

Industrial Hemp Program

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History of Industrial Hemp Program

- Prior to 2014, it was illegal to produce industrial hemp in the United States
 - Considered marijuana, a controlled substance under federal and state laws
- Section 7606 of the Agricultural Act of 2014 (2014 Farm Bill) allowed for industrial hemp to be grown under specific circumstances:
 - State Departments of Agriculture or Institutions of Higher Education may grow industrial hemp if:
 - It is grown or cultivated for purposes of research conducted under a pilot program or other academic research; and
 - The growing/cultivating of industrial hemp is allowed under the laws of the state in which such institutions are located and the research occurs

History of Industrial Hemp Program

- 2015, Minnesota legislature passed Minnesota Statutes Chapter 18K, the Industrial Hemp Development Act
 - 18K.09 authorized the Minnesota Department of Agriculture to create a pilot program as outlined in the 2014 Farm Bill.
 - Chapter 18K also authorizes the licensing of producers for commercial purposes and for rulemaking when federal law allowed for the commercial production
- 2019, In anticipation of commercial production, Minnesota Legislature authorized the Minnesota Department of Agriculture to use emergency rulemaking process to create the Industrial Hemp Program

History of Industrial Hemp Program

- December 20, 2018-Agricultural Improvement Act of 2018 (2018 Farm Bill):
 - Removed Industrial Hemp from the Controlled Substances Act
 - Provided for the commercial production of Industrial Hemp once a state or tribe either has an approved plan from the federal government or simply follows the rules set by the federal government.
 - Required USDA to promulgate regulations and guidelines to establish and administer a program for the production of hemp in the United States.

History of Industrial Hemp Program

- October 31, 2019, USDA issued interim rules:
 - Effective until November 1, 2021
 - 60 day comment period on the interim rules: Ends December 30, 2019
 - Along with the rule, it also posted guidelines for sampling hemp growing facilities, testing for identifying Delta-9 THC concentration in hemp, and lab reporting to USDA
 - Extended the 2014 pilot project authorization for 1 year.
 - Once again, clarified that interstate shipment of hemp is allowed.

What does the new rule say?

- Outlines provisions for USDA to approve plans submitted by States and Indian Tribes for the domestic production of hemp.
- It establishes a Federal plan for producers in States or territories of Indian Tribes that do not have their own USDA-approved plan.
- Includes provisions for maintaining information on the land, testing, disposing, licensing, and compliance

What does the new rule say?

- States and Tribes have 3 options:
 - Submit their own plan to USDA for approval and run their own program.
 - Once a plan is submitted, Feds have 60 days to approve.
 - Minnesota Legislature passed law requiring Department to submit a plan.
 - Do nothing and allow USDA federal plan to become effective.
 - Feds will license and be responsible for enforcement.
 - Feds will start licensing producers 30 days after rule became effective unless the State indicates that they are submitting a plan.
 - Continue under the 2014 pilot project for 1 year before deciding on the options above.

What is required in a State or Tribal Plan?

- Land used for production
 - Plan needs to contain a process by which certain information re the land used for hemp production is collected and maintained.
 - Legal description and geospatial location for each field, greenhouse, or other site where hemp is produced
 - Records need to be maintained by States or Tribes for 3 years
 - Licensed producers must also report their hemp acreage to FSA office
 - Will allow producers to access services from USDA, including Farm Services Agency, Agricultural Marketing Services, National Resources Conservation Service and Rural Development

What is required in a State or Tribal Plan?

- Sampling and Testing:
 - Plan must include procedures for sampling and testing hemp
 - Sampling procedures must ensure that a representative sample of hemp production is physically collected and delivered to a DEA-registered laboratory for testing.
 - Requires that within 15 days prior to harvest, a Federal, State, local or Tribal law enforcement agency or other Federal, State or Tribal designated person shall collect samples from the flower material.
 - Producer or authorized representative must be present during collection.
 - Producer shall not harvest the cannabis crop prior to samples being taken.

What is required in a State or Tribal Plan?

- Testing:
 - Testing is done in a DEA registered lab.
 - Necessary because labs could potentially handle cannabis that tests above the .30% THC (marijuana)
 - Instructions for labs to obtain registration and a list of DEA approved labs will be on USDA website
 - Must be tested using post-decarboxylation or other similarly reliable method where total THC concentration level reported accounts for the conversion of THCA into delta-9 THC.
 - Decarboxylated value is calculated using conversion formula that sums delta 9-THC and 87.7% of THC-acid
 - Total delta-9 THC, derived from the sum of delta-9 THC and THCA content shall be determined and reported on a dry weight basis.
 - USDA issued separate testing and sampling procedures which can be located on their website.

TESTING AND SAMPLING

- Rule reiterates that anything above .30% THC on a dry weight basis must be destroyed.
- Rule requires labs calculate and include measurement of uncertainty when they report THC testing results.
- “Acceptable Hemp THC level” If .30% or less is within the distribution or range, then the sample will be considered to be hemp for the purposes of compliance with the requirements of State, Tribal or USDA hemp plans.

TESTING AND SAMPLING

- USDA is considering accrediting labs
 - This would be in addition to DEA registration.
 - USDA approved labs would need to comply with Laboratory Approval Program requirements.
 - Perhaps requiring ISO 17025 accreditation
 - Would allow for assurances that labs are testing properly.
 - USDA taking comments on this

DISPOSAL

- Plans are required to include procedures for ensuring effective disposal of plants produced in violation of the rule.
- Disposal must be in accordance with the Controlled Substances Act and DEA regulations
 - Material must be collected for disposal by a person authorized under the CSA to handle marijuana
 - DEA registered reverse distributor
 - A person registered with DEA to dispose of marijuana under the CSA
 - Federal, State, or local law enforcement officer
- State must notify USDA of any occurrence of cannabis plants that do not meet the definition of hemp.

TESTING AND SAMPLING

- Plans must include compliance procedures that hemp is being produced according to law.
 - All fields must be tested
- Plans must include the following:
 - Procedures to identify and attempt to correct negligent acts:
 - Failing to provide a legal description of the land where hemp is produced
 - Not obtaining a license
 - Producing hemp above the acceptable hemp THC level

NEGLIGENT ACTS

- Person who negligently violates Plan 3 times in a five year period will be ineligible to produce hemp for a period of 5 years from the date of the third violation.
- Negligence: Failure to exercise the level of care that reasonably prudent person would exercise
 - Producers do not commit negligent act if they do everything right and plant does not exceed .5% THC on a dry weight basis
 - Not considered negligent but still must dispose of plants
 - If negligent act occurs, a corrective action plan needs to be established
 - Must contain date to correct violation
 - Report to State on their compliance for not less than 2 years

MORE THEN NEGLIGENT....

- Plan must contain provisions for violations made with a “culpable mental state greater than negligence.”
 - Intentional, knowing or with recklessness
- If more than negligence, State shall immediately report producer to the U.S. Attorney General, USDA, and chief law enforcement officer of the State

BACKGROUND CHECKS

- Plans must not allow any person convicted of a felony related to a controlled substance under State or Federal law from participating in the Plan or from producing hemp for 10 years following the date of conviction.
- Rule requires States to review criminal history reports for each applicant, and in the case of a business entity, allows the States to decide which employees shall need to have a background check and are subject to the felony restrictions.
- USDA plan requires “each key participant in the business.”
 - Key participant: persons who have a direct or indirect financial interest in the entity

INFORMATION SHARING

- Plans must contain procedures for sharing information with USDA
 - Separate from requirement to report to FSA
- Information must be submitted to USDA not later than 30 days after the date it is received
- This information will be available to Federal, State and local law enforcement in real time.
- All information submitted to USDA must be maintained by the States for at least 3 years.

STATE AUTHORITY

- Comments to the rules:
 - States are not preempted to adopt more stringent requirements or to prohibit the production of hemp.
 - “States have wide latitude to develop the required practice and procedures.”
- Comments on USDA Interim Rules:
 - <https://www.ams.usda.gov/rules-regulations/hemp>
- Comment to Minnesota Department of Agriculture:
 - Email: hemp.mda@state.mn.us

Thank you!

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