

FINDING OF EMERGENCY

The Secretary of the California Department of Food and Agriculture (Department) determined that an emergency exists; timeframes, definitions, and procedures for industrial hemp registration and program eligibility determination based on controlled substance related felony convictions, as required in Food and Agricultural Code (FAC) Sections 81003, 81004, 81006, and 81013, need to be in place in order to confirm compliance of registered industrial hemp growers and breeders with Division 24 of the FAC. The Department is proposing emergency readoption of Title 3 California Code of Regulations (CCR) Sections 4901 and 4902, the effect of which will be to create timeframes, definitions, and procedures for industrial hemp registration and program eligibility determination.

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. After submission of the proposed emergency to the OAL, the OAL shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

The purpose of CCR Sections 4901 and 4902 is to create timeframes, definitions, and procedures for industrial hemp registration and program eligibility determination based on controlled substance related felony convictions. For the purpose of promoting and protecting the agricultural industry in California, existing law provides that, before the cultivation, industrial

hemp growers shall register with the commissioner of the county in which the grower intends to engage in hemp cultivation. Established agricultural research institutions are currently exempt from registration until the state regulatory plan for California is approved by U.S. Department of Agriculture (USDA). (Food and Agricultural Code [FAC], Sections 81003(a)(1), 81004(a)(1), and 81004.5(a)(1)).

Senate Bill (SB) 153 was approved by the Governor on October 12, 2019 and took effect on January 1, 2020 unless otherwise specified in the provisions. SB 153 amends existing law regarding the cultivation of hemp, including registration and program eligibility requirements, to mirror federal requirements outlined in the Agriculture Improvement Act of 2018 (2018 Farm Bill), which was signed into law by the President on December 20, 2018. SB153 requires the Department, in consultation with the Governor and the Attorney General, to submit a state regulatory plan pursuant to 297B of the 2018 Farm Bill to the USDA by May 1, 2020. The USDA established an interim final rule to further specify the federal requirements for hemp cultivation on October 31, 2019.

Existing law, as amended by SB 153, requires the county agricultural commissioners to determine that the requirements for registration pursuant to FAC Division 24 are met and that the applicant is eligible to participate in the industrial hemp program before issuing registration to the applicant (FAC Sections 81003(b) and 81004(b)). Existing law, as amended by SB 153, also restricts any person convicted of a felony related to a controlled substance under state or federal law before, on, or after January 1, 2020 from participating in the industrial hemp program for 10 years from the date of the conviction (FAC Section 81013).

Existing law, as amended by SB 153, prohibits the cultivation of industrial hemp on premises licensed by the Department to cultivate or process cannabis. Industrial hemp, regardless of its THC content, that is cultivated on premises licensed by the Department for cannabis cultivation shall be considered as cannabis as defined in Section 26001(f) of the Business and Professions Code (BPC) and subject to licensing and regulatory requirements for cannabis pursuant to BPC Division 10.

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 readopt CCR Sections 4901 and 4902 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

FAC Sections 81003 and 81004 sets forth requirements for effective industrial hemp registration and program eligibility determination. However, the regulations addressed in this finding (proposed CCR Sections 4901 and 4902) specify detailed timeframes, definitions, and procedures necessary to implement the registration requirements and program eligibility requirements based on controlled substance felony convictions mandated in FAC Sections 81003, 81004, 81006, and 81013. These regulations also specify a material falsification on an application resulting in ineligibility as mandated by FAC Section 81014. Statutes regarding industrial hemp cultivation as amended by SB 153 were approved by the Governor on October 12, 2019 and became effective on January 1, 2020. Drafting regulations to implement the statutes began shortly after the approval of SB 153.

Nevertheless, promulgating regulations establishing a new agricultural program in a shifting legal landscape is an uncertain endeavor. This is complicated by the establishment of the interim final rule by USDA on October 31, 2019. The interim final rule provided additional specifications to the federal registration and program eligibility requirements. These specifications need to be taken into consideration in the development of the regulations as the statutes amended by SB 153 mirrored existing federal law with the intent of complying with federal law.

CDFR would prefer to have registration and program eligibility requirements address these interim final rules through non-emergency regulations. While the CDFR began the process to develop regulations in October 2019, the state industrial hemp registration and program eligibility statutes took effect on January 1, 2020. Likewise, federal regulations further clarifying federal requirements were established on October 31, 2019.

The Department could not adopt registration and program eligibility statutory requirements until the federal interim rules were in place. The amount of time needed to promulgate these necessary regulations via the regular rulemaking process and fully implement them will exceed the time between when the statutes amended by SB 153 that authorize these regulations

became effective and when the Department was required to submit a state plan to USDA. Therefore, an emergency adoption was proposed for the Department to implement the necessary timeframes and procedures for industrial hemp registration and program eligibility determination required by state and federal law.

On April 25, 2019, CCR Section 4900 was approved and became effective. This regulation established a registration fee and renewal fee for industrial hemp growers and breeders and allowed for industrial hemp growers and breeders to register with the county agricultural commissioners and begin to grow industrial hemp. As of December 3, 2020, there are 515 registered industrial hemp growers with a total of 17,467 acres registered for industrial hemp production. Dollar yields from industrial hemp vary wildly depending on the crop purpose (fiber, seed, or flowers) and the cultivation methods. Currently, an industrial hemp crop can yield \$20,000 per acre. Assuming potential yield of \$20,000 an acre, if the current California industrial hemp crop were to be destroyed because of the lack of statutory compliance, it would result in a potential direct loss of over \$349,340,000 to California farmers. Associated production costs would increase this loss.

Necessity for Readoption

The Department has made substantial progress and proceeded with diligence to complete the rulemaking process for these regulations. However, the Department was obligated to make several revisions to the proposed regulations based on the Office of Attorney General's feedback on the proposed state regulatory plan provided on June 22, 2020.

Additionally, CDFA drafted the proposed language in anticipation of legislative changes to FAC Division 24 through SB 864. However, SB 864 failed to pass this year and required the Department further amending the proposed regulations in order to satisfy federal requirements for the state regulatory plan approval.

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 passed statutory provisions for registration and program eligibility determination to ensure that the resulting crops would not qualify as adult use cannabis under state law (FAC Section 81006).

Without these regulations implementing FAC Sections 81003, 81004, 81006, 81013, and 81014, California citizens who have relied on Division 24 and Title 3 CCR Section 4900, which allows registered industrial hemp cultivation, may sustain large economic losses. With these regulations, the State of California will be able to develop a well-regulated industry, high quality industrial hemp production, and avert economic losses that will occur if currently and soon-to-be planted crops must be destroyed due to the lack of statutory compliance.

Some of the proposed regulations repeat and rephrase statutory provisions in the FAC. This duplication is necessary to centrally locate the industrial hemp registration application requirements.

Regulation Description

CCR Section 4901 Registration Application for Industrial Hemp Cultivation

This section establishes timeframes and procedures for registration application for industrial hemp cultivation so growers stay in compliance with all applicable state and federal requirements. In order to become registered for industrial hemp cultivation, growers of industrial hemp or hemp breeders must register prior to cultivation with the commissioner of the county in which the grower intends to engage in hemp cultivation as per FAC Sections 81003 and 81004.

Section (a) defines the term “cultivation site,” which is used throughout the sections, as contiguous land area on which the applicant plans to engage in industrial hemp cultivation, storage, or both.

Section (b)(1) establishes the application procedures for hemp growers to register. Before cultivation, a grower needs to register with the commissioner of the county in which the grower will be growing hemp. The registration application for growers of industrial hemp shall include:

- The name, physical address, and contact information of the applicant, including mailing address, telephone number, and email (if available), so the grower can be contacted as needed per FAC 81003,
- The business type (sole, proprietor, partnership, corporation, limited liability corporation, or specified other), business name(s), including all DBAs (“doing business as”), principal

business address, and the employer identification number (EIN) provided by the Internal Revenue Service (IRS) of the business entity as required in title 7 CFR Part 990.70(a)(1),

- The name(s) and title(s) of all key participants as defined in Section 4902(a)(2) for determining program eligibility as required in title 7 CFR Part (a)(1)(ii),
- The legal description, Global Positioning System coordinates, and map of the land area on which the applicant plans to engage in industrial hemp cultivation, storage, or both, per FAC Section 81003(a)(2)(B),
- The approved cultivar to be grown, including the state or country of origin, per FAC Section 81003(a)(2)(C), and
- The applicant's signature certifying the following to ensure compliance with Division 24 of FAC and title 3 of the CCR:
 - The information provided on the application is true and correct,
 - Confirmation that the cultivation site(s) to be registered for hemp cultivation is not on premises licensed by the department to cultivate or process cannabis to ensure compliance with FAC Section 81006(c),
 - The applicant shall comply with all the requirements outlined in Division 24 of the Food and Agricultural Code and this chapter, and
 - Any changes to the registration shall be provided to the commissioner in accordance with Section 4901(c).

Section 4901(b)(2) establishes the application procedures for hemp breeders to register to develop cultivars. Before cultivation, a breeder needs to register with the commissioner of the county in which the breeder will be growing industrial hemp. The registration application for hemp breeders shall include:

- The name, physical address, and contact information of the applicant, including mailing address and telephone number, and email (if available), so the grower can be contacted as needed per FAC Section 81003(a)(2)(A),
- The business type (sole, proprietor, partnership, corporation, limited liability corporation, or specified other), business name(s), including all DBAs ("doing business as"), principal business address, and the employer identification number (EIN) provided by the IRS of the business entity as required in title 7 CFR Part 990.70(a)(1),
- The name(s) and title(s) of all key participants as defined in Section 4902(a)(2) for determining program eligibility as required in title 7 CFR Part (a)(1)(ii),

- The legal description, Global Positioning System coordinates, and map of the land area on which the applicant plans to engage in industrial hemp cultivation, storage, or both, per FAC Section 81004(a)(2)(B),
- A variety development plan, which shall include per FAC Section 81004(a)(2)(C) as amended by SB 153:
 - The name of the seed-certifying agency that will be conducting the certification if a new cultivar is to be certified by a seed-certifying agency,
 - The hemp varieties that will be used and, if applicable, how those varieties will be used in the development of a new cultivar,
 - A plan for testing the THC concentration of all the plants grown,
 - The measures that will be taken to destroy any plants with THC concentrations that test above 0.3 percent,
 - The measures that will be taken to prevent the unlawful use of hemp under Division 24 of the Food and Agricultural Code and this chapter, and
 - A procedure for the maintenance of records documenting the development of the new cultivar,
- The applicant's signature certifying the following to ensure compliance with Division 24 of FAC and Title 3 of CCR:
 - The information provided on the application is true and correct,
 - Confirmation that the cultivation site(s) to be registered for hemp cultivation is not on premises licensed by the department to cultivate or process cannabis to ensure compliance with FAC Section 81006(c),
 - The applicant shall comply with all the requirements outlined in Division 24 of the Food and Agricultural Code and this chapter, and,
 - Any changes to the registration shall be provided to the commissioner in accordance with Section 4901(c).

Section 4901(b)(3) establishes that each registration application needs to be accompanied with the following: the registration fee in accordance with Section 4900, and a criminal history report in accordance with Section 4902.

Section 4901(c) establishes procedures for alterations and changes to registration. A registration can be updated for the following reasons:

- Alterations or changes to business name,

- contact information,
- changes to key participants as defined by Section 4902(a)(2),
- cultivation sites,
- approved cultivars, or
- variety development plans

Any alterations or changes to business name, contact information, or key participants must be submitted within 15 days of the change to be valid. If there are any alterations or changes to cultivation sites, approved cultivars, variety development plans, or key participants as defined by Section 4902(b)(2), these changes must be submitted and approved by the commissioner prior to planting.

Section 4901(d) specifies a timeframe for registration renewal. The registrant shall submit the application to the commissioner in each county they intend to grow in at least 30 days prior to the expiration of any previous registration in accordance with Section 4901(b). This allows enough time for commissioners to review and approve applications for registration renewal.

Section 4901(e) specifies that registrants will receive confirmation of registration and may begin cultivating hemp using the registered cultivar(s), cultivation site(s), and variety development plan(s) once the commissioner has determined that the application for registration, registration amendment, or registration renewal meets the requirements outlined in Division 24 of FAC and this chapter. Applicants have 30 calendar days from the receipt of notification from the commissioner of any deficiencies in the registration application to provide the requested information to the commissioner. If the requested information is not provided within the timeframe, the commissioner will deny registration or changes to the registration. This timeline is to ensure a timely determination and notification regarding registration status to the applicant. If registration is denied due to deficiencies in the registration application, the applicant must submit a new registration application to the commissioner, including a new registration fee, in order to register to cultivate hemp.

CCR Section 4902 Criminal History Report for Industrial Hemp Program Eligibility

This section establishes timeframes, definitions, and procedures for submitting criminal history reports for program eligibility determination based on controlled substance related felony convictions. Any person convicted of a felony relating to a controlled substance under state or federal law before, on, or after January 1, 2020, is ineligible, during the 10-year period following

the date of the conviction, to participate in the industrial hemp program as per FAC Section 81013.

Section 4902(a) provides definitions for “criminal history report,” “key participants,” and “disqualifying conviction.” “Criminal history report” means the Federal Bureau of Investigation’s Identity History Summary. “Key participant” means any person in the entity producing industrial hemp, such as a sole proprietor, a partner in a partnership, a person with executive managerial control in a corporation, or a person with executive managerial control, including persons such as a chief executive officer, chief operating officer and chief financial officer. The definition of “key participant” does not include non-executive managers such as farm, field, or shift managers.

“Disqualifying conviction” means any plea of guilty or nolo contendere, or any finding of guilt as to a State or Federal felony related to a controlled substance, except when the finding of guilt is subsequently overturned on appeal, pardoned, or expunged, or where an individual is allowed to withdraw an original plea of guilty or nolo contendere and enter a plea of not guilty and the case is subsequently dismissed.

Section 4902(b) outlines the requirements for criminal history reports for all key participants listed on the registration application. These criminal history reports must be submitted along with the registration application to the commissioners. Applications are not considered complete without the required criminal history report and are subject denial per Section 4901(e)(2). All criminal history reports must be dated within 60 days of submission of the registration application.

The section specifies the timeframe for all registrants to comply with this requirement. Any registrants approved prior to the submittal date of April 30, 2020 must provide a list of key participants and a criminal history report for each key participant to the commissioner by April 30, 2020. Failure to comply with this requirement results in registration cancellation. The reason for this timeframe is to comply with federal requirements as required by FAC Section 81015.

Any applicant or key participant found to have a qualifying felony will be ineligible to participate in the hemp program for 10 years from the date of the conviction. Once registration is issued, any changes to key participants must be reported to the commissioner as an amendment to the registration within 15 calendar days of the change. Criminal history reports for each additional key participant must accompany the amended registration application. Registrants are also required to notify the commissioner in writing within 48 hours of receiving a qualifying conviction

against the registrant or a key participant. If any criminal history reports in an application or registration are falsified, the application will be revoked or registration will be refused and the individual will be ineligible to participate in the industrial hemp program.

The Department relied upon the following information:

“Establishment of a Domestic Hemp Production Program” 84 Fed. Reg. 58522 (C.F.R. Part 990). October 31, 2019, pages 58522-58564

“Identity History Summary Checks”, 2019. Federal Bureau of Investigation website at: <https://www.fbi.gov/services/cjis/identity-history-summary-checks>, Accessed 12/31/2019

“Live Scan Locations”, 2019. State of California Department of Justice website at: https://oag.ca.gov/fingerprints/locations?county=Riverside&order=field_livescan_rolling_fee&sort=asc, Accessed 12/31/2019

Section 10113, Hemp Production, Agriculture Improvement Act Of 2018, 115th Congress, 2d Session

Vote Hemp, 2018, U.S. Hemp Crop Report

Authority and Reference Citations:

Authority: Food and Agricultural Code sections 407, 81003, 81004, 81005, 81006 and 81013.

Reference: Food and Agricultural Code sections 81003, 81004, 81005, 81006, 81013 and 81014.

Informative Digest

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.

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 readoption of Title 3 CCR Sections 4901 and 4902 allows

industrial hemp cultivators to comply with registration and program eligibility in compliance with federal law requirements, and thereby avoid large-scale economic losses that could result from noncompliance.

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 4901 and 4902

The Department is proposing to readopt CCR Sections 4901 and 4902, the effect of which will create timeframes, definitions, and procedures for industrial hemp registration and program eligibility determination based on controlled substance related felony convictions. These regulations also specify a material falsification on an application resulting in ineligibility as mandated by FAC Section 81014.

Mandate on Local Agencies or School Districts

The Department of Food and Agriculture has determined that Sections 4901 and 4902 do 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 is currently 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, that establishes roles and responsibilities for FAC Division 24. Those counties that wish to participate in the Industrial Hemp Program can opt for reimbursement from the department for the cost of implementing the registration program.

Economic Impact Analysis

The proposed regulation provides a regulatory framework for industrial hemp registration and program eligibility determination based on controlled substance related felony convictions. Existing law, as amended by SB 153, requires the commissioner to determine that the requirements for registration pursuant to FAC Division 24 are met and that the applicant is eligible to participate in the industrial hemp program before issuing a registration to the applicant. Existing law, as amended by SB 153, also restricts any person convicted of a felony related to a controlled substance under state or federal law before, on, or after January 1, 2020

from participating in the industrial hemp program for 10 years from the date of the conviction. Currently, no registrants have been verified to comply with the requirements outlined in FAC Sections 81006(c) and 81013, as amended by SB 153. Thus, it is anticipated that the regulatory framework for industrial hemp registration and program eligibility determination based on controlled substance related felony convictions will likely not support the creation of new businesses and the expansion of businesses in California.

The proposed rulemaking would require applicants to provide a Federal Bureau of Investigation's Identity History Summary for each key participant. A Federal Bureau of Investigation's Identity History Summary costs \$18 and requires fingerprinting. Fingerprinting can be taken by local, county, or state law enforcement, or private companies including an FBI-approved Channeler. Based on quotes from three options in California, estimated fingerprinting costs approximately \$10 to \$15 per set. This cost will likely be more than offset by revenue collected by the grower or breeder over one year. It is anticipated that this regulation may limit the growth of the industrial hemp industry in California, with a decrease in the number of businesses dedicated to producing hemp. The registration and eligibility requirements may restrict some current registrants and individuals who have a direct or indirect financial interest in a registered business from participating in the industrial hemp program.

Anticipated Benefits from This Regulatory Action

Establishment of timeframes, definitions, and procedures for industrial hemp registration and program eligibility determination will allow commercial cultivation and harvest of industrial hemp in California to comply with federal requirements and allow the growth of the industrial hemp industry in California. According to Vote Hemp, the United States has seen significant growth in acreage of industrial hemp cultivation: 9,770 acres of industrial hemp were grown in 2016; 25,713 acres were grown in 2017; and 78,176 acres were grown in 2018.

Currently, most 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. Without this regulation, industrial hemp production in California would not be in compliance with federal law and unable to contribute to the domestic hemp supply. With this regulation, the state of California will be able to promote a well-regulated industry with high quality industrial hemp production.

Assessment

Based upon the Economic Impact Analysis, the Department has made an assessment that the proposed regulation could eliminate jobs or existing businesses within California because it may prohibit some current registrants from participating in the industrial hemp program. Based on the economic assessment, the Department has made an assessment that the proposed regulation would likely not lead to the creation of new jobs or businesses. However, without procedures for compliance with this federal law, registered growers and breeders will not be able to comply with federal requirements. This would limit the amount of domestic hemp available to product producers and result in higher prices to California consumers if California is not contributing to the domestic hemp supply.

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 proposed regulation will require the industrial hemp program participants to pay for a Federal Bureau of Investigation's Identity History Summary to be licensed within the State of California. The cost to obtain a Federal Bureau of Investigation's Identity History Summary for each key participant is reasonable and should be exceeded by revenue collected by the grower or breeder over the registration period of one year. There may also be a cost of losing key participants due to being disqualified by failing to meet the requirements of 81013. The agency is not aware of any additional cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

The Department of Food and Agriculture has determined that the readoption of CCR Sections 4901 and 4902 has no savings or increased costs to any state agency, no reimbursable costs or savings under Part 7 (commencing with FAC 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 proposed action.

The Department has determined that the proposed action will not have a significant adverse economic impact on housing costs or California businesses, including the ability of California businesses to compete with businesses in other states. The Department's determination that this action will not have a significant adverse economic impact on businesses was based on the following effects of the proposed regulation:

- Timeframes, definitions, and procedures for industrial hemp registration and program eligibility determination based on controlled substance related felony convictions. Without procedures for compliance with federal law, registered growers and breeders will not be able to comply with federal requirements. This would limit the amount of domestic hemp available to product producers and result in higher prices to California consumers if California is not contributing to the domestic hemp supply.
- Regulatory oversight by the county agricultural commissioners to help ensure that industrial hemp cultivation meets statutory requirements. This will result in a product that is superior to unregulated industrial hemp being available in greater quantities.
- Protection of the public and environment from illegal cultivation activities. This will improve the health and safety of Californians.