Buscher Law LLC
3900 E Mexico Ave. Suite 300
Denver, CO 80210

Alex@BuscherLaw.com
720-258-6940
BuscherLaw.com

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U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, D.C. 20250

COMMENT to the U.S. DEPARTMENT OF AGRICULTURE

"Establishment of a Domestic Hemp Production Program"

DOC: AMS-SC-19-0042; SC19-990-2 IR
FR: 10/31/19; p.58522

A. USDA Should Clarify to Whom "Representative Sampling" Applies.

§ 990.3(a)(2) *A State or Tribal plan must include a procedure for* ***accurate and effective sampling of all hemp produced****, to include the requirements in this paragraph (a)(2).*

§ 990.3(a)(2)(ii) *The method used for sampling from the flower material of the cannabis plant must be sufficient at a confidence level of 95 percent that no more than one percent (1%) of the plants in the lot would exceed the acceptable hemp THC level. The method used for sampling must ensure that* ***a representative sample is collected*** *that represents a homogeneous composition of the lot.*

As currently written, there is significant potential confusion produced by the above proposed subsections as to who exactly must be sampled. Do the two subsections, read together, mean that that *all registrants* must each individually produce a representative sample, or do they mean that a *representative sample of all registrants* must be collected, allowing for state plans that do not sample every registrant?

This confusion stems from the fact that subsection (a)(2)(ii) can be read as either an additional specification that the "effective sampling" requirement in subsection (a)(2) must be *from* all applicants, OR that subsection (a)(2)(ii) is a modification of subsection (a)(2)—in other words, that "effective sampling" may be done by collecting a representative sample *across* all applicants.

In order to reduce the burden on hemp producers and regulators, while still providing USDA with the information it needs, the USDA should allow for state programs that provide an accurate and effective sample of hemp plants produced in the aggregate, meaning not every registrant must be tested.

B. USDA Should Clarify That DEA Registration Is Required Only For Labs Conducting Sample Testing Under the State or USDA Hemp Production Plans.

Regarding testing of collected samples, USDA's interim rules require that, under both State and USDA plans, lots must be tested by a "DEA-registered laboratory." There is some question about whether this will require *all* labs completing hemp testing to register with the DEA, or if the DEA registration requirement applies only to laboratories conducting regulatory sample testing under either a State or USDA hemp production plan.

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In the introduction to the interim rules, USDA notes that "[s]ampling procedures…must ensure that a representative sample of the hemp production is physically collected and delivered to a DEA-registered laboratory for testing."[1] We believe this indicates that while *sample testing under a plan* must be done at a DEA-registered lab, it does not require all labs that engage in hemp testing generally to register with the DEA.

The USDA should clarify that rather than setting a DEA registration requirement for all labs testing hemp, this part of the interim rules sets requirements for *regulatory authorities* when they are selecting a lab to use for testing.

C. USDA Should Raise the Threshold for Negligent Violations from 0.5% to 1.0% THC and Add a Presumption of Negligence Standard For Concentrations Between 1.0 and 3.0%.

§990.6 Violations of State and Tribal plans. *(b)Negligent violations. Each USDA- approved State or Tribal plan shall contain provisions relating to negligent producer violations as defined under this part. Negligent violations shall include, but not be limited to:*

(3) Production of cannabis with a delta-9 tetrahydrocannabinol concentration exceeding the acceptable hemp THC level. Hemp producers do not commit a negligent violation under this paragraph (b)(3) if they make reasonable efforts to grow hemp and the cannabis (marijuana) does not have a delta-9 tetrahydrocannabinol concentration of more than 0.5 percent on a dry weight basis.

§990.29 Violations. *(a) Negligent violations. A hemp producer shall be subject to enforcement for negligently:*

(3) Producing cannabis (marijuana) exceeding the acceptable hemp THC level. Hemp producers do not commit a negligent violation under this paragraph (a) if they make reasonable efforts to grow hemp and the cannabis (marijuana) does not have a delta-9 tetrahydrocannabinol concentration of more than 0.5 percent on a dry weight basis

Under subsections 990.6 and 990.29, the interim rules state that hemp producers will not be in violation of either State or USDA plans when those producers "make reasonable efforts to grow hemp and the cannabis…does not have a delta-9 tetrahydrocannabinol concentration of more than 0.5 percent on a dry weight basis."

Given the realities of the hemp industry, it is likely this will result in many negligent violations under the interim rules, even despite farmers' best and reasonable efforts to stay within the 0.5% threshold. To reduce the overall frequency of violations which would require a corrective action plan, USDA should raise this threshold from 0.5% to 1.0%.

Additionally, in order to protect farmers from undue prosecution and the unnecessary transmission of their names to state Attorneys General, there should be a "Presumption of Negligence" for hemp plants that test between 1.0% and 3.0% THC concentration on a dry weight basis. This would eliminate issues related to inconsistent regional application of prosecutorial discretion that will exist with the interim rules as written.

Proposed Changes

[1] USDA Interim Rules § 1(B) (emphasis added).

§990.6 Violations of State and Tribal plans. *(b) Negligent violations. Each USDA-approved State and Tribal hemp production plans shall contain provisions relating to negligent producer violations as defined under this part. Negligent violations shall include, but not be limited to:*

(3) Production of cannabis with a delta-9 tetrahydrocannabinol concentration exceeding the acceptable hemp THC level. Hemp producers do not commit a negligent violation under this paragraph if they make reasonable efforts to grow hemp and the cannabis (marijuana) does not have a delta-tetrahydrocannabinol concentration of more than one percent (1%) *on a dry weight basis.* There shall be a Presumption of Negligence when a hemp producer makes a reasonable effort to grow hemp and the cannabis (marijuana) has a delta-9 tetrahydrocannabinol concentration of greater than one percent (1%) but no more than three percent (3%).

§990.29 Violations. *(a) Negligent violations. A hemp producer shall be subject to enforcement for negligently:*

(3) Producing cannabis (marijuana) exceeding the acceptable hemp THC level. Hemp producers do not commit a negligent violation under this paragraph if they make reasonable efforts to grow hemp and the cannabis (marijuana) does not have a delta-9 tetrahydrocannabinol concentration of more than one percent (1%) *on a dry weight basis.* There shall be a Presumption of Negligence when a hemp producer makes a reasonable effort to grow hemp and the cannabis (marijuana) has a delta-9 tetrahydrocannabinol concentration of greater than one percent (1%) but no more than three percent (3%).

D. <u>Add a Definition for "Commingle" to Clarify that Harvested Lots of Hemp May be Dried in the Same Facility.</u>

§ 990.1 *Lot. A contiguous area in a field, greenhouse, or indoor growing structure containing the same variety or strain of cannabis throughout the area.*

§ 990.26 *(c) Harvested lots of hemp plants shall not be commingled with other harvested lots or other harvested material without prior written permission from USDA.*

(d) Lots that meet the acceptable hemp THC level may enter the stream of commerce.

Under the USDA plan, these two sections require producers to keep harvested hemp plants separate until testing results confirm that each lot complies with the acceptable level of THC concentration. As written, this could require producers to maintain distinct drying facilities for each lot of hemp they produce, which is impractical given the larger number of lots an individual producer may oversee.

USDA should provide a definition of "Commingle" that expressly allows different lots to be dried together, with appropriate labeling, within the same facility while awaiting testing.

Proposed Definition

Commingling. Mixing or combining a harvested lot of hemp plants with one or more other harvested lots such that the lots are no longer discernible from one another. It shall not be considered Commingling to dry or store harvested lots of hemp plants in the same facility when the lots are discernible from one another.

E. <u>USDA Should Add Procedures for Remediation Rather Than Requiring Immediate Mandatory Disposal.</u>

990.3 State and Tribal Plans; Plan requirements. *(a)(3)(iii)(E). An effective disposal procedure for hemp plants that are produced that do not meet the requirements of this part. The procedure must be in accordance with DEA regulations.*

990.27 Non-compliant cannabis plants. *(a) Cannabis plants exceeding the acceptable hemp THC level constitute marijuana, a schedule I controlled substance under the Controlled Substances Act (CSA), 21 U.S.C. 801 et seq., and must be disposed of in accordance with the CSA and DEA regulations.*

990.70 State and tribal hemp reporting requirements. *(a)(4)(b) State and tribal hemp disposal report. If a producer has produced cannabis exceeding the acceptable hemp THC level, the cannabis must be disposed of in accordance with the Controlled Substance Act and DEA regulations.*

990.71 USDA plan reporting requirements*. (b) USDA hemp plan producer disposal form. If a producer has produced cannabis exceeding the acceptable hemp THC level, the cannabis must be disposed of in accordance with the Controlled Substances Act and DEA regulations.*

The USDA has seemingly taken the position that it does not have any jurisdiction over cannabis plants that test above the 0.3% THC concentration as evidenced by the Department's deference to regulations promulgated by the DEA.

Instead of immediately giving jurisdiction to the DEA, USDA should add procedures that allow for the remediation of hemp plants that test over the 0.3% THC concentration, rendering them compliant, rather than requiring immediate mandatory disposal under DEA regulations.

Remediation options could include:

- **Removal of THC through processing.** There are proven methods to remove THC from hemp during processing. USDA should allow for the quarantine and monitored diversion of non-compliant hemp to a processor, which will then remove enough THC from the hemp to render all finished products made from it compliant.

- **Conversion and of THC.** There are methods that claim to reduce the THC-A and THC concentration of raw hemp, which may be able to render it compliant without resorting to DEA destruction. Instead of mandatory destruction for non-compliant hemp, USDA should allow a 30-day remediation period, during which farmers can work to make their plants compliant.

- **Diversion to Fiber Market.** Diverting non-compliant hemp to processing for non-consumable products like paper, plastics, and biofuel would seemingly alleviate any public safety concern raised by non-compliant hemp. Diversion could include both stalks and flower, or require destruction of flower and allow diversion of stalks. Either method would allow producers to make some use of their hemp plants, alleviating complete economic loss. This is also a much more sustainable practice.

F. Additional Protections for Hemp In Interstate Commerce to Protect Against Hemp Seizures

By not significantly addressing issues of interstate commerce in the interim rules, USDA has created a regulatory environment where the interstate shipment of hemp plants—while explicitly allowed in the 2018 Farm Bill—is still subject to the risk of seizure while in transport. This is because local law enforcement assumes all Cannabis is Marijuana until proven otherwise. If the USDA wants to promote

the adoption and feasibility of both individual state hemp production plans, as well as the USDA plan, it must implement rules preventing the seizure of compliant hemp in interstate commerce.

To make it easy to identify compliant hemp, USDA should consider implementing a two-part system that would allow hemp transporters to provide shipment information and then demonstrate their compliance to law enforcement officers in the event of a traffic stop or inspection. Below are options for the USDA to consider:

- **Allow for the submission of shipping manifests or itineraries in the FSA Database.** While the FSA is currently set to include at a minimum the address and geospatial location where the hemp is grown, the acreage of the grow, and the license number under a hemp production plan, it does not provide any information that would help a transporter demonstrate that the specific hemp *in transit* is compliant with both state and federal regulations.

  By allowing for the submission of shipping manifests and itineraries that could be viewed in conjunction with the other required information, law enforcement could easily do roadside compliance checks on a particular shipment of hemp.

- **Affix "USDA Approved" tags to all containers in a shipment.** USDA should consider creating specialized tags that can be affixed by a USDA, State, or Tribal inspector to harvested hemp being prepared for transport. These tags could contain the registrant's ID number and could be linked to the documents and information disclosed in the FSA database.

These options would be possible with minimal additional cost expenditures and would protect hemp farmers and transporters from losing their compliant hemp products in roadside traffic stops, while building upon the systems USDA has already planned to put in place.

G. Increase Harvest time from 15 days to 30 days

§990.26 Responsibility of a USDA producer after laboratory testing is performed. *(a) The producer shall harvest the crop not more than fifteen (15) days following the date of sample collection.*
(b) If the producer fails to complete harvest within fifteen (15) days of sample collection, a secondary pre-harvested sample of the lot shall be required to be submitted for testing.

Under the USDA plan, plants cannot be harvested prior to sampling, and farmers are then required to harvest within fifteen days of collection. This time limit is unrealistic and incredibly onerous. Harvesting hemp requires substantial manual labor and even with around-the-clock work, most farmers would not meet this deadline. Allowing thirty days provides a realistic timeframe to undertake all necessary harvesting activities so that USDA, Tribes, and State Departments of Agriculture will not have to retest the majority of farmers under its jurisdiction for failing to meet the fifteen-day deadline.

Proposed Changes
§990.26 Responsibility of a USDA producer after laboratory testing is performed. *(a) The producer shall harvest the crop not more than thirty (30) days following the date of sample collection.*
(b) If the producer fails to complete harvest within thirty (30) days of sample collection, a secondary pre-harvested sample of the lot shall be required to be submitted for testing.

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H. Raise the THC limit for Hemp to 1%

As the rest of the world moves toward a legal THC concentration of 1.0%, farmers in the United States will only become increasingly disadvantaged in global trade. Raising the legal limit of THC to 1.0% will prevent U.S. farmers from falling behind and keep the United States competitive with other countries. Although this is not possible through rulemaking alone, USDA should advocate on behalf of US farmers for this change in allowable THC percentage so that US hemp farmers have an equal footing on the global stage.

Sincerely,

Alex Buscher, Esq.
Alex@buscherlaw.com

Meg Reeder-Cramer, Esq.
Meg@buscherlaw.com

Andrew Janson
Ajanson@buscherlaw.com

Buscher Law provides outside general counsel and limited scope legal services to hemp businesses. Current clients include hemp cultivators, processors, investors, retail product manufacturers, exporters, and ancillary businesses.