriculture, Agricultural Marketing Service
1400 Independence Avenue, S.W.
Washington, DC 20250-0237

Re: Doc. No. AMS-SC-19-0042; SC19-990-2IR
Federal Register Vol. 84, No. 211, p. 58522, October 31, 2019 Establishment of a Domestic Hemp Production Program

Administrator Summers,

This communication concerns the Interim Final Rule (IFR) for the United States Department of Agriculture's (USDA) hemp program, CFR 990. We are the National Hemp Association, the nation's largest non-partisan hemp advocacy group. We represent all elements of the hemp industry - from seed to sale - and every conversion point in between. We are not a pay to play CBD lobby group disguised as an industry business organization, nor are we a group of lobbyists disguising itself as industry advocates.

The Standing Committee of Hemp Organizations (SCOHO) for the National Hemp Association (NHA) represents directly or indirectly virtually every hemp farmer and related business in America today. Our associations have paid members in California, Washington, Oregon, Nevada, Arizona, Montana, North Dakota, Colorado, Nebraska, Kansas, Minnesota, Iowa, Wisconsin, Michigan, Ohio, Texas, Kentucky, Tennessee, Florida, Indiana, Virginia, Georgia and Connecticut. In addition, NHA covers all fifty states as well as many tribal councils, territories and international interests. As leaders in the hemp industry with regards to state-level policy and business development, it is fair to say we collectively represent more than 90% of hemp farmers and acres grown.

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Our work and our members have created tens of thousands of jobs, pioneered processing and manufacturing innovations and have been leaders on policy and rules, working harmoniously with our respective legislatures and departments of agriculture. We communicate respectfully with profound concern regarding fear in the marketplace and collateral, economic devastation to the entire hemp industry caused directly by the proposed rules being put forward by the Department.

We sincerely thank you for reopening the comment period to allow us to address several, key points with relatively easy fixes outlined herein. These remedies, if heeded, provide a desperately needed reset for an industry that was poised by the largely self-regulating, 2014 pilot program to dominate production and set reasonable standards for hemp markets globally.

We, likewise, thank you for understanding the Agricultural Improvement Act of 2018 (the 2018 Farm Bill) decriminalizes all hemp-derived cannabinoids, derivatives, isomers and salts, without exception. Though Congress and the President permanently removed law enforcement from the regulation of this commodity crop through codification of the 2018 Farm Bill, there is a notable absence of a policy in CFR 990 allowing for the movement of concentrates. This creates problems in interstate commerce for hemp which was not addressed sufficiently in the present iteration of the IFR of protections for farmers and processors dealing with disposal of noncompliant plants, derivatives and concentrates.

It is our understanding from the memo General Vaden wrote (Executive Summary of New Hemp Authorities, dated May 28, 2019), that THC derived from hemp is not scheduled. It is clear that when the IFR was written and submitted for initial comment on October 31, 2019, the legal opinion of USDA offered some legal protections for concentrates that were never translated into the IFR.

The ending of USDA jurisdiction at cultivation by USDA has unwittingly forced the Drug Enforcement Agency (DEA) to take action to reinsert the Department of Justice into our industry through the issuance of its own IFR on hemp. Not only do we see their "Non Significant" classification of their IFR submission to OMB as inappropriate or possibly misleading, it has caused widespread panic among law abiding citizens trying to make a living from this crop and has hindered much of the potential for explosive growth.

To date, most states that have been operating under USDA approved programs in the 2020 growing season do not have final results tabulated to fully demonstrate the adverse effects of the rules as they currently stand. Due to this fact, we strongly encourage that the implementation of the Interim Final Rule be delayed until 2022. The 2014 pilot program provisions have now been extended until 9/30/2021. This means that the 2021 growing season will again leave states operating under different sets of rules and regulations. USDA should take the extra time to review all submitted comments and the results from the 2020 growing season before making rules permanent.

Not only do we need consistency to ensure market integrity but, given the vast economic damage many farms have seen from COVID and other unprecedented market factors which necessitated over 35 billion dollars in bailouts over the last 3 years, our farmers simply cannot manage the added economic blow they will face with the impracticable regulations

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currently being proposed by USDA. Farmers need more economic opportunities, which is why many of them are seeking out this new hemp market.

SAMPLING & TESTING

How the crop is sampled plays the most significant role in the results. This difference in sampling can produce dramatically different results from the same plant, as can its impact on the analytical sampling. The scientific research from which the 0.3% Δ9-THC distinction between hemp and marijuana originated (Small and Cronquist, 1976) adopted that concentration specifically for "young, vigorous leaves of relatively mature plants as a guide to discriminating [the] two classes of plants." This .3% threshold was admitted to by the author to be a completely arbitrary number that is still affecting our industry all these years later.

The IFR provides the sample should come from the top one-third of the flower. THC levels are the highest in this part of the plant and impossible to retain in a commercial automated fashion required to farm large acreage. Biomass, which has many grades, is a composite of flowers, leaves and small lateral branches, and sometimes larger stems. This composite biomass is the most functional way for the industry to evolve and utilize all parts of the plant, versus an industry focused on cannabinoid value. A full plant composite sample is not only more forgiving to farmers, it also is a realistic representation of the THC levels of the product that is leaving the farm.

It is also important to note that a recent study titled *THC Distribution in Field Grown Hemp Prior to Harvest - J. Scott Lowman, Jack He, Mike Clark, and Mark Gignac - The Institute for Advanced Learning and Research (IALR), Danville Virginia, 24540* clearly shows the dramatic difference in results even when the sample is all flower material taken from various parts of the plant.

A change in sampling to a full plant composite sample is the single most effective way to ease the burden and risk to farmers while maintaining tight regulatory control over hemp being introduced into the marketplace.

Even in the scenario where flower is destined to go straight to market, the DEA's IFR only references Δ9 THC concentrations. This ensures that even with whole plant composite samples, the top flower material will still be compliant per the DEA.

Please see graphic on next page.

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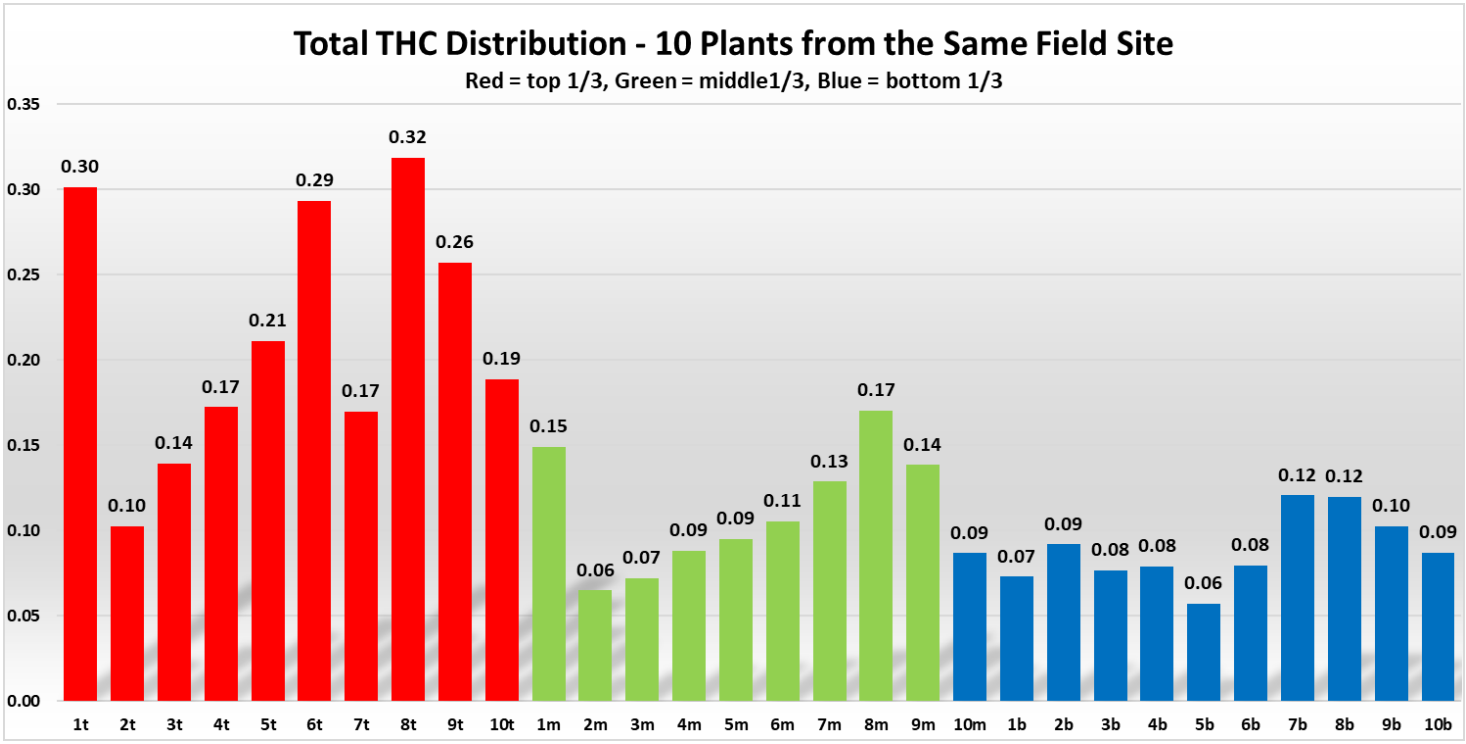

We propose adding a new rule that allows states and tribal councils to exempt certain hemp varieties from being sampled and tested. Hemp is currently globally produced with varieties with stable genetics that meet the internationally recognized standard of 0.3% tetrahydrocannabinol threshold. To include these stable varieties with genetics that are being newly developed ignores the science around agriculture and significantly harms those in the hemp industry seeking to build the fiber and grain sector of hemp. Hemp has many non-consumable industrial applications and these industrial varieties are developed from certified seed that currently meet all testing standards, therefore mandating valuable state resources be used to sample and test these crops is wasteful and threatens our ability to be competitive in already established global markets. Therefore, hemp crops that are grown specifically for fiber use products should be allowed to be exempt from mandatory testing and sampling. This will also free up the pipeline from crop to lab and ensure a timely turnaround for more volatile flower crops.

Additionally, new science is being developed around cloning and stabilizing non-traditional agricultural genetics in not only hemp, but other food crops. States and tribal councils should be provided flexibility to develop programs to research, develop and certify these new methods. Once stable genetics are established, this will relieve many cash strapped states and tribal resources and maximize farmers' ability to grow compliant hemp from both certified seeds and clones.

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What must be kept top of mind is farmers want to stay compliant. Creating rules that make one-tenth of 1% the difference between a farmer making profit or suffering a devastating loss is not conducive to a farming risk profile. One-tenth of 1% is not only a small number but applied and measured to a value that is subject to change from a variety of factors not in human control.

RULE REQUIRING USE OF DEA CERTIFIED LABS

USDA should strike the requirement for all states to use DEA-registered laboratories for testing hemp. Instead, states and tribal councils should be allowed the authority to create and use their own network of certified laboratories for testing hemp for two compelling reasons.

First, there are simply not enough DEA-registered labs to handle the volume of hemp that is being grown across the country and tribal territories. Additionally, there is no guarantee that current labs that are registered would be willing to take on the added burden of testing hemp or, even if they are willing, have the capacity to turn around results within a timely manner that wouldn't threaten the viability of tested crops with the already limited window of 15 days.

Secondly, many states currently have a robust network of experienced laboratories that are currently testing all forms of cannabis from hemp to marijuana. In order to handle the large volume of hemp being produced that would be required to be sampled and tested for THC compliance, we should be able to independently certify and regulate these labs to adhere to established ISO Standard 17025.

PROCESSING PERMITS

Another issue that has not been adequately addressed is legal gap between farm and consumer. Particularly concerning to the industry was the release of the DEA's IFR on Hemp. It clearly stated what has always been the elephant in the room, that mid process product that temporarily exceeds legal THC limits is legally considered marijuana. This places processors in an untenable position where there is literally no way for them to be federally compliant. Many states have taken it upon themselves to issue hemp processor permits.

This offers a modicum of protection for these businesses which are essential to the farmers success. Considering that hemp must go through this temporary process, and often the resulting crude oil or distillate that is produced needs to cross state lines for additional processing that will remediate the excess THC to formulate the final product, there needs to be a federal compliant way to accomplish this.

We strongly encourage USDA to expand its jurisdiction over hemp to include permits for processors. This processing permit would not in any way supercede FDA's ultimate jurisdiction to regulate final consumer goods, but rather close

the legal gap in chain of custody and would also be a good opportunity to standardize and offer guidance as to proper protocols for disposal of the remediated THC.

MEASUREMENT OF UNCERTAINTY & NEGLIGENCE LEVELS

While the IFR does provide for each lab to calculate a small variance in the form of a 'measurement of uncertainty', which is likely to equate to only a few hundredths of a percent, this does not provide enough natural variability in production. Farmers want to be compliant, but such strict adherence a .3% Total THC requirement is overly burdensome. To have crops that test even at .35% after the measurement of uncertainty, especially when .5% has been marked as the level of 'negligence', is setting the farmer up for failure. It will also deter the experimentation of different varietals in different parts of the country when three negligent test results will lead to a suspension of the license. This research is essential to find what varietals work best in different climate zones and soil types as well as for the development of better genetics. The level that is considered negligent should be no less than 1% and crops that test less than .6% should still be deemed compliant to be sold to a processor.

Processors with the ability to scientifically control THC levels and analytically measure them bear the obligation to ensure that end products that reach consumers are compliant with the .3% THC requirement. Additional and stricter guidelines could be created for the specific compliance of hemp to be sold as raw flower. Since most (80%+) of the hemp sold will be further processed, the burden for stricter compliance should not be on the farmer.

TIME BETWEEN SAMPLING AND HARVEST

THC levels do have the potential to rise towards the end of harvest making it important from a regulatory position to have limits between the time a sample is tested to ensure compliance and when the actual harvest takes place. The challenge becomes what is the right balance from a regulatory perspective, while also taking into account practical considerations such as weather conditions and logistics. The short 15-day window of sampling before harvest, combined, has lead to almost insurmountable logistical problems. The time between sampling and harvest should be 30 *business* days. 30 business days are required due to all affected parties for testing and regulation operate on a 5 day business week.

CROP DISPOSAL

While it is our hope to see the regulations eased, making the need for crop destruction much less likely, in the unfortunate event that disposal is required we oppose the requirement that the material must be collected for destruction by a person authorized under the CSA to handle marijuana, such as a DEA-registered reverse distributor, or a duly authorized federal, state, or local law enforcement officer. Not only does this requirement add additional costs to an already suffering farmer that is facing crop destruction, it also adds the undue stress and stigma of having their farm descended upon by law enforcement. If hemp is to be considered a true commodity crop, we need to move away from the perception that hemp is marijuana until proven otherwise. While a crop with slightly elevated THC levels may meet the strict legal definition of marijuana, in the real-world hemp would need to well exceed 2% or 3% to reasonably be considered marijuana or a diversion risk.

We oppose destruction as a first go to step. Disposal does not mean destruction, as a first means of regulation and compliance enforcement and it should be left to the states to direct and handle.

The states are more than capable of overseeing destruction as they have done since pilot programs began. Taking this approach will reduce costs and prevent an unnecessary burden on law enforcement whose time and energy can be better utilized in our communities.

It is also vital that there be other disposal options other than destruction. Even prior to hemp legalization, stalks and seeds have always been exempted from the CSA. At a minimum, the stalks and grain of crops that have failed compliance testing should still be able to be taken to market.

CONCLUSION

What is often overlooked in the process is the understanding of the intent of Congress by the passage of the 2018 Farm Bill which includes the lawful processing and transportation of hemp and its derivatives or extracts so long as the final product reaching consumers adheres to the 0.3% Δ9-THC limits. Congress had the opportunity to change the legal definition of hemp to be total potential THC but chose to keep the legal definition as Δ9-THC. This should give more flexibility in the sampling and testing protocol to create a program that both complies with the law while also adhering to the spirit and intent of the law, which is to have hemp be a widely grown commodity crop.

We acknowledge that implementation of the hemp provisions of the 2018 Farm Bill is a challenging task for regulators as it touches many different federal and state agencies, farmers, businesses and the public and we appreciate the opportunity to express our concerns and make recommendations for improvement.

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We hope you will consider our comments and recommendations and make the adjustments needed to provide a more effective framework within which the industry can thrive.

Thank you for this opportunity to present our positions and for your consideration.

On behalf of the National Hemp Association and the Standing Committee of Hemp Organizations

Best regards,

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Geoff Whaling, *Chair*

Erica Stark, *Executive Director*

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