



From Rural Education Action Project  
DBA Rural Vermont  
**Comments to the USDA Regarding Interim  
Final Rule for Establishment of a Domestic  
Hemp Production Plan**  
January 29, 2020

The Honorable Secretary Sonny Perdue  
United States Department of Agriculture  
1400 Independence Avenue, SW  
Washington, DC 20250

Dear Secretary Perdue:

Rural Vermont, a non-profit farm advocacy organization founded in 1985, has been advocating for hemp production in Vermont for over 15 years. We deeply recognize the exciting and necessary opportunities hemp could provide our state's working lands community by supporting the economic viability of farms, creating jobs, boosting local economies, and promoting environmental stewardship. Vermont's burgeoning hemp sector, which began under a pilot program in 2014, now represents over 900 growers and processors who registered 9,000 acres in 2019.

Market data indicates strong and sustained growth for the U.S. hemp industry in the global marketplace. However, Rural Vermont is very concerned about a number of provisions in the IFR and their unintended and potentially harmful consequences to the economic future, position, and competitive advantages in the emerging hemp economy, particularly as they impact farmers and the state's agricultural sector.

Thank you for your time and for considering our comments and recommendations when USDA undertakes the final rulemaking.

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I. **Hemp Sampling Procedure:** The interim final rule requires that only the flower material is be used when taking samples for testing. USDA's new *Sampling Guidelines for Hemp* require that a sample of the "flowering material be taken from ... the top one-third (1/3) of the plant".

**Our Concern:** The definition of hemp in the 2018 Farm Bill is based on THC level by weight of the plant, not the flower. Farmers are harvesting the flower from the whole plant and many farmers are harvesting and utilizing the entire plant including flowers, stalks, leaves, and stems. *We are very concerned that USDA's new sampling requirement will invariably lead to inaccurate test results for many harvest "lots".*

**Our Recommendation:** We urge USDA to revise their Sampling Guidelines by requiring that a composite sample of the whole-plant be taken; including flower, leaves and stems from the top, middle, and bottom portions of the plant in order to get a more accurate overall THC level.

**II. Hemp Sampling - Timing of Samples Taken:** The interim final rule states, "Sampling and testing for delta-9 tetrahydrocannabinol (will take place) within 15 days prior to the anticipated harvest of cannabis plants."

**Our Concern:** Based on six years of prior experience, *we are very concerned that allowing only 15 days to collect the samples, submit them for testing, and expect to receive test results creates an impossible obstacle for growers and labs to overcome.* The unlikelihood of meeting a 15-day requirement could easily be compounded by inclement weather, equipment or labor issues, the limited number of certified or registered laboratories and a high demand for laboratory services during harvest season in particular.

**Our Recommendation:** We respectfully urge USDA to require hemp crops be sampled and tested a minimum of 28 days prior to harvest for each lot.

**III. Cannabinoid Testing Procedure – "Total THC":** The IFR states that hemp samples must be tested using methods where the "THC concentration level accounts for the conversion of delta-9-tetrahydrocannabinolic acid (THCA) into THC."

**Our Concern:** The 2018 Farm Bill requires testing for delta-9-THC using "post decarboxylation or *other similarly reliable methods*" (our emphasis). However, *instead of allowing similarly accurate and reliable non-decarboxylation tests to be used to measure delta-9 THC, this new USDA requirement contravenes the language and intent of the 2018 Farm Bill* by requiring testing that Congress specifically did not include.

**Our Recommendation:** Reliable testing methods exist that don't require decarboxylation to accurately measure THC concentrations. Given the 2018 Farm Bill specificity, and because it allows "other similarly reliable methods" to be used, we urge USDA to remove all requirements for converting THCA into THC and allow testing for delta-9 THC using methods that do not involve the application of heat or decarboxylation and allow for the continued expansion and improvement of reliable testing methods for this industry.

**IV. Cannabinoid Testing Procedure – DEA Registered Labs:** The interim final rule stipulates, "the laboratories conducting hemp testing must be registered by the DEA to conduct chemical analysis..."

**Our Concern:** Currently, hemp producers in Vermont and across the country use independent, and soon to be, State certified labs to test hemp crops. *The requirement for hemp farmers to submit their crops to a Drug Enforcement Administration (DEA)-*

*registered laboratory for testing sets a poor precedent and is concerning for two reasons:*

1. The 2018 Farm Bill removed hemp from the list of controlled substances and gave USDA and the FDA sole regulatory authority over hemp production, making it a legal agricultural commodity. *Like all other legal agricultural commodities, hemp should not be subjected to prohibitive DEA regulations.*

2. An estimated 16,000 growers planted ~230,000 acres of hemp in 2019 (of 511,000 registered acres). If the requirement to only use DEA-registered labs remains in the final rule, which we believe would be in conflict with the intent of the 2018 Farm Bill, *this could cause significant bottlenecks and delays for all hemp producers* as there are only 37 DEA registered labs currently listed with the USDA and the registration process can take up to 12 months.

***Our Recommendation:*** We recommend the USDA remove the requirement that testing labs must be DEA-registered and instead leave the decision of lab certification to the individual state hemp programs.

**V. Negligent Violations, specifically regarding THC levels:** The IFR establishes that hemp producers may be found to have committed a negligent violation... if they produce plants that “have a THC concentration of more than .05 percent on a dry weight basis.”

***Our Concern:*** Section 297B.e.(2) of the 2018 Farm Bill stipulates that a “...state department of agriculture may take corrective action if they ...determine that the hemp producer has negligently violated the State plan, including by negligently producing *Cannabis sativa* L. with a delta-9 tetrahydrocannabinol concentration of more than 0.3 percent on a dry weight basis.”

*Rural Vermont is very concerned that USDA is exceeding its regulatory mandate by arbitrarily using the results of a THC test to define or determine negligence.* Furthermore, if under this IFR rule a THC test (*rather than the actions or omissions of a hemp producer*) is used to determine a hemp producer is negligent “... 3 times in a 5-year period (the hemp producer) shall be ineligible to produce hemp for a period of 5 years beginning on the date of the third violation” (2018 Farm Bill, Sec. 297B.e.2.D).

Under this proposed rule, a cautious hemp producer or researcher could inadvertently produce plants that exceed this 0.5% THC concentration using certified and compliant seed and engaging in other best practices that any reasonably prudent person would undertake in similar circumstances - and still be found negligent solely on the basis of an arbitrary limit of their test results, and potentially risk exclusion from the industry due to factors outside of grower’s control, such as the weather.

***Our Recommendation:*** A THC test result should not be used to automatically determine a hemp producer’s negligence. Rather, an evaluation of negligence should be based on whether or not a hemp producer “exercised the standard of care that a reasonably prudent person would have exercised in a similar situation”. Consistent with the 2018 Farm Bill, individual states should be allowed to evaluate potentially negligent violations of the state plan.

**VI. Disposal of non-compliant plants:** The interim final rule states, “If a producer has produced cannabis exceeding the acceptable hemp THC level, the material must be

disposed of in accordance with the CSA and DEA regulations...by a person authorized under the CSA to handle marijuana.”

**Our Concern:** While we recognize the challenge that USDA faces in regulating a new agricultural commodity that can inadvertently cross over into a Schedule 1 classification (due to THC concentration test results), our concern with this section relates back to our comments above:

1. The sampling and testing requirements in the IFR will invariably lead to inaccurate test results and “non-compliant” plants for many hemp producers. If those requirements are not corrected in the final rulemaking, the resulting crop losses will be staggering.

2. *We are very concerned the IFR oversteps the intent and language of the 2018 Farm Bill by invoking DEA regulations* in the event of a hemp crop exceeding the acceptable THC level. As we previously stated in section IV above, the 2018 Farm Bill gave USDA and the Food and Drug Administration sole regulatory authority over hemp production.

**Our Recommendation:** The goals of the 2018 Farm Bill can be met and hemp producers and processors can minimize crop losses from THC testing by the IFR requiring that testing be conducted to determine the *average THC concentration* of the entire plant (not just the top 1/3 of the plant). In addition, the IFR should endorse taxonomic (genetic) determination of cultivars as a viable option for THC compliance under the 2018 Farm Bill.

**VII. Felony Ban, Specifically Criminal History Report:** Section 2(D) of the IFR states, “the State or Indian Tribe will need to review criminal history reports for each (hemp program) applicant.”

**Our Concern:** Rural Vermont and Vermont’s community of hemp growers and producers are fundamentally opposed to the 2018 Farm Bill’s provision that any person with a prior felony conviction related to a controlled substance is ineligible to participate in their state’s hemp program for 10 years after their conviction.

Although we understand the USDA isn’t able to make changes to the Farm Bill provision, *an applicant should not have to submit a criminal record report in order to grow or process an agricultural commodity*. We find this requirement of the IFR intrusive, and unnecessary.

Furthermore, “ex post facto” laws (those that impose new punishment for past offenses) are specifically forbidden by the United States Constitution in Article 1, Section 9, Clause 3 (with respect to federal laws) and Article 1, Section 10 (with respect to state laws).

**Our Recommendation:** It should be left to the individual States or Indian Tribes to decide how they will administer the 2018 Farm Bill’s provision regarding prior felony convictions of hemp program applicants. It is time to return hemp to its former status as a valuable agricultural crop and treat it like any other agricultural commodity.

**VIII. Information sharing:** The IFR requires that, “licensed producers must also report their hemp crop acreage to the FSA”.

**Our Concern:** Vermont's hemp program registrants are already required to provide land use information, geospatial locations, hemp acreage, etc. to the state Agency of Agriculture. Hemp producers are further required to submit detailed reports of actual acres planted, amounts of hemp grown or processed, etc. after the harvest. Furthermore, the state Agency of Agriculture must submit the aggregate data of all participants in the hemp program to the USDA. *Hemp producers should not be required to duplicate already stringent registration requirements by reporting to the FSA.* Rural Vermont believes this is a redundant and unnecessarily burdensome requirement to place on the hemp farming community.

**Our Recommendation:** We respectfully request the USDA to remove the requirement that licensed producers must also report their hemp crop acreage to the FSA. This is a decision that should be left to the individual States or Indian Tribes to decide.

We recognize the importance of this undertaking by the USDA and thank you for considering these comments and recommendations from Rural Vermont.

Sincerely,

Mollie Wills  
Director of Grassroots Organizing  
Rural Education Action Project, DBA Rural Vermont