



November 6, 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: 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, noticed on October 20, 2020. RCRC is an association of thirty-seven rural California counties, and the RCRC Board of Directors is comprised of an elected county supervisor from those member counties.

The proposed changes as recently amended include a significant step backward from the original draft published in August 2020. The prior draft explicitly and correctly recognized local governments' police power authority with respect to hemp and disclaimed any intention to undermine this authority. This acknowledgement was inexplicably removed from the current draft.¹ Moreover, the deletion of these important provisions was not "clearly indicated" (or noted in any way) in the revised text or Initial Statement of Reasons (ISOR), in violation of the Administrative Procedure Act (APA).²

We continue to object to the obfuscation of express terms, such as inconsistently noting additions and deletion of text, that has been prolific throughout this rulemaking.

¹ None of the comments included in the Final Statement of Reasons (FSR) appears to object to this provision, nor is any other explanation for – or acknowledgement of – CDFA's change in direction provided elsewhere in the regulatory materials.

² Government Code Section 11346.8 (c). The FSR erroneously states that "[t]he Department has decided not to change the proposed regulations" in response to earlier requests to include such language (FSR, p. 33), and entirely ignores the fact that CDFA had *actually included* this language in the prior draft regulations.

This is but one symptom of the confusion engendered by CDFA throughout this process, which has included multiple overlapping sets of draft regulations without any clearly explained relationship (most of which were never published on the Department's website). Aside from any APA violations, this has hindered transparency and severely disadvantaged stakeholders attempting to constructively participate in the rulemaking process.

On the merits, the express recognition of local police power should be restored to the text. The Final Statement of Reasons (FSR) states that "[c]ounties already possess local ordinance authority to carry out the requested actions and thus such provisions are not necessary for inclusion in this regulation." This is legally accurate but misses the point. Clear acknowledgement of local authority to adopt land use rules, develop abatement processes, administer business licenses, and engage in the wide array of regulatory tasks that may affect hemp growers will help avoid conflict and confusion among the regulated community. Express recognition that registered hemp growers are not exempt from local regulation – or abatement – will help avoid any disputes in the field – which is why the Legislature was careful to include such a statement in Senate Bill 153 (Statutes 2019, Chapter 838). CDFA should take their cue from this, and likewise restore the language included in the August draft.

Other substantive concerns remain, such as the unfunded mandate on county Agricultural Commissioners to perform random annual inspections, which has been confusingly expanded to include "confirm[ing] crop destruction" as part of the random inspection. The intent and effect of this new mandate are unclear, as Section 4950(e) already requires the commissioner to "confirm the destruction of the crop by conducting field inspections" - leaving little more to be discovered in this regard during a random inspection weeks or months later. The FSR is also at odds with the language of Section 4950 and internally inconsistent. The FSR (page 1) implies that crop destruction is verified through an annual inspection of random samples, rather than contemporaneously with each destruction as indicated on FSR, page 31.

Notwithstanding these drafting errors, we continue to urge CDFA to assume direct responsibility for these required inspections or provide the necessary reimbursement to fulfill them through cooperative agreements with commissioners. As contemplated by the rulemaking, the onus is expressly placed on County Boards of Supervisors to raise fees on local hemp producers. Further, having each commissioner administer a random inspection program within their individual county will result in great disparities throughout the state. In counties with few growers, each grower is likely to be frequently inspected. By contrast, in a county with many growers, it could be years between inspections of any particular cultivation site. It would be far more sensible and effective for CDFA to administer a program that selected random inspection subjects on a statewide basis.

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We do, however, greatly appreciate the updates to Section 4943 to reflect USDA guidance, thereby allowing greater flexibility of laboratory registration requirements and minimizing the detrimental consequences of (inapplicable) DEA registration.

Thank you for your consideration of our comments.

Sincerely,

A handwritten signature in blue ink, reading "Leigh Kammerich". The signature is fluid and cursive, with the first name "Leigh" written in a larger, more prominent script than the last name "Kammerich".

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