



October 8, 2020

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

Re: Doc. No. AMS-SC-19-0042; SC19-990-2IR
Federal Register Vol. 85, p. 55363, September 8, 2020
Additional public comments regarding Establishment of a Domestic Hemp
Production Program

Administrator Summers,

The National Association of State Departments of Agriculture (NASDA) appreciates the opportunity to submit these additional comments on the United States Department of Agriculture (USDA) interim final rule (Rule) establishing a federal domestic hemp program. NASDA continues to emphasize that federal policies related to domestic production of hemp provide flexibility to state authorities to implement regulatory plans that work best for them, while ensuring legal certainty through a uniform, predictable set of standards for hemp producers across the country.

NASDA represents the Commissioners, Secretaries, and Directors of the state departments of agriculture in all fifty states and four U.S. territories. State departments of agriculture are responsible for a wide range of programs including conservation and environmental protection, food safety, combating the spread of plant and animal diseases and fostering the economic vitality of our rural communities.

I. Background

The intention of the Agricultural Improvement of Act of 2018 (2018 Farm Bill) was to create a new opportunity for producers to establish a domestic hemp industry. NASDA has supported the legalization of hemp production for 18 years.

Recognizing the tremendous promise hemp offers as an alternative crop for U.S. farmers, NASDA advocated for enactment of a permanent federal hemp program in the 2018 Farm Bill. By the time the Rule was released, 34 states already issued grower licenses under administered programs that support and regulate hemp

cultivation. Another 13 states have enacted hemp legislation and are considering new programs as well.

NASDA recognizes that the 2018 Farm Bill sought to differentiate industrial hemp from other products of the cannabis plant that remain illegal at the Federal level. NASDA also recognizes that a growing list of States have fully legalized, partially legalized for medical use, or decriminalized all forms of the cannabis plant. While NASDA takes no position on this latter point, we do recognize that the status of the cannabis plant across the various political jurisdictions within the United States creates a competitive imbalance for producers of hemp based on where they fall within these political boundaries.

NASDA appreciates the complexity of the challenges USDA faces in developing regulations in support of this nascent industry. Nevertheless, we continue to emphasize the need for flexibility so that States can facilitate, rather than interfere with development of this industry across all states.

In February 2019, NASDA members updated our formal policy concerning a federal hemp program, emphasizing five key principles.

- NASDA supports the production, processing and commercialization of hemp.
- NASDA encourages research in all aspects of hemp from production to finished products.
- NASDA supports consistent model legislation to assist state legislatures in their efforts to enact laws permitting hemp production within their jurisdictions in accordance with the 2018 Farm Bill.
- NASDA supports the development of uniform standards for field sampling and tetrahydrocannabinol (THC) content testing with gas chromatography (GC) methods.
- NASDA encourages the U.S. Food & Drug Administration (FDA), in consultations with states, to develop a model regulatory framework for oversight of the processing of hemp and manufacturing of cannabidiol (CBD) which will protect public health and foster growth in the U.S. hemp industry while remaining consistent with letter and spirit of federal law.

At the heart of these principles is the recognition that hemp production offers enormous potential to U.S. farmers.

In our previous comments¹, we outlined our concerns in several key areas of the Rule that either lacked clarity or failed to provide the flexibility many states will need to meet the federal requirements in a way that best facilitates the development of hemp production.

NASDA conducted a survey with all 50 states to better understand some of the challenges that states are facing as they adjust their laws and regulations to be able to comply with the Rule. This survey, previously transmitted to USDA, emphasized the importance that states have a clear understanding of the ways they may meet the new federal standards. Without some flexibility, NASDA fears the Rule could exacerbate competitive differences between these states and hamper the growth of the U.S. industry.

In USDA's request for additional comments, NASDA wishes to remind USDA of our responses to our concerns related to Disposal and Remediation of Non-Compliant Plants; Negligence; 15-Day Harvest Window; and Testing by a DEA-registered Laboratory.

II. Disposal and Remediation of Non-Compliant Hemp

The Rule requires that non-compliant material must be collected for destruction by a person authorized under the Controlled Substances Act to handle marijuana, such as a DEA-registered reverse distributor or duly authorized enforcement officer. NASDA continues to believe that this new requirement is unnecessarily stringent and costly when the primary focus is having expert oversight and thus compliance. States can and have provided the latter.

NASDA supports the purpose behind the Rule's requirement that state plans "include procedures for ensuring effective disposal of plants" that exceed the acceptable THC level, but we urge USDA to provide more flexibility to states in meeting this requirement. Such flexibility should include allowing for remediation of non-compliant plants or plant parts.

The disposal of non-compliant plants without DEA involvement has been a part of many state programs since the authorization of industrial hemp production by the 2014 Farm Bill. DEA's involvement with hemp disposal is burdensome for growers, state regulators and law enforcement.

¹ <https://www.nasda.org/letters-comments-testimony/nasda-comments-on-usda-interim-final-hemp-rule>

Moreover, DEA's requirements for approved disposal of non-compliant hemp are unclear to many NASDA members. Under the U.S. Department of Justice's final rule that implements the Secure and Responsible Drug Disposal Act of 2014, which addresses the disposal of a controlled substance, DEA does not require a particular method of destruction, as long as the "desired result" is achieved. Thus, a state is authorized to implement a method of disposal it deems most appropriate for its particular situation.

Those requirements must be elucidated with greater clarity to state authorities tasked with implementing hemp programs, or USDA's requirement will be less flexible and harder to satisfy than necessary.

Recommendation: NASDA urges USDA to ensure that states have the flexibility to work with their state law enforcement, instead of DEA, to establish a protocol for disposal of non-compliant materials as each state deems most appropriate. Additionally, NASDA urges USDA to allow for post-harvest retests to allow for remediation option prior to entering interstate commerce.

III. Negligence Threshold

The negligence threshold established by the Rule will be a challenge for farmers growing this new and emerging crop. The Rule further establishes that if a grower is "negligent" three times in a five-year window, the grower would not be permitted to grow hemp for five years. The rule will put many farmers in a difficult position due to factors beyond their control.

NASDA urges that USDA reconsider the negligence threshold value and give flexibility to state agencies to work with farmers on mitigation plans. These could include the capacity to allow for use of stalks or seed of the plant for biomass or other non-human consumption purposes rather than into the stream of

commerce for CBD products. This flexibility would better ensure that states are able to work with their farmers to protect the farmer's investment and welfare.

Recommendation: NASDA urges USDA to set the negligence threshold for THC at 1% and allow for states to develop mitigation plans.

IV. Testing by a DEA-registered Laboratory

NASDA appreciates that testing is essential to define the crop as hemp. Therefore, the most important focus must be on having validated, accurate and timely testing.

The Rule requires that testing procedures are completed by a DEA-registered laboratory, but this requirement has nothing to do with conducting validated and accurate testing. In addition, there is a dearth of DEA-approved laboratories in many states. Often, authorities in many states utilize the services of private laboratories that operate with ISO 17025 certification but that are not DEA-registered. For their own reasons, many of these private laboratories may be unwilling to secure DEA approval, meaning those private laboratories will be unavailable for hemp testing. Therefore, the states that rely on these private laboratories, and the hemp producers these state agencies regulate, could face very difficult challenges in satisfying the Rule's requirements. It is worth noting that for many states, it is more important to retain the services of an ISO-certified laboratory, since ISO certification assures third-party validation that the private laboratory can perform testing with a high degree of precision and accuracy while maintaining a high technical proficiency.

For many states, getting new labs registered for DEA approval can potentially be costly and time consuming. It is NASDA's understanding that there are numerous private laboratories that possess the expertise and resources, as well as the DEA license, needed to carry out testing on hemp according to the requirements of the Rule but are reluctant to operate in the hemp space.

In addition, Federal law removed hemp from the Controlled Substances Act, so this requirement operates under the assumption that hemp growers are still growing a crop that is controlled by the Department of Justice. We believe that this requirement goes beyond the intent of the 2018 Farm Bill language, as cited below.

Sec. 297B

“(2) CONTENTS. – A state or Tribal plan referred to in paragraph (1) –

“(A) shall only be required to include - ...

(ii) a procedure for testing, using pos-decarboxylation or other similarly reliable methods, delta-9 tetrahydrocannabinol concentration levels of hemp produced in the State or territory of the Indian tribe;”

Recommendation: NASDA urges USDA to drop the requirement to use a DEA registered laboratory.

V. Conclusion

Thank you again for the opportunity to submit these comments. On behalf of NASDA state and territorial members, we are grateful for your dedicated work in establishing a federal program that facilitates the growth of a promising new industry while accommodating the diverse needs and challenges of farmers across our country.

Given their own diverse resources and challenges, our members will benefit from greater clarity from USDA in meeting the requirements of the 2018 Farm Bill. We ask that you incorporate these concerns, as well as the feedback from our individual members, as you continue to refine the Rule.

NASDA stands ready to work with you

Sincerely,

A handwritten signature in black ink that reads "Barbara P. Glenn". The signature is written in a cursive, flowing style.

Barbara P. Glenn, Ph.D.
Chief Executive Officer