

USDA Issues Rule Establishing Domestic Hemp Production Program

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On October 31, 2019, the United States Department of Agriculture (USDA) issued its long-awaited interim final rule establishing a "Domestic Hemp Production Program," nearly a year after being directed to do so by Congress in the 2018 Farm Bill.

The 2018 Farm Bill facilitated the commercial cultivation, processing, and marketing of hemp in several ways. Most significantly, it carved out a distinction between two forms of cannabis: marijuana and hemp. Marijuana, which is listed as a Schedule 1 controlled substance under the Controlled Substances Act (CSA), can cause intoxicating effects owing to relatively high levels of its psychoactive component – tetrahydrocannabinol or THC. Hemp, by contrast, is defined by the Farm Bill as cannabis having less than 0.3 percent THC content. From a regulatory perspective, the upshot of the distinction between marijuana and hemp is that a consumer of hemp-derived products cannot get "high" from ingesting them, irrespective of the amount consumed. The Farm Bill also amended the CSA to exclude hemp from the statutory definition of marijuana, thereby removing hemp from the list of controlled substances.

Moreover, the 2018 Farm Bill created a regulatory framework for hemp production subject to USDA oversight. It empowers states and tribal governments seeking primary regulatory authority over hemp production within their jurisdictions to submit plans to the USDA for approval. For states and tribes without USDA-approved plans and that do not prohibit hemp cultivation, the legislation directs the USDA to develop its own plan that will govern hemp producers in those jurisdictions.

As mandated by the 2018 Farm Bill, the USDA promulgated this interim final rule, which details the USDA plan and largely sets forth the requirements for participation in hemp production on the state, tribal, and federal level. Here are some key takeaways from this rule.

State and Tribal Plans. For states and tribes that submit their own plans to the USDA for approval, the interim final rule requires that these plans include procedures for tracking sites where hemp is produced, collecting and reporting information about hemp producers and hemp production, sampling and testing cannabis plants, disposing of non-compliant cannabis plants that exceed the acceptable hemp THC level, and identifying and addressing violations of hemp laws and regulations.

States and tribes are permitted to adopt stricter requirements than those imposed by the USDA and can even ban hemp production within their jurisdictions.

Once submitted, the USDA has 60 days to review and either approve or reject a state or tribe's plan. Hemp producers in states or tribes with approved plans are required to participate in those plans. To date, 15 states and 12 tribes have submitted plans to the USDA for approval, which

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are currently under review.

USDA Plan. The requirements of the USDA plan concerning the collection and maintenance of records, testing procedures, background checks, disposal, enforcement of violations, and other matters are similar to those for state and tribal plans. On December 2, 2019, the USDA began accepting license applications from producers in states and tribes where hemp production is legal but not covered by an approved or pending state or tribal plan. USDA-issued hemp producer licenses will be valid for 3 years.

2014 Farm Bill Pilot Programs. For the 2020 planting season, state departments of agriculture and institutions of higher education may continue operating their hemp production pilot programs authorized under the 2014 Farm Bill. However, after October 31, 2020, all hemp must be produced pursuant to an approved state or tribal plan or the USDA plan.

Interstate Transportation of Hemp. States and tribes are prohibited from interfering with the “transportation or shipment of hemp or hemp products” lawfully produced pursuant to an approved state or tribal plan, the USDA plan, or a pilot program authorized under the 2014 Farm Bill.

Sampling and Testing. Hemp producers under all plans must have their cannabis plants sampled for testing within 15 days prior to the anticipated harvest. This sampling requirement may be burdensome to growers in states like Oregon, which allots up to 28 days for the collection of pre-harvest samples under its current pilot program. Moreover, all testing must be conducted by a DEA registered laboratory.

Prohibited Persons. Persons with a state or federal felony conviction relating to a controlled substance are ineligible to participate in hemp production on the state, tribal, and federal level for a period of 10 years from the date of conviction. However, an exception applies to hemp producers who were lawfully participating in a state hemp pilot program pursuant to the 2014 Farm Bill before December 20, 2018 and whose conviction occurred before that date.

It is also important to note what this rule did not address, such as the exportation of hemp and hemp products. Additionally, the USDA declined to implement a national seed certification program. It explained that the same seed grown in different locations and conditions can produce plants with different THC concentrations and that current technology cannot determine planting results in various locations. For these reasons, it is not feasible to create a seed-certification scheme.

CONSIDERATIONS

This interim final rule will be effective from October 31, 2019 to November 1, 2021, after which the USDA will replace it with a final rule. In the meantime, all interested persons have the opportunity to submit comments to the USDA about the interim rule, which will influence and help shape the final rule. Comments must be received by December 30, 2019 for consideration. To submit a comment or read the entire interim final rule, visit <https://www.regulations.gov/document?D=AMS-SC-19-0042-0001>.