

FINDING OF EMERGENCY

The Secretary of the California Department of Food and Agriculture (Department) determined that an emergency exists; timeframes for harvesting industrial hemp as required in Food and Agricultural Code (FAC) Section 81006 need to be amended to be in compliance with Section 297B of the federal Agricultural Marketing Act of 1946 (added by Section 10113 of the federal Agriculture Improvement Act of 2018 (December 20, 2018) (Public Law 115-334), implementing regulations, and guidance. The Department is proposing an emergency amendment of Title 3 California Code of Regulations (CCR) Sections 4940, 4944 and 4946, the effect of which will be to change the harvest period from within 15 days after sampling to within 30 days in accordance with recent amendments to United States Department of Agriculture (USDA) regulations. Additionally, the timeframe to request sampling and test samples for THC concentrations has also been increased to accommodate commissioners and testing laboratories.

Emergency Defined

“Emergency’ means a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare,” Government Code Section 11342.545. If a state agency makes a finding that the adoption of a regulation is necessary to address an emergency, the regulation may be adopted as an emergency regulation. Government Code Section 11346.1(b)(1).

In this document, the Department is providing the necessary specific facts demonstrating the existence of an emergency and the need for immediate action to prevent serious harm to the general welfare of the citizens of California, pursuant to Government Code Section 11346.1(b)(2).

Government Code Section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law, the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency.

The purpose of CCR Sections 4940, 4944, and 4946 is to create timeframes for industrial hemp sampling, laboratory testing, and destruction. For the purpose of promoting and protecting the agricultural industry in California, existing law provides that, before the harvest of each crop, a registrant that grows industrial hemp shall obtain a laboratory test report indicating the THC levels of a random sampling of the industrial hemp grown, except when industrial hemp is grown by an established agricultural research institution. (Food and Agricultural Code [FAC], Section 81006 (d) (1)). As per FAC 81006 (d) (3), the Department shall establish, by regulation, the sampling procedures, and as per FAC 81006 (d) (5), the Department shall establish approved testing laboratories and testing methods.

The information contained within this finding of emergency meets the requirements of Government Code Sections 11346.1 and 11346.5.

The Secretary is proposing to amend CCR Sections 4940, 4944, and 4946 pursuant to the authority in FAC Section 407: “the director may adopt such regulations as are reasonably necessary to carry out the provisions of this code which he is directed or authorized to administer or enforce.”

Additionally, FAC Section 401.5 states: “The department shall also seek to enhance, protect, and perpetuate the ability of the private sector to produce food and fiber in a way that benefits the general welfare and economy of the state.”

Evidence of an Emergency

Industrial hemp cultivation was federally authorized through the Federal Agricultural Act of 2014 (2014 Farm Bill) and the 2018 Farm Bill. The U.S. Domestic Hemp Production Program was established by the USDA through an interim final rule on October 31, 2019, and further amended through a final rule on January 15, 2021. The final rule will take effect on March 22, 2021.

The Department adopted regulations 4940, 4944 and 4946 on January 11, 2021. At that time, the regulations were in compliance with the interim final rule from the USDA. The changes in the final rule will require additional changes to the current industrial hemp regulations. Of immediate import, the interim final rule initially required a 15-day window to collect samples before harvest. The final rule now extends this requirement to 30 days before harvest.

Sections 4940, 4944, and 4946 need to be quickly updated to harmonize with the federal requirements outlined in the final rule. The short harvest timeframe was the issue most commented upon when the Department released the final draft of regulations CCR Sections 4940, 4944, and 4946. Multiple commentors expressed concern that needing to harvest in such a short timeframe was a burden to current registrants. Also, there were concerns that the shorter timeframe impacted the time allotted to testing laboratories to process and test industrial hemp samples for THC concentration. Despite the reasonable nature of these comments, at the time of adoption, the Department was unable to accommodate them by making any adjustments to allow for a longer time to complete testing and harvest due to the need to comply with federal law at that time. Therefore, the shorter timeframes for testing and harvesting are currently in force in state regulation.

The current crop of industrial hemp will be ready to harvest by the end of April, and thus, regular rulemaking does not allow enough time to adopt the 30-day time frame that is now allowed under federal law. But if the changes are made now via emergency regulation to extend these timeframes, the harvesters of the current industrial hemp crops will be able to follow the more feasible timeframe in accordance with the USDA's final rule.

Background

Currently, most industrial hemp products processed and manufactured in the United States heavily rely on imported material, according to the Congressional Research Service. Imports of industrial hemp material into the United States have increased over the last decade. Therefore, in order to benefit the agricultural sector and the population

of California in general, the Legislature crafted and approved statutes allowing production of industrial hemp in California (these statutes can be found in FAC Division 24). However, industrial hemp, as defined by law, is a subset of cultivars of *Cannabis sativa* with THC content of no more than three-tenths of 1 percent. Thus, the Legislature included in statute provisions for obligatory testing to confirm that the resulting crops would not qualify as adult use cannabis under state law (FAC Section 81006). Without this regulation implementing FAC 81006, California citizens will be unable to participate in the emerging United States industrial hemp industry, and citizens who have relied on Division 24 and Title 3 CCR Section 4900, which allow registered industrial hemp cultivation, will sustain large economic losses. With this regulation, the State of California will be able to provide effective oversight to a well-regulated industry and high quality industrial hemp production, and avert economic losses that will occur if currently and soon-to-be planted crops that are ready for harvest beginning in April cannot be harvested within the current timeframe. Without emergency rulemaking, crops could be affected by the more restrictive timeframe until June.

Project Description

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

This section establishes that sampling for THC concentration shall take place no later than 11 calendar days before the anticipated harvest start date listed on the pre-harvest report. Additional sampling and testing will be required for any changes to the harvest date that results in harvest activities to occur more than 30 calendar days after the sample collection date. The requirement in CCR Section 4940(a)(1), as amended, will allow the sample to be collected earlier to accommodate the timeframe for sample delivery and laboratory testing for THC concentration. Furthermore, CCR Section 4940(a)(2), as amended, will reflect the amended harvest timeframe of 30 days. This is necessary, as the current timeframe prescribed by state regulation is the minimum needed under ideal conditions and leaves no margin of time for common or uncommon contingencies.

The THC sampling process begins when the registrant submits a signed pre-harvest

report to their commissioner at least 30 calendar days prior to the anticipated harvest start date. This will allow enough time for the commissioner to schedule a staff member to oversee the sampling to ensure the accuracy and sanitation of samples and fields (FAC 81006(e)(3)(D)). The requirement in CCR Section 4940(b)(1), as amended, will provide commissioners additional notice of any sampling needs ahead of the anticipated harvest start date. This is necessary, as the current time frame prescribed by state regulation is the minimum needed under ideal conditions and leaves no margin of time for common or uncommon contingencies.

Section 4944 Notification of Laboratory Test Report

This section establishes the notification requirements for laboratory testing reports. The laboratory shall provide registrant and the commissioner an electronic copy of the laboratory test report concurrently within 10 calendar days from the sample collection date. The requirement in CCR Section 4944(c), as amended, will provide additional time for laboratories to prepare and test the samples for THC concentration. This is necessary, as the current time frame prescribed by state regulation is the minimum needed under ideal conditions and leaves no margin of time for common or uncommon contingencies.

Section 4946 Final Disposition for Registered Industrial Hemp Crops

This section establishes that the registrant may harvest a crop for which a passing laboratory test report has been received (FAC 81006(e)(1)). The requirement in Section 4946(a)(3) is being amended from within 15 days to harvest after sampling to 30 days to stay in compliance with current federal regulations. This is necessary, as the current time frame prescribed by state regulation is the minimum needed under ideal conditions and leaves no margin of time for common or uncommon contingencies.

Based on this change to the USDA hemp guidelines the Department is proposing an emergency regulation to amend CCR Sections 4940, 4944, and 4946. The amendment of these sections will change the harvest period from within 15 days after sampling to within 30 days in accordance with recent amendments to USDA regulations, and will adjust the timeframes for pre-harvest notification and testing for THC concentration to

accommodate this change.

The Department also relied upon the following information:

Authority and Reference Citations:

Authority: Sections 407 Food and Agricultural Code

Reference: Sections 401.5 Food and Agricultural Code and Section 4900 of the California Code of Regulations.

Informative Digest

U.S. Domestic Hemp Production Program Final Rule, issued January 15, 2021, United States Department of Agriculture

Existing law, FAC Section 407, provides that the Secretary may adopt such regulations as are reasonably necessary to carry out the provisions of this code which the Secretary is directed or authorized to administer or enforce.

Existing law, FAC 81006, obligates the Secretary to adopt sampling procedures and approve laboratories and laboratory testing methods.

Existing Title 3 CCR Section 4900 establishes the conditions for registration and the registration fees for industrial hemp growers. This adoption provides the necessary regulatory mechanic to allow the laboratory testing of industrial hemp.

FAC Section 401.5 states: "The department shall seek to protect the general welfare and economy of the state and seek to maintain the economic well-being of agriculturally dependent rural communities in this state." The amendment of Title 3 CCR Sections 4940 and 4946 allows industrial hemp to be legally harvested.

As required by Government Code Section 11346.5(a)(3)(D), the Department has

conducted an evaluation of this regulation and has determined that it is not inconsistent or incompatible with existing state regulations.

CCR Sections 4940, 4944, and 4946

The Department is proposing to adopt CCR Sections 4940, 4944 and 4946, the effect of which will change the harvest period from within 15 days after sampling to within 30 days and increase the timeframes to request sampling and to test samples for THC concentrations.

Mandate on Local Agencies or School Districts

The Department of Food and Agriculture has determined that amending Sections 4940, 4944, and 4946 does not impose a mandate on local agencies or school districts. No reimbursement is required under Section 17561 of the Government Code because each county agricultural commissioner currently is reimbursed through CCR Section 4900, Industrial Hemp Registration Fees, and FAC Section 81005. There is a memorandum of understanding between the department and California Agricultural Commissioners and Sealers Association (CACASA), the respective organization of the county agricultural commissioners.

Economic Impact Analysis

The proposed regulation amends the procedures for harvesting industrial hemp after sampling. There is no additional cost to the state for these changes. It is anticipated that this regulation will allow the growth of the industrial hemp industry in California, with an increase in the number of businesses dedicated to producing hemp and the concomitant increase in jobs. There are no anticipated elimination of jobs and businesses within California.

Anticipated Benefits from This Regulatory Action

There is a potential savings to the growers of industrial hemp as the extended period to harvest industrial hemp after sampling will allow for more time to harvest, resulting in less frequent retesting and allowing for fewer crops to be destroyed due to an inability to

meet the regulatory deadlines. With this regulation, the State of California will be able to continue to regulate a growing industry, with high quality industrial hemp production.

Assessment

Based upon the Economic Impact Analysis, the Department has made an assessment that the proposed regulation would not eliminate jobs or existing businesses within California. The Department has made an assessment that the proposed regulation would likely lead to the creation of new jobs or businesses, and it would positively affect the expansion of businesses currently doing business within California.

As required by Government Code Section 11346.5(a)(3)(D), the Department has conducted an evaluation of this regulation and has determined that it is not inconsistent or incompatible with existing state regulations.

Estimated Cost or Savings to Public Agencies or Affected Private Individuals or Entities

The Department of Food and Agriculture has determined that the amendment of Sections 4940 and 4946 does not impose a mandate on local agencies or school districts and no reimbursement is required under Section 17561 of the Government Code.

The Department also has determined that no savings or increased costs to any state agency, no reimbursable costs or savings under Part 7 (commencing with Section 17500) of Division 4 of the Government Code to local agencies or school districts, no nondiscretionary costs or savings to local agencies or school districts, and no costs or savings in federal funding to the State will result from the amendment of Sections 4940 and 4946

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. The Department has determined that the proposed actions will not have a significant adverse economic impact on housing costs or California business, including the ability

of California businesses to compete with businesses in other states. The Department's determination that the action will not have a significant statewide adverse economic impact on business was based on the following:

The amendment of Sections 4940, 4944, and 4946 will change the harvest period from within 15 days after sampling to within 30 days. This will not change the cost of harvesting; it will allow the growers more time to harvest their crops, which will result in less crop destruction than if the crops could not be harvested within the 15-day period.