RURAL COUNTY REPRESENTATIVES OF CALIFORNIA

October 6, 2020

United States Department of Agriculture
AMS/Specialty Crops Program Hemp Branch
407 L'Enfant Plaza SW
P.O. Box 23192
Washington, DC 20026

Submitted electronically via eRulemaking Portal

RE: Interim Final Rule, Establishment of a Domestic Hemp Production Program Published October 31, 2019

To Whom It May Concern:

On behalf of the Rural County Representatives of California (RCRC), we offer comments on the Establishment of a Domestic Hemp Production Program, first published by the Federal Register on October 31, 2019. RCRC is an association of thirty-seven rural California counties, and the RCRC Board of Directors is comprised of elected supervisors from those member counties. We thank you for renewing the opportunity to provide our perspective. The issue of hemp production, particularly those surrounding cultivation, are of importance to many of RCRC's member counties. RCRC has done extensive work to ensure that California's hemp laws will create consistency between the state's oversight of industrial hemp and new federal standards in the 2018 Federal Farm Bill.

Like the 2018 Federal Farm Bill, California law speaks to testing the delta-9 tetrahydrocannabinol (THC) levels and taking cultivation samples from the flowering plant. We appreciate the guidance issued by the USDA in February 2020 to delay the requirement to use federal Drug Enforcement Administration (DEA) registered laboratories for testing, as well as the requirement to use DEA-registered reverse distributors or law enforcement for disposal on non-compliant hemp plants that exceed testing for THC limits. These are welcome changes that should receive permanence in the Final Rule.

In fact, the testing procedures outlined by the USDA in the October 31, 2019 Interim Final Rule (IFR) were concerning and the Final Rule USDA puts forward should allow greater flexibility for State Plans to demonstrate how it will achieve the 0.3% THC limits of industrial hemp per the 2018 Federal Farm Bill. Each state has unique growing conditions

for hemp seed cultivars and are well-suited to establish protocols for testing samples. Additionally, USDA should consider ISO 17025 laboratory accreditation as a reasonable and attainable standard in lieu of DEA-registered laboratories in the Final Rule.

California's Agricultural Commissioners promote and protect our food supply, agricultural trade and the environment, as well as instill public confidence in the public health and safety of the commodities produced in California. These commissioners implement state and federal regulatory programs at the local level in tandem with local laws, regulations, and ordinances. Local governments—via our county Agricultural Commissioners—therefore are the boots on the ground to implement both the State plan, as well as the USDA portions of the Program plan. RCRC is committed to preserving local control, provide explicit county taxing authority, put strict licensing requirements in place, and address environmental impacts of hemp and cannabis cultivation.

The USDA regulations should clearly recognize and reflect the role of local governments in implementing state hemp plans[1] by including references to "applicable local law" or similar verbiage as appropriate throughout the regulations (e.g., in Sections 990.8 and 990.20).[2] Further, to ensure that licensees under the USDA plan do not produce hemp in a manner (or location) prohibited by state or tribal law, as set forth in Section 297B, subdivision (f)(2), USDA should require such USDA licensees demonstrate they are not in violation of any applicable tribal or state laws (including applicable local laws), even in states without an adopted state plan.

RCRC remains concerned with the USDA's compressed 15-day timeframe for harvest. California law more reasonably provides that hemp sampling and testing occur no more than 30 days before harvest. This, on the other hand, is a feasible standard that provides the functional ability to sample, transport samples for testing, conduct laboratory testing and potential re-testing, and begin—let alone complete—harvest. State Plans, therefore, need more leeway in the Final Rule to determine reasonable workload standards for Agricultural Commissioners to carryout testing and harvest beyond the current 15 days in the IFR.

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[1] California's hemp laws and administrative regulations rely heavily on county agricultural commissioners to implement the state's regulatory scheme for hemp (see California Food & Agricultural Code, §§ 81000 et seq.; California Code of Regulations, title 3, §§ 4940 et seq.), and recent California legislation explicitly confirms the responsibility of local governments to enact supplementary regulations in accordance with state law. (California Statutes of 2019, chapter 838, § 1.) Nor is California unique in this regard. For example, regulatory provisions submitted as part of the state plans for Kentucky and Montana similarly provide for a local regulatory role and authority with respect to hemp. (See 302 Kentucky Administrative Regulations 50:020, Section 21, subdivision (6); Administrative Rules of the State of Montana 4.19.106, subdivision (2).)

[2] Local laws authorized by (and enforceable under) under the constitution and statutes of a state are part-and- parcel of the "law of a State" that USDA must respect under Section 297B, subdivisions (a)(3) and (f). Just as local government officers, acting under color of state law, are forbidden by Section 10114 to interdict interstate commerce in hemp, local government regulations enacted under the same color of state law are equally mandatory for affected hemp producers, and should be acknowledged in the USDA regulations.

Further, RCRC appreciates the inclusion of the banking industry in USDA's "good cause analysis." RCRC supports efforts at both the state and federal level to allow for and make available financial services to hemp and cannabis operators in order to minimize the use of cash, protect public safety, and curtail the illicit market. Additionally, we agree that law enforcement needs assistance to identify hemp that is lawfully transported across state lines and would appreciate further guidance from the USDA to accomplish this.

RCRC offers more specific comments from the Interim Final Rule, below, that are of importance to California rural local governments.

Subpart A—Definitions

USDA should clarify that "culpable mental state greater than negligence" includes gross negligence,[3] as follows:

> *Culpable mental state greater than negligence.* To act intentionally, knowingly, willfully, recklessly, or with gross negligence.

USDA should further provide the framework for information sharing with *all* state, federal, and local officials responsible for regulation of hemp – not just law enforcement:[4]

> *Information sharing system.* The database mandated under the Act which allows USDA to share information collected under State, Tribal, and USDA plans with Federal, State, Tribal, and local law enforcement and other state, federal, and local officials responsible for regulation of hemp.

Additionally, the IFR should be revised to clearly allow (but not require) State and Tribal plans to include registration of non-commercial hemp producers,[5] at the option of the State or Tribe:

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[3] Federal caselaw defines "gross negligence" as "neglect so gross that it is inexcusable." (*Lal v. California* (9th Cir. 2010) 610 F.3d 518, 524 quoting *Boughner v. Sec'y of Health, Educ. & Welfare* (3rd Cir. 1978) 572 F.2d 976, 978.) Of the terms currently used in the IFR, "reckless[]" is often defined synonmously with the foregoing - but not always. (See, e.g., *Saba v. Compagnie Nationale Air Fr.* (D.C.Cir. 1996) 78 F.3d 664, 668.) The IFR definitions should be clarified to ensure that "neglect so gross that *it is inexcusable*" is not excused as simple negligence.

[4] While Section 297C, subdivision (d) only *requires* information sharing with "Federal, State, territorial, and local law enforcement," the statute *does not prohibit* USDA from developing a broader information sharing framework - and the cooperative federal/state/local program for the regulation of hemp contemplated in the IFR (and existing state plan drafts) will plainly be impracticable without broad information sharing amongst all responsible regulatory officials.

[5] The IFR cross-references the definition of "producer" in 7 CFR § 718.2, which refers to "the crop available *for marketing*." Some States or Tribes might desire to develop a unified regulatory scheme for both "market[ed]" and non-commercial hemp (i.e., hemp grown for personal use or consumption). USDA's regulations should allow this flexibility.

Producer. Producer means a producer as defined in 7 CFR 718.2 that is licensed or authorized to produce hemp under this part. A state or tribal plan may, but is not required to, provide for registration of persons who cultivate hemp for non-commercial purposes, in which case such persons shall be treated as producers for purposes of such state or tribal plan.

Subpart B—State and Tribal Hemp Production Plans

Section 990.3, State and Tribal plans: Plan Requirements

As previously mentioned, RCRC is concerned with the unattainable timeline of sampling hemp crops within 15 days prior to harvest. USDA should increase this timeframe to at least 30 days prior to harvest. An increased timeline would also give State and Tribal plans the authority to reduce this sampling window as practicable.

RCRC is very concerned with conducting testing only at DEA-registered labs.[6] This provision is infeasible from a practicality standpoint, as there are likely not enough labs nationwide or in the state of California. Further, in states with insufficient DEA-registered labs, this backlog will predictably result in hemp samples being transported across state lines for testing – which, if the samples are noncompliant (and thus a Controlled I Substance), represents a potentially serious federal offense. These difficulties are compounded by the fact that the DEA does not publish a list of registered laboratories without requiring a substantial financial payment to obtain the list.[7] The USDA should ensure there is an adequate supply of DEA-registered labs in each state to ensure the timely testing of hemp samples.

Moreover, perhaps more troubling, are disposal procedures requiring compliance with DEA reverse distributor regulations.[8] Both Subpart B and Subpart C require that non-compliant hemp plants (i.e. that test above an "acceptable hemp THC level") must be disposed "in accordance with DEA reverse distributor regulations found in 21 CFR 1317.15."[9] The IFR preamble further explains that "the material must be collected for destruction by a person authorized under the CSA to handle marijuana, such as a DEA-registered reverse distributor, or duly authorized Federal, State, or local law enforcement officer."

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[6] Section 990.3 (a)(3)(i)

[7] See https://classic.ntis.gov/products/dea-csa/

[8] Section 990.3 (a)(3)(iii)(E

[9] Section 990.3 (a)(3)(E); 990.27 (a)

This provision has sensible intentions but will be exceedingly difficult to implement in practice. To begin with, while the IFR preamble clearly envisions that a substantial portion of these disposal activities will be handled by DEA-registered reverse distributors, this is neither practicably nor legally feasible. As indicated on the DEA's May 2019 list, there are very few reverse distributors presently in business, particularly in major hemp producing states.[10] There are only three in California and none in Kentucky, Oregon, and Colorado. Further, even cursory review of the major reverse distributors' websites (e.g. www.farwestreturns.com) makes it clear that these businesses are not presently equipped for the destruction of dozens—if not hundreds—of acres of dense plant material in often remote agricultural areas.

Perhaps more importantly, registered reverse distributors cannot, under current DEA regulations, dispose of noncompliant hemp plants as contemplated in the IFR. Under 21 CFR §§ 1317.15(b) and 1317.30, reverse distributors are generally permitted to accept and handle controlled substances *only from other DEA registrants*.[11] They are permitted to "collect" controlled substances from non-registrants *only under certain limited circumstances*, none of which apply here.[12] Since licensed hemp producers are not themselves DEA registrants, they simply will not have access to registered reverse distributors.

We appreciate the complexity of handling non-compliant hemp, which amounts to a Controlled I substance. However, the foregoing restraints will likely leave law enforcement as the only possible option for disposal under the IFR for many hemp producers. This places an untenable burden on local law enforcement. Many rural law enforcement agencies are already stretched thin and may not have the resources to devote to the timely destruction of non-compliant hemp without endangering public safety priorities. While preventing serious violations of controlled substances laws is a priority for law enforcement agencies, hemp crops that fail testing due to slightly elevated THC levels typically present little risk of diversion to the illegal cannabis market. Even in states like California where law enforcement agencies could charge growers' fees for such services, law enforcement resources for this function may simply not be available as and when needed under the IFR. This threatens to leave producers with no available means to dispose of a non-compliant crop in accordance with the IFR. Disposal procedures entirely outside of the scope of law enforcement, therefore, are needed.

USDA is encouraged to allow other lawful methods of disposing of a non-compliant hemp crop, other than destruction in accordance with DEA's reverse distributor

[10] See Attachment "A" hereto.

[11] See also 21 CFR § 1300.01(b) ("Reverse distribute means to acquire controlled substances *from another registrant or law enforcement*...")

[12] 21 CFR §§ 1317.40(b); 1317.55(a).

regulations. USDA should also address a process for the voluntary disposal or destruction of hemp crops. Specifically, the DEA's 2014 Final Rule on Disposal of Controlled Substances explicitly acknowledged that non-registrant "ultimate users" are permitted to self-dispose of controlled substances that lawfully came into their possession.[13] Hemp producers whose crop tests above the acceptable hemp THC level are similarly situated and should be authorized to commence crop destruction or pursue other disposal methods authorized by local government regulatory officials. We further encourage USDA to clarify what constitutes compliant disposal, either by adopting the DEA's "non-retrievable" standard, or through technical specification to be included in States' plans or cannabis regulations.[14]

USDA should also relocate Section 990.3, subdivision (b)(1) ("No preemption") to its own section in Subpart E, to clarify that limitations upon the production of hemp contained in state or tribal law are not preempted by *any provision* of the IFR, *regardless* of whether the State or Tribe has an approved state or tribal plan. While States and Tribes lacking an approved plan do not exercise "*primary* regulatory authority," they nonetheless retain the ability to "limit the production and sale of hemp and hemp products within their borders"[15] as reflected in Section 297B, subdivision (f)(2). This should be clearly acknowledged in USDA's regulations:

> 990.64. No preemption.
> Nothing in this part preempts or limits any law of a State or Indian Tribe that:
> (a) Regulates the production of hemp; and
> (b) Is more stringent than this part or Subtitle G of the Act.

Section 990.4, USDA approval of State and Tribal plans

We can assume that once the USDA accepts a State or Tribal Plan within 60 calendar days of its receipt it goes into effect immediately, however, that remains unclear in the language of this section. Clarification is requested in the final rule.

Section 990.6, Violations of State and Tribal plans

The current language of Section 990.6(b) ("Negligent violations *shall* include...") could be interpreted to categorically declare that the listed misdeeds constitute negligence, regardless of actual mental state. This would be inconsistent with Section 297B, subdivision (e)(2) ("...including *by negligently*") and the analogous IFR provision for USDA plan violations (Section 990.29, "A hemp producer shall be subject to enforcement

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[13] 79 Fed.Reg. 53520-53521, 53548 (Sept. 9, 2014).

[14] See, e.g., 21 CFR § 1317.90; California Code of Regulations, title 16, section 5054 ("…rendering it unrecognizable and unusable").

[15] *Agriculture Improvement Act of 2018, Conference Report to Accompany H.R. 2* (H. Rept. 115-1072, Dec. 10, 2018), p. 738

for negligently...") This provision should be revised to clarify that the listed violations constitute negligent violations *only when actually done negligently*.

Additionally, this provision should clarify that the limitations upon criminal enforcement apply only to plan violations themselves, not to any violations of other provisions of law that may co-occur with a plan violation. For example, a negligent failure to obtain a license may be accompanied by a criminal violation of environmental laws or zoning ordinances, and would be punishable as such under those laws.

We suggest the following revisions to this Section:

> (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 <u>may</u> include, but not be limited to <u>the following, if done negligently</u>:
> ***
> (c) *Corrective action for negligent violations.* Each USDA-approved State or Tribal plan shall contain rules and regulations providing for the correction of negligent violations <u>of the plan</u>. Each correction action plan shall include, at minimum, the following terms:
> ***
> (3) A producer that negligently violates a State or Tribal plan approved under this part shall not <u>solely</u> as a result of that violation <u>of the plan</u> be subject to any criminal enforcement action by the Federal, State, Tribal, or local government.

Section 990.8, Production under Federal law

As discussed above (and below under Section 990.22), we recommend that the verbiage of this Section be revised to clarify that licensees producing hemp under federal law may not do so in a manner (or location) prohibited by state or tribal law:

> 990.8. Production under Federal law.
> Nothing in this subpart prohibits the production of hemp in a State or the territory of an Indian Tribe for which a State or Tribal plan is not approved under this subpart if the production of that hemp is in accordance with subpart C of this part, and if the production of hemp <u>will not violate any applicable provisions of tribal, state, or local law</u>. ~~is not otherwise prohibited by the State or Indian Tribe.~~

Subpart C—USDA Hemp Production Plan

Section 990.21, USDA hemp producer license

We recommend that Section 990.21, subdivision (a)(6) be revised to clarify what happens when a State or Tribal plan is approved *after* licenses have been issued by USDA for that territory. USDA's FAQ document (https://www.ams.usda.gov/rules-regulations/hemp/questions-and-answers) asserts that "USDA producer licenses are invalid once the State or Tribe begins to issue licenses under their own jurisdiction." However, the actual provisions of the IFR are not entirely clear on this point. We therefore recommend the following additional language:

> (6) *License expiration.* USDA-issued hemp producer licenses shall be valid until December 31 of the year three years after the year in which license was issued, provided that USDA-issued hemp producer licenses shall automatically expire upon approval of a State or Tribal plan covering the area where the production of hemp will occur.

Section 990.22, USDA hemp producer license approval

For the reasons outlined above, we recommend that Section 990.22, subdivision (a)(8) be revised to read as follows:

> (8) The proposed production of hemp will not violate any applicable provisions of tribal, state, or local law. ~~State or territory of Indian Tribe where the person produces or intends to produce hemp does not prohibit the production of hemp.~~

While no one expects USDA to actively police compliance with a myriad of differing state, tribal, and local laws, USDA can and should require hemp license applicants to self-certify compliance with applicable state and local law, and take disciplinary action against licensees found to have violated those laws.

Additionally, consistent with our comment on Section 990.21, we recommend the following revision to Section 990.22, subdivision (b)(2):

> (2) Licenses will be valid until December 31 of the year three after the year in which the license was issued, provided that USDA-issued hemp producer licenses shall automatically expire upon approval of a State or Tribal plan covering the area where the production of hemp will occur.

Section 990.24, Responsibility of USDA licensed producer prior to harvest

Collecting samples 15 days before harvest is an untenable burden for local law enforcement agencies, which are contemplated to be the USDA’s designated sample

collectors. Hemp is often cultivated in rural areas where resources are already scarce, especially public safety resources on a compressed deadline. In a state as large as California, there may be hundreds of hemp producers with overlapping harvest timelines due to similar microclimate conditions. Additionally, law enforcement officers are not trained agricultural biologists and may not be the most appropriate sample collectors from a technical perspective. We encourage the USDA to work with state Departments of Agriculture to best designate approved persons to collect samples under USDA's plan and ensure there are enough resources made available to local agencies to conduct this undertaking.

Additionally, the USDA should address testing standards for non-flowering plants by allowing State Plans to determine pre-harvest sampling and testing protocols. Non-flowering hemp crops, such as nursery stock or clones, need to be treated uniformly to flowering hemp crops.

Sections 990.25, Standards of performance for detecting delta-9 tetrahydrocannabinol (THC) concentration levels and 990.26, Responsibility of USDA producer after laboratory testing is performed

USDA should also clarify re-testing procedures. According to Section 990.25, subdivision (d), *any* test resulting in higher than the acceptable hemp level is considered conclusive evidence and may not be further handled and must be disposed.[16] However, according to Section 990.26, subdivision (f) and USDA's supplemental testing procedures, re-testing is allowed upon request, with no apparent cap on the number of times re-testing could occur (or other limits, such as prohibiting re-testing of samples with THC concentrations clearly beyond any reasonable margin of error). The regulations should further clarify the consequence if the retest differs from the original test: Does the latter govern? Finally, the regulations should clarify whether the retest must be conducted by the same lab, or whether the hemp producer will be permitted to "laboratory shop."

Furthermore, laboratory testing reports should clearly identify whether these sample tests pass or fail by clearly indicating as such. For example, reports should clearly label results by stating either "PASSED AS INDUSTRIAL HEMP," or "FAILED AS INDUSTRIAL HEMP."

Section 990.26, Responsibility of a USDA producer after laboratory testing is performed

It is unclear if additional testing per subdivision (f) is to be done by the original sample collected, or if additional samples must be collected from the field. USDA should provide further guidance on additional testing procedures if requested by a hemp producer.

[16] See also Section 990.3 (a)(3)(i)

Section 990.27, Non-compliant cannabis plants

As noted above under Section 990.3, we recommend that USDA revise this section to provide additional disposal options for noncompliant hemp.

Section 990.29, Violations

Consistent with our comments on Section 990.6, we recommend the following revisions to this section:

> (c) *Negligent violations and criminal enforcement.* A producer that negligently violates this part shall not, solely as a result of that violation of this part be subject to any criminal enforcement action by any Federal, State, Tribal, or local government.

Subpart E—Administrative Provisions

Section 990.63, Interstate transportation of hemp

While no State or Tribe may prohibit hemp or hemp products from being transported across interstate lines, USDA should not effectively require hemp producers to send hemp samples across state lines because there are no DEA-registered laboratories either within the state to conduct hemp testing, or within the state that can conduct such testing in a timely manner for a producer to meeting harvesting deadlines.

Subpart F—Reporting Requirements

Section 990.71, USDA plan reporting requirements

USDA should, in a reciprocal fashion to Section 990.70, subdivision (d), require licensees or laboratories to report test results to the State.

Thank you for your reconsideration of our comments on the Interim Final Rule for Domestic Hemp Production. We look forward to the establishment of a Final Rule that would take into consideration many of the recommendations made by rural California counties.

Sincerely,

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