

DEPARTMENT OF FOOD AND AGRICULTURE
PROPOSED CHANGES IN THE REGULATIONS

Title 3, California Code of Regulations

Sections 4940, 4944, and 4946

Sampling Timeframe and Pre-Harvest Notification for Industrial Hemp, Notification of
Laboratory Test Report, Final Disposition for Registered Industrial Hemp Crops

INITIAL STATEMENT OF REASONS/

POLICY STATEMENT OVERVIEW

Description of Public Problem, Administration Requirement, or Other Condition or Circumstance
the Regulation is Intended to Address

These regulations are intended to address the duty of the Department of Food and Agriculture to create timeframes, definitions, and procedures for industrial hemp cultivation.

This current rulemaking action will amend the Sampling Timeframe and Pre-Harvest Notification for Industrial Hemp, Notification of Laboratory Test Report, Final Disposition for Registered Industrial Hemp Crops regulations on a permanent basis. The emergency amendment of these regulations became effective on April 9th, 2021. Based on changes to the United States Department of Agriculture (USDA) hemp regulations, the Department is proposing to amend Title 3 of the California Code of Regulations (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 adjust the timeframes for pre-harvest notification and testing for Delta-9-tetrahydrocannabinol (THC) concentration to accommodate this change.

Purpose

The specific purpose of the amendments to CCR Sections 4940, 4944, and 4946 is to 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.

Factual Basis

The factual basis for the determination by the Department that amendment of these regulations is necessary is as follows:

Industrial hemp cultivation was federally authorized through the Federal Agricultural Act of 2014 (2014 Farm Bill) and the 2018 Farm Bill. The United States 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 took effect on March 22, 2021.

Prior to the federal interim final rule, the Department adopted regulations through emergency regulatory action to establish timeframes, procedures, methods, sampling, laboratory testing, and destruction related to industrial hemp cultivation. The emergency regulations required harvest of a compliant hemp crop to be completed within 30 days from the sampling date. The emergency regulations provided the maximum harvest timeframe allowable in accordance with FAC Section 81006(e)(2), which was 15 days. In addition, the emergency regulations adopted the recommendations from the Industrial Hemp Advisory Board, including a 30-day pre-harvest notification timeframe and 10-day laboratory testing window to provide adequate timeframes for sample delivery, sample preparation, sample analysis, and test reporting.

Due to the establishment of the federal interim rule, the Department proposed regulations to amend and permanently adopt regulations through regular rulemaking pertaining to timeframes, procedures, methods, industrial hemp sampling, laboratory testing, and destruction related to industrial hemp cultivation. The regulations complied with state plan requirements outlined in the interim rule, including a 15-day harvest window. The timeframes for pre-harvest notification and laboratory testing were also amended to accommodate for the shortened harvest window. The regulations, including CCR Section 4940, 4944, and 4946 were adopted on January 11, 2021.

The federal final rule now extends harvest requirement to 30 days from the sampling date. Sections 4940, 4944, and 4946 need to be updated to harmonize with the federal harvest timeframe requirements outlined in the final rule to prevent serious harm to the general welfare of the citizens of California. Failure to extend the harvest and other related timeframes will be detrimental to the current 438 registered growers who are cultivating industrial hemp on 13,058 acres.

Without the current emergency regulations, the 15-day post-sample harvest window limitation will most likely result in multiple rounds of resampling and retesting within a short timeframe for California growers, creating a burden for registered growers and a large workload for local county agricultural commissioners. In order to extend the harvest window and avoid interruptions in harvest activities, a California grower would need to work within a narrow time frame. The grower would need to resample nine days after the initial sample collection and two days after receiving the initial laboratory test report to allow sufficient time for sample delivery, sample preparation, sample analysis, and test reporting prior to the end of the first harvest window. Each additional resampling and retesting would only extend the harvest window by eight days.

Without the proposed amendment to the regulation, county agricultural commissioners will be inundated with frequent sampling requests from registered hemp growers. Current regulations require that samples are collected by the commissioner, an USDA-approved sampling agent, or a federal, state, or tribal law enforcement agent authorized by USDA to collect samples. There are currently no USDA-approved sampling agents, or any federal, state, tribal law enforcement agents authorized by USDA to collect samples. Thus, commissioners will be left to meet the demands to conduct all the sample collections, which will negatively impact the commissioners' ability to administer and enforce other program activities.

In addition, the impracticality of the current harvest timeframe requirement may discourage many from partaking in the emerging industry in California. The short harvest timeframe was the issue most commented upon when the Department released the initial draft of CCR Sections 4940, 4944, and 4946 in 2020. 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 due to the need to comply with the federal interim final rule.

According to Vote Hemp, the United States has seen a 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. 511,442 acres were authorized across the U.S. in 2019. Therefore, absent the proposed amendments that make harvesting feasible, California registered growers will be at a competitive disadvantage with growers from other states since California's harvest requirements are more stringent than the national standard set by USDA in the federal final rule.

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, requires the Department 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 regulation provides the necessary regulatory mechanism 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 allow industrial hemp to be legally harvested.

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 one percent. Thus, the Legislature enacted statutes for required testing to confirm that the resulting crops would not qualify as adult-use cannabis under state law (FAC Section 81006). Without the

proposed amendment implementing FAC 81006, California citizens will be disadvantaged due to restrictive testing and sampling requirements that will limit their ability 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 facilitate high-quality industrial hemp production.

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 than the previous six days 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 more advance 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 five days longer than previously allowed for laboratories to prepare and test the samples for THC concentration. This is necessary, because 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.

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 mirror 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.

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 encourage the growth of the industrial hemp industry in California by modifying a requirement that, in some cases, may be onerous in its current form.

The Creation or Elimination of Jobs within the State

Based upon the Economic Impact Analysis, the Department has made an assessment that the proposed regulation would not eliminate jobs within California. The Department has made an assessment that the proposed amendment would likely lead to the creation of new jobs within California.

The Creation of New Businesses or the Elimination of Existing Businesses within the State

Based upon the Economic Impact Analysis, the Department has made an assessment that the proposed regulation would not eliminate existing businesses within California. The Department

has made an assessment that the proposed amendment would likely lead to the creation of new businesses within California.

The Expansion of Businesses Currently Doing Business within the State

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 amendment would likely lead to the creation of would positively affect the expansion of businesses currently doing business within California.

Worker Safety

The amendment of this regulation is not expected to have an effect on worker safety.

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 while facilitating high quality industrial hemp production.

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

The Department of Food and Agriculture has determined that the amendment of Sections 4940, 4944, 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, 4944, 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.

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.

Alternatives Considered

The Department has determined that no reasonable alternative has been identified and brought to the attention of the agency that would be more effective in carrying out the purpose for which the action is proposed, or is as effective and less burdensome to affected private persons than the proposed action, or is as cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Information Relied Upon

The Department relied upon the following studies, reports, and documents in the proposed amendment of Sections 4940, 4944, and 4946:

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

Vote Hemp, 2016, U.S. Hemp Crop Report

Vote Hemp, 2017, U.S. Hemp Crop Report

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

Vote Hemp, 2019, U.S. Hemp Crop Report