RURAL COUNTY REPRESENTATIVES OF CALIFORNIA

June 22, 2020

Mr. Dean Kelch
Environmental Program Manager
California Department of Food and Agriculture
Plant Health and Pest Prevention Services
2800 Gateway Oaks Drive, Suite 200
Sacramento, CA 95833

Transmittal Via E-mail: *Dean.Kelch@cdfa.ca.gov*

RE: 45-Day Written Public Comments for Proposed Rulemaking of Title 3, California Code of Regulations, Sections 4935, 4940, 4941, 4942, 4943, 4944, 4945, 4946, 4950, and 4950.1

Dear Mr. Kelch:

On behalf of the Rural County Representatives of California (RCRC), we offer comments to the proposed rulemaking for Industrial Hemp Planting, Sampling, Laboratory Testing, Harvest and Destruction. RCRC is an association of thirty-seven rural California counties, and the RCRC Board of Directors is comprised of an elected county supervisor from each of those member counties.

We understand the unfortunate timing of the previous rulemaking in Fall 2019 regarding Industrial Hemp Cultivation, Abatement and Enforcement, which was upended by the issuance of the United States Department of Agriculture's (USDA) Interim Final Rule. We appreciate that the California Department of Food and Agriculture (CDFA) has taken the necessary steps to not only respond to the USDA, but also to provide a robust 45-day public comment period on these proposed regulations.

RCRC has done extensive work to ensure California's hemp law is consistent with the 2018 Federal Farm Bill and establishes clear oversight responsibilities at the state and county level, implemented through county Agricultural Commissioners. It is in our general view that CDFA has aligned these regulations with the provisions of USDA's Interim Final Rule and have addressed previous concerns, such as:

- Addressing USDA requirements governing felony provisions for "key participants" through Emergency Regulations. We look forward to a more

comprehensive set of permanent Industrial Hemp regulations addressing this issue in the future[1]; and

- Chain of custody provisions, which are now more clearly established throughout the testing phase of Industrial Hemp in these regulations.

However, RCRC would also like to offer the following comments that are of particular importance to rural California counties and would better align state Industrial Hemp regulations with state law, as well as federal law and guidance.

Section 4935, Planting Report for Industrial Hemp

We appreciate the inclusion of a requirement that a signed planting report be provided to the county Agricultural Commissioner, not only fulfilling USDA requirements, but also providing Agricultural Commissioners the unfettered ability to conduct field inspections at their discretion. We request that CDFA harmonize certain terms with federal regulations for overall clarity and consistency, such as using "producer" rather than "registrant."

Section 4940, Sampling Timeframe and Pre-Harvest Notification for Industrial Hemp

The timeframes for sampling hemp plants prior to harvest are confusing and unnecessarily restrictive. As a threshold matter, the proposed October 17, 2020 transition date is difficult to understand. The Initial Statement of Reasons (ISOR) indicates this date was selected because "crops harvested after October 30, 2020 must comply with federal requirements"; however, the relationships between these two dates, and between the respective timeframes set forth in this proposal and the federal regulations, are not immediately clear nor explained in the ISOR. Further, the October 30, 2020 deadline for federal compliance itself is applicable only to states that operated pilot programs under the 2014 Farm Bill – which does not include California.

Perhaps more importantly, both of the timeframes included in this proposal (i.e., 11 calendar days for harvests prior to October 17, 2020,[2] and six calendar days thereafter) are shorter than the 15 days allowed under the federal regulations. Further, the wording of Section 4940(a)(1)(A) and 4940(a)(1)(B) is unnecessarily confusing and should, at a minimum, be framed similarly. For example, Section 4940(a)(1)(A) states that samples shall be collected "no **later** than 11 calendar days" prior to the anticipated harvest date (implying 11 days **minimum** before harvest), whereas 4940(a)(1)(B) states that samples shall be collected "no **more** than 6 calendar days" prior to the anticipated

[1] We note that CDFA has still not incorporated the USDA requirement for annual inspections of a random sample of hemp producers. We request that this issue be addressed either in these regulations, or expeditiously in future regulations.

[2] The ISOR asserts that "[a]ny crops harvested before October 17, 2020 shall continue to comply with existing timeframes established through the emergency rulemaking" but this is inaccurate. The emergency regulations provided a 30-day testing window, whereas these regulations allow only 11 days.

harvest date (implying 11 days **maximum** before harvest).[3] Regardless, however framed, these timeframes are too short, and threaten to overwhelm Agricultural Commissioners' ability to respond, especially if many sampling requests are received during the busy harvest season. We strongly recommend simply adhering to the federal regulations' allowance of 15 days for sampling prior to harvest, regardless of when harvest occurs.

Section 4941, Sampling Procedures for Testing Industrial Hemp for THC Concentration

Unfortunately, the USDA's designation of, and process for, authorizing USDA-approved sampling agents raises many questions. For instance, USDA's "Designation of Sampling Agents Under the U.S. Domestic Hemp Production Program" simultaneously references a state's ability to designate sampling agents, but also requires them to be approved by USDA.[4] It is therefore incumbent upon CDFA to clearly specify the process to become an approved third-party sampling agent with whom Agricultural Commissioners may contract with to collect samples, including their training and process of becoming designated. Furthermore, while producers cannot collect their own samples, CDFA should take additional steps to safeguard any conflicts of interest between the hemp producer and the third-party sampling agent.

We further request CDFA ensure a stronger chain of custody during the sampling period by specifying that samples shall be delivered by the sampler to the testing laboratory.[5] As currently written, Section 4941(c)(4) could signal a loophole allowing a hemp producer to deliver, and effectively tamper with, industrial hemp samples otherwise collected by official means unless explicit anti-tampering provisions are specified.

Moreover, regardless of who is responsible, getting samples to a testing laboratory within the 24-hour period proposed in the regulations may be infeasible, depending on transport options. We appreciate the need for ensuring the freshness of samples for testing, but this timeframe is too short to be workable, and should be extended.

We appreciate that the sampling procedures comply with USDA's Interim Final Rule and appear to comply with California Food & Agriculture Code (FAC) 81006 (d)(1), obtaining random samples of the dried flowering tops.

Section 4942, Approved Testing Method for Testing Industrial Hemp for THC Concentration

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[3] The ISOR adds to the confusion, by describing both timeframes as "no later" on Page 6.

[4] https://www.ams.usda.gov/sites/default/files/media/GuidelinesforSamplingAgents.pdf

[5] USDA's "Sampling Agent Training Module" explicitly asserts that "The USDA-approved sampling agent is responsible for arranging shipment of hemp samples to DEA-registered laboratories." (https://www.ams.usda.gov/sites/default/files/media/USDAHempSamplingTraining112719.pdf - p. 11.)

Our understanding of this section has been limited by the missing justification in the ISOR. Of utmost importance is for CDFA to comply with USDA's testing methods in California's State Plan, which appears sufficient as currently drafted.

Section 4943, Approved Laboratory for Testing Industrial Hemp for THC Concentration

We request that the requirement for hemp testing laboratories to "be registered with U.S. Drug Enforcement Administration (DEA) to handle controlled substances" be revised in light of recent USDA guidance. As you may be aware, on February 27, 2020 the USDA issued additional guidelines for laboratory registration (among other things), effectively delaying the Interim Final Rule provisions requiring laboratories be registered with the DEA.[6] CDFA appropriately defers to evolving federal guidance throughout these proposed regulations in other sections[7] and should not make an exception to approved laboratories. We therefore recommend that Section 4943(a)(1) be revised to read as follows:

> *Laboratories testing industrial hemp for THC concentration on or after October 17, 2020 shall meet all requirements set forth in Section 297B of the federal Agricultural Marketing Act of 1946 (added by Section 10113 of the federal Agriculture Improvement Act of 2018 (Public Law 115-334), implementing regulations, and guidance.*

We further recommend that CDFA's own approval criteria for laboratories take advantage of the full flexibility allowed by USDA's guidance.

RCRC has expressed opposition to the USDA's Interim Final Rule concerning rigid - if not unattainable - laboratory requirements (and reverse-distributor disposal provisions), largely due to the potential unavailability of these laboratories in California, as well as nationwide, that could lead to testing backlogs. Due to the evolving nature of USDA's rulemaking and guidance, we would urge CDFA take advantage of any flexibility that USDA provides – and maintain an off-ramp from these requirements in the event that USDA's regulations on this subject evolve in the future.

Section 4945, Approved Testing Method for Retesting of Industrial Hemp for THC Concentration

CDFA should clarify re-testing procedures, which currently assumes that all samples will be re-tested more than once, and without limitations. We request CDFA to:

1) Clarify additional samples for re-testing shall only be collected and tested at the request of the producer or Agricultural Commissioner;

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[6] https://www.ams.usda.gov/rules-regulations/hemp/enforcement

[7] Section 4950(a) and Section 4950.1(a)

2) Limit re-testing to no more than two laboratory tests per FAC 81006, which specifies destruction of non-compliant hemp, in specified time frames, shall occur after the second laboratory test; and
3) Articulate how re-testing due to non-compliant THC levels interacts with re-testing due to changes in the harvest date.[8]

The ambiguity of re-testing protocols currently opens the door for producers to game the system and should be avoided by revising the regulatory text.

Section 4950, Destruction of Non-Compliant Industrial Hemp Crops
As with Section 4942, our understanding of the intent of this section has been limited by the missing justification in the ISOR. As such, we request that Section 4950 (d) be changed from "The commissioner *shall*" to, "The commissioner ***may***" confirm the destruction of the crop through field inspections. Making this change to be more permissive would also align with the Notice of Proposed Rulemaking that CDFA has determined there are no mandates on local agencies. If Agricultural Commissioners shall confirm destruction, CDFA should likewise update its Economic Impact Assessment to reflect both this mandate and the higher fees that could be charged to hemp producers to off-set the costs of regulatory oversight and compliance inspections.

Additionally, FAC Section 81006 (e)(8) requires that if a hemp crop is determined to have a THC concentration exceeding 0.3 percent but less than 1 percent, destruction of that crop "shall take place as soon as practicable, but no later than 45 days after receipt of the second test report." CDFA's prior Emergency Regulations implemented this provision by requiring registrants to implement such destruction "*within a timeframe specified by the [county agricultural] commissioner*, but no later than 45 days after the registrant's receipt of notification of abatement from the commissioner."[9] This provision appropriately gave Agricultural Commissioners oversight authority to determine how soon it is "practicable" to undertake crop destruction.

The proposed permanent regulations inexplicably remove this oversight authority, revising this section to provide simply that the non-compliant hemp will be destroyed "*as soon as practical*, but destruction must be completed no later than 45 calendar days after the grower's receipt of notification of abatement from the commissioner." Deletion of the commissioner's authority to specify an appropriate timeframe for destruction makes the grower the sole arbiter of how quickly destruction is "practicable," which is plainly problematic.[10]

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[8] Section 4940(a)(2), *"Any changes to the harvest date may require additional sampling for THC concentration prior to harvest."*

[9] Section 4950, subdivision (a)(1), as promulgated June 10, 2019.

[10] This provision also inappropriately commences the destruction timeline upon "the registrant's receipt of notification of abatement from the commissioner" – rather than "receipt of the second test report" as required by the governing statute, and correctly referenced elsewhere in the regulations. (§ 4946, subd.

While we expect that most growers will be conscientious and perform the required destruction with alacrity, some inevitably will not be (as in any regulated activity). Even the most diligent of growers will have economic incentives to defer the (often expensive) task of destroying a valuable crop – and the less diligent may risk diversion of the crop to the black market if destruction is delayed. Further, a hemp crop that tests above 0.3% THC constitutes *cannabis*, and its cultivation and possession implicates an array of state, federal, and local laws. Any delay in destruction consequently increases the likelihood of disputes with regulatory authorities or law enforcement. Under these circumstances, placing sole responsibility for determining the "practicable" destruction timeline upon the grower is inappropriate, and likely to cause conflict. Rather, the regulatory official responsible for administering the program, i.e., the Agricultural Commissioner, should be empowered to develop and enforce an appropriate practicable timeline, giving due consideration to the totality of the circumstances. CDFA is therefore urged to reinstate the provision that destruction must be undertaken "within a timeframe specified by the commissioner."

Lastly, while there is nothing in the regulatory text to suggest that a local governments "police power authority" does not apply, we request CDFA include the following language at the end of Section 4950 for purposes of clarity, and to avoid any potential dispute:

> *(f) If the grower does not complete destruction of the crop within the timeframe specified by the commissioner, the county or city within which the crop is located may undertake destruction of the crop in accordance with a duly-adopted local abatement procedure.*
> *(g) Nothing in this Chapter shall be interpreted to limit nor prevent a city, county, or city and county from exercising its police power authority under Section 7 of Article XI of the California Constitution, or to otherwise restrict a local government from enforcing state or local law or abating a hemp crop that does not comply with state or local law.*

Section 4950.1 Voluntary Destruction of Industrial Hemp Crops
We appreciate the reference to federal law *and guidance* to govern the destruction of Industrial Hemp. This reflects the needed changes issued by USDA after publishing the Interim Final Rule.

Finally, in addition to a complete Initial Statement of Reasons document, we request that CDFA release an accurate "Express Terms"[11] document that accurately

(b)(2).) This section should be corrected to avoid any argument that growers may delay even *commencing* the destruction timeline until receiving an order from the commissioner.

[11] Office of Administrative Law requires State Agencies to include one document relating to Express Terms to start the formal rulemaking period: "The text of the proposed regulation will clearly identify any changes to the California Code of Regulations. Proposed additions to regulatory text will appear as underlined and

reflects changes to the current regulatory text. Similarly, any revisions made to these regulations following the 45-Day public comments should be similarly, and clearly, noted.

Thank you for your consideration of our comments.

Sincerely,

Leigh Kammerich
Regulatory Affairs Specialist

cc: The Honorable Scott Wilk, Member of the State Senate
Sandy Elles, Executive Director, California Agricultural Commissioners and Sealers Association
Kiana Valentine, Politico Group

proposed deletions will be appear in strike-through format. The Authority and Reference citations that follow the text of each regulation section identify the statutes on which the section is based."
https://oal.ca.gov/rulemaking_participation/