

UPDATE ON **HEMP** **LAW AND** **REGULATIONS** IN THE U.S.

After years of changes, hemp growers are beginning to see some consistency when it comes to legislation in the industry.

BY MARNE COIT

After decades of being prohibited in the United States, the 2014 Farm Bill allowed hemp to be grown again. One of the most consistent attributes of the hemp industry since then has been that the law seems to change constantly. This has made it more difficult for growers to plan for their businesses. We are now at a place, though, where the laws around hemp cultivation may be settling out, which will provide much-needed consistency for the industry.

When the 2014 Farm Bill was passed, states were permitted to establish pilot programs to grow hemp, as long as it was legally allowed in the state. However, even though it was legal, there were still considerable restrictions.

The passage of the 2018 Farm Bill further opened the door for hemp production. In particular, it removed the term "hemp" from the definition of marijuana under the Controlled Substances Act. This had the practical

effect of making it easier to conduct business in the industry, including issues such as obtaining seed, which no longer required Drug Enforcement Agency (DEA) involvement.

The 2018 Farm Bill also gave authority to the United States Department of Agriculture (USDA) to create a Domestic Hemp Production Program. In October of 2019, USDA published an interim final rule (IFR) on hemp production. It created a framework for joint responsibility for hemp production between states or tribal nations and the USDA. In particular, it allowed states and tribal nations the option to continue to regulate hemp production within the state. States or tribes that chose to continue to regulate hemp production were required to submit what is known as a state plan to the USDA for approval. The IFR required state plans to include certain provisions, such as requirements for licensing, how the state will track land used for production, allowable

INTERIM FINAL RULE

- Crop has to be harvested within 15 days of when sample was taken
- Disposal of non-compliant crops
- DEA reverse distributor or law enforcement required to be in attendance
- Negligence threshold set at .5% THC. If a crop tested above this limit three times within five years, then the grower lost license for five years.
- Compliance testing must be done at DEA registered lab
- Sample for compliance test taken from the top third of the plant
- For testing, hemp must be 0.3% or below total THC on a dry-weight basis (delta-9 THC and THCA)

FINAL RULE

- Crop has to be harvested within 30 days of when sample taken
- Disposal of non-compliant crops (made USDA guidance permanent)
- DEA reverse distributor or law enforcement not required to be in attendance
- Non-compliant crops can be plowed under, composted, disked, buried, burned, etc.
- Remediation possible: either the whole plant can be shredded into biomass, then retested OR non-compliant flower can be destroyed and the remainder of the plant can be used (stalks, leaves, seeds, etc.)
- Negligence threshold increased to 1.0% THC. Maximum cap of one violation per calendar year. If a crop tests above this limit three times within five years, the grower still loses license for five years
- Compliance testing must be done at DEA registered lab, but this provision won't go into effect until Jan. 1, 2022
- Sample for compliance test taken from 5 to 8 inches from the main stem, terminal bud or central cola of the flowering top of the plant.
- For testing, hemp must be 0.3% or below total THC on a dry-weight basis (delta-9 THC and THCA)
- State and tribes can develop performance-based sampling procedures. Factors to consider may include grower history and seed certification (as means to review the history of a particular seed variety in that location)
- Tribal nations have authority to regulate hemp production throughout their respective territories

methods of disposal of non-compliant crops, how compliance testing would be conducted, etc.

Alternatively, the IFR provided that states and tribes had the option to not submit a state plan, and to allow the growers in their state to apply for a license directly from the USDA. In those cases, the USDA would be responsible for the items listed above — licensing, tracking land, disposal of non-compliant crops, etc. However, the IFR was clear that states and tribes would need to choose one or the other. In other words, all growers would either need to comply with the state plans or all growers would need to comply with the USDA's plan.

There were a number of provisions in the IFR that were controversial. Once the IFR was published in October 2019, the USDA opened it up to public comment. After reviewing the comments and making a number of adjustments, the agency published the final rule (FR) in January 2021. As this issue went to press, the provisions in this rule were set to go into effect March 22, 2021. The chart below highlights the major changes between the IFR and the FR.

There are two important points to keep in mind. One is that the focus of this article is on the federal regulation of hemp cultivation. The laws in each state may vary. The FR makes it clear that the rules are a "floor," or a basic minimum requirement. This means that states and tribes must comply with them; however, states and tribes may implement laws that are stricter than what is required by the USDA.

Also, not all states and tribes are currently operating under the same laws. Some are still operating under pilot programs created under the 2014 Farm Bill. These programs were originally set to expire in October 2020. However, this time has been extended by Congress until January 2022. These states still have a choice as to whether to submit a state plan or go under the USDA's plan. Other states and tribal nations have already submitted a state plan to USDA under the provisions of the 2018 Farm Bill. These entities now have a choice as to whether to continue with their current plan, amend it based on the updates to the USDA's FR, or retract their state plan and continue under the rules of their pilot program (if they had one in place prior to submitting a state plan). All that to say — it is important to check with the appropriate agency in order to know what the law is in your state or tribal nation.

For more information, visit the North Carolina State Hemp Extension website at www.hemp.ces.ncsu.edu and the USDA Domestic Hemp Production Program website at www.ams.usda.gov/rules-regulations/hemp. **HPN**

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