Legislative history and background of Industrial Hemp program in Minnesota

Industrial Hemp was a key product of the United States up until the 1937 Marijuana Tax Act was passed, which started the decline in production. Production finally ceased in 1970 when it was included in the Controlled Substances Act, which made it illegal to produce industrial hemp in the United States, as the plant Cannabis sativa L., the plant in which hemp is derived from, was considered marijuana. However, Section 7606 of the Agricultural Act of 2014 (2014 Farm Bill) defined industrial hemp as “the plant Cannabis sativa L. and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis” and allowed for it to be grown under certain circumstances. The law stated in relevant part:

(a) Notwithstanding the Controlled Substances Act (21 U.S.C.801 et seq.), the Safe and Drug-Free Schools and Communities Act (20 U.S.C. 7101 et seq.), chapter 81 of title 41, United States Code, or any other Federal law, an institution of higher education (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001)) or a State department of agriculture may grow or cultivate industrial hemp if:

(1) the industrial hemp is grown or cultivated for purposes of research conducted under an agricultural pilot program or other agricultural or academic research; and

(2) the growing or cultivating of industrial hemp is allowed under the laws of the State in which such institution of higher education or State department of agriculture is located and such research occurs.

The 2014 Farm Bill defines “Agricultural pilot program” as the following:

(1) The term “Agricultural pilot program” means a pilot program to study the growth, cultivation, or marketing of industrial hemp—

(A) In States that permit the growth or cultivation of industrial hemp under the laws of the State; and

(B) In a manner that—

   (i) ensures that only institutions of higher education and State departments of agriculture are used to grow or cultivate industrial hemp;

   (ii) requires that sites used for growing or cultivating industrial hemp in a State be certified by, and registered with, the State department of agriculture; and

   (iii) authorizes State departments of agriculture to promulgate regulations to carry out the pilot program in the States in accordance with the purposes of this section.
Thus, federal law allowed industrial hemp to be grown by State departments of agriculture and institutions of higher learning if it was done under a pilot program for research purposes, and the state in which the entities are located allows it.

In 2015, the Minnesota Legislature passed Minnesota Statutes Chapter 18K, the Industrial Hemp Development Act. Minnesota Statutes Section 18K.09 authorized the pilot program referred to above in federal law:

Subdivision 1. **Authorized activity.**

The commissioner may grow or cultivate industrial hemp pursuant to a pilot program administered by the commissioner to study the growth, cultivation, or marketing of industrial hemp. The commissioner may: (1) authorize institutions of higher education to grow or cultivate industrial hemp as part of the commissioner's pilot program or as is necessary to perform other agricultural, renewable energy, or academic research; and (2) contract with public or private entities for testing or other activities authorized under this subdivision. Authorized activity under this section may include collecting seed from wild hemp sources.

Subd. 2. **Site registration.**

Before growing or cultivating industrial hemp pursuant to this section, each site must be registered with and certified by the commissioner. A person must register each site annually in the form prescribed by the commissioner and must pay the annual registration and certification fee established by the commissioner in accordance with section 16A.1285, subdivision 2.

Subd. 3. **Rulemaking.**

The commissioner may adopt rules that govern the pilot program pursuant to this section and Public Law 113-79.

In addition to authorizing a pilot program, the Minnesota legislature, in anticipation of federal law allowing a broader industrial hemp program in the future, also passed provisions in Chapter 18K for licensing of hemp producers, reporting requirements, and fees. The legislature also gave the Department rulemaking authority in Minnesota Statutes Section 18K.06:

18K.06 RULEMAKING.

(a) The commissioner shall adopt rules governing the production, testing, and licensing of industrial hemp.

(b) Rules adopted under paragraph (a) must include, but not be limited to, provisions governing:

(1) the supervision and inspection of industrial hemp during its growth and harvest;

(2) the testing of industrial hemp to determine delta-9 tetrahydrocannabinol levels;

(3) the use of background check results required under section 18K.04 to approve or deny a license application; and
(4) any other provision or procedure necessary to carry out the purposes of this chapter.
(c) Rules issued under this section must be consistent with federal law regarding the production, distribution, and sale of industrial hemp.

The legislature added that the above rulemaking authority was effective the day after the federal government authorized the commercial production of industrial hemp.

Minnesota started their Hemp Pilot program in 2015.

On December 20, 2018, the President signed the Agricultural Improvement Act of 2018 (2018 Farm Bill), which removed industrial hemp from the Controlled Substances Act, and also provided for the commercial production of industrial hemp once a state either has an approved plan from the federal government or, if the state has no approved plan, allow the federal government to enforce under federal authority. It also required the United States Department of Agriculture (USDA) to establish rules detailing the regulation of industrial hemp and what would be required in a state plan.

On October 31, 2019, the USDA issued 84 FR 58522, an interim final rule with requests for comments specifying rules and regulations to produce hemp (Interim Final Rule). The Interim Final Rule outlined provisions USDA would use to approve plans submitted by the States. It also established a Federal Plan to allow for hemp production in states without their own USDA approved plans. The Interim Final Rules are in effect for 2 years while USDA receives comments; after which, the USDA will publish final rules. The Interim Final Rule allows hemp pilot programs to operate until November 2020, after which time, states must either operate under a USDA-approved state-specific hemp plan, or else operate under the Federal Plan, by default.

Since the interim rules came out October 31, 2019, Minnesota decided to continue under its Hemp Pilot Program for the 2020 growing season while consulting with stakeholders and drafting our State Plan.

MDA developed Minnesota’s hemp plan and submitted it to the USDA for approval on March 31, 2020.

During the 2020 legislative session, Minnesota Statutes Chapter 18K was amended to provide for processing, and included the following as it pertains to rulemaking:

The commissioner shall adopt rules governing the production, testing, processing, and licensing of industrial hemp. Notwithstanding section 14.125, the commissioner’s authority to adopt these rules expires June 30, 2022.

(b) Rules adopted under paragraph (a) must include, but not be limited to, provisions governing:

(1) the supervision and inspection of industrial hemp during its growth and harvest;

(2) the testing of industrial hemp to determine delta-9 tetrahydrocannabinol levels;
(3) the use of background check results required under section 18K.04 to approve or deny a license application; and

(4) any other provision or procedure necessary to carry out the purposes of this chapter.

(c) Rules issued under this section must be consistent with federal law regarding the production, distribution, and sale of industrial hemp.

On May 1, 2020, the USDA responded with comments and required edits to Minnesota’s hemp plan. MDA revised its Hemp Plan pursuant to USDA’s response, and on July 14, 2020, USDA approved Minnesota’s Hemp Plan. Minnesota will operate under the approved hemp plan starting with the 2021 growing season.

Authority for the Proposed Rules and MDA’s Statement in Support

Minnesota Statutes Section 14.388, Subdivision 1, states the following:

If an agency for good cause finds that the rulemaking provisions of this chapter are unnecessary, impracticable, or contrary to the public interest when adopting, amending, or repealing a rule to:
(1) address a serious and immediate threat to the public health, safety, or welfare;
(2) comply with a court order or a requirement in federal law in a manner that does not allow for compliance with sections 14.14 to 14.28;
(3) incorporate specific changes set forth in applicable statutes when no interpretation of law is required; or
(4) make changes that do not alter the sense, meaning, or effect of a rule, the agency may adopt, amend, or repeal the rule after satisfying the requirements of subdivision 2 and section 14.386, paragraph (a), clauses (1) to (4).

The MDA is using the “good cause” rulemaking provision because, under Minnesota Statutes Section 14.388, subdivision 1(2), the proposed rules are required, and comply with, federal law that does not permit compliance with Minnesota Statutes Section 14.14 to 14.28.

The 2018 Farm Bill allowed for the commercial production of industrial hemp, under the jurisdiction of the USDA:

297B (a): A State or Indian tribe desiring to have primary regulatory authority over the production of hemp in the State or territory of the Indian tribe shall submit to the Secretary, through the State department of agriculture (in connection with the Governor and chief law enforcement officer of the State) or the Tribal government, as applicable, a plan under which the State or Indian tribe monitors and regulates that production...

The 2018 Farm Bill proscribes what is required to be in the State Hemp Plan, including procedures for testing hemp plants, maintaining licensee information, disposal of plants in violation, inspections, and submitting information to USDA. It also outlines provisions requiring USDA to monitor states to ensure adherence to their USDA-approved state plans, enforcement procedures for producer violations of an
approved state plan, and requires USDA, in consultation with the U.S. Attorney General’s Office, to promulgate regulations on how to implement these provisions.

Based on input from the growers and processors obtained through numerous listening sessions and meetings, MDA submitted the Minnesota Hemp Plan to the USDA. The USDA initially denied several of the provisions that they found in violation of the Interim Final Rule. MDA revised the Minnesota Hemp Plan based on comments from the USDA, which ultimately approved the Plan.

MDA is seeking to adopt the Minnesota Hemp Plan through the rulemaking process. Since the plan must comply with the requirements set forth in the Interim Final Rule, and the plan has already been approved by the USDA as meeting those requirements, MDA has no discretion to change the plan. Thus, it is impracticable and unnecessary for MDA to fulfill the requirements of Minnesota Statutes Section 14.14 to 14.28.