
2018 Farm Bill Policy Guide and Model Hemp Production Plan 2020 PART TWO: PROGRAMMATIC CONSIDERATIONS

INTRODUCTION

The *Agriculture Improvement Act of 2018* (the “**2018 Farm Bill**”) was signed into law on December 20, 2018. The 2018 Farm Bill, among other things, removes hemp (including any part of the cannabis plant containing not more than 0.3% delta-9 THC by dry weight), its extracts, derivatives, and cannabinoids from the *Controlled Substances Act of 1970*, and allows for federally-sanctioned hemp production under the purview of the United States Department of Agriculture (the “**USDA**”), in coordination with state departments of agriculture or Tribal governments that elect to have primary regulatory authority. States¹ and Tribal governments can adopt their own regulatory plans, even if more restrictive than federal regulations, so long as the plans meet minimum federal standards and are approved by the USDA. After a State or Tribal government submits its plan, the United States Secretary of Agriculture (“**Secretary**”) has sixty (60) days to approve or disapprove of the plan. USDA issued an interim final rule (“**IFR**”) on October 31, 2019 governing U.S. hemp production. The IFR is effective from October 31, 2019 through November 1, 2021, at which time it will be replaced by a final rule (unless adopted earlier). Since the IFR was published, USDA has begun approving plans. Hemp production in jurisdictions that do not choose to submit their own plans (and that do not otherwise prohibit hemp production) will be governed by USDA regulation. Section 7606 of the *Agricultural Act of 2014* (the “**2014 Farm Bill**”) and the pilot programs adopted thereunder will remain authoritative for states operating under such authority (and who do not have a USDA approved plan under the 2018 Farm Bill) until October 31, 2020 (one (1) year after the USDA adopted rules to regulate hemp production), at which point the 2014 Farm Bill agricultural pilot program authority will be repealed.

This guide is Part Two of an update to the 2018 Farm Bill Policy Guide and Model Hemp Production Plan released on February 28, 2019. Part Two follows Part One released on February 27, 2020, which outlines policy considerations applicable to State regulation of hemp production, and a model hemp production plan intended to promote compliance with the 2018 Farm Bill and IFR minimum plan requirements. This Part Two includes additional considerations to assist States² with creating successful, reasonable, and practical commercial hemp programs. These programmatic recommendations are intended for adoption into State regulation or policy and extend beyond the 2018 Farm Bill and IFR minimum requirements and include processing and transportation considerations. These considerations for State hemp programs are critical to an effective and reasonably regulated commercial state hemp program.

The 2018 Farm Bill Policy Guide and Model Hemp Production Plan 2020 Part One was produced by a coalition of leading hemp stakeholders: the Vicente Sederberg LLP law firm, Vote Hemp, Agricultural Hemp Solutions, the American Herbal Products Association, and the U.S. Hemp Roundtable. For more information, please contact lead author Shawn Hauser (303-860-4501, shawn@vicentesederberg.com)

¹ Consistent with the 2018 Farm Bill, the term “State” is defined herein to include: (A) a state; (B) the District of Columbia; (C) the Commonwealth of Puerto Rico; and (D) any other territory or possession of the United States.

² The additional considerations outlined herein generally apply to Tribal programs, however, Indian Tribes may need to alter specific provisions to suit Tribal needs. Any Indian Tribes interested in utilizing these considerations, please contact the organizations or individuals listed herein for additional guidance.

KEY POLICY POINTS

1. If a Harvest Lot tests over the Acceptable THC Level, the Producer should be entitled to request that the Department retest the Harvest Lot before any disposal is ordered (see section II below).
2. Due to the lack of availability of certified Hemp seed, a state should not require the use of certified or authorized seed (see section III below).
3. A state should explicitly allow for the use of a fully germinated seedling, mature plant, clone, cutting or tissue culture including the transportation of said plant parts from out-of-state into a state (see section III below).
4. The Department of Agriculture should require that all Raw Hemp Materials and Propagative Material in transport be accompanied by specific documentation to ensure that law enforcement is aware that the material is legally grown Hemp (see section IV below and the Sample Transport Manifest at the end of this document).
5. Authority to regulate the manufacture and sale of Hemp Ingredients and/or Hemp Products shall be accorded to the state agency responsible for regulation of the commodity to which the Hemp Ingredient or Hemp Product is most alike (the Regulating Entity). For example, Hemp Products intended for human ingestion should be regulated as food or dietary supplements, and Hemp Products intended for cosmetic use should be regulated as cosmetics (see section V below).

RECOMMENDATIONS AND POLICY CONSIDERATIONS

I. DEFINITIONS

- A. **“Acceptable THC Level”** When a laboratory tests a sample, it must report the Delta-9 THC content concentration level on a dry weight basis and the measurement of uncertainty. The Acceptable Hemp THC Level for the purpose of compliance with the requirements of State, Tribal, or USDA hemp plans is when the application of the measurement of uncertainty to the reported Delta-9 THC content concentration level on a dry weight basis produces a distribution or range that includes 0.3% or less. For example, if the reported Delta-9 THC content concentration level on a dry weight basis is 0.35% and the measurement of uncertainty is $\pm 0.06\%$, the measured Delta-9 THC content concentration level on a dry weight basis for this sample ranges from 0.29% to 0.41%. Because 0.3% is within the distribution or range, the sample is within the Acceptable Hemp THC Level for the purpose of plan compliance.
- B. **“Applicant”** means a Person, or a Person who is authorized to sign for a business entity, who submits an application to participate in the [STATE] Hemp Program.
- C. **“Cannabis”** means a genus of flowering plants in the family Cannabaceae of which *Cannabis sativa* is a species, and *Cannabis indica* and *Cannabis ruderalis* are subspecies thereof. Cannabis refers to any form of the plant in which the delta-9 concentration on a dry-weight basis has not yet been determined.
- D. **“Department”** means the [STATE] Department of Agriculture.
- E. **“Handle”** means to harvest or store Hemp plants or Hemp plant parts prior to the delivery of such plants or plant parts for further Processing, and includes the disposal of Cannabis plants that are not Hemp for purposes of chemical analysis and disposal of such plants.
- F. **“Harvest Lot”** means a quantity of Hemp, of the same variety, harvested in a distinct timeframe that is: (1) Produced in one contiguous production area within a grow site; or (2) Produced in a portion or portions of one contiguous production area within a grow site. Harvest Lot does not include a quantity of Hemp comprised of Hemp grown in noncontiguous production areas.
- G. **“Hemp”** means the plant *Cannabis sativa* L., and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not with a THC concentration of not more than three-tenths of one percent (0.3%) on a dry weight basis, or as otherwise defined in Federal law.

- H. **“Hemp Ingredient”** means an ingredient intended for use in a Hemp Product that is derived from, or made by, Processing Hemp.
- I. **“Hemp Program”** means a Hemp program administered by the Department as described in the Department’s hemp production plan and approved by the USDA.
- J. **“Hemp Product”** means products derived from, or made by, Processing Hemp, or containing one or more Hemp Ingredients. This term includes products intended for human ingestion, topical application, and inhalation.
- K. **“Person”** means a natural person, corporation, foundation, organization, business trust, estate, limited liability company, licensed corporation, trust, partnership, limited liability partnership, association, or other forms of a legal business entity, as well as a state or local government entity.
- L. **“Process”** means to convert any portion of a Hemp crop into a Hemp Ingredient, Hemp Product, or other marketable forms. Typical farm operations such as, but not limited to, harvesting, drying, shucking/bucking, sorting, grading, and baling, are not considered “processing”.
- M. **“Processor”** means a person engaged in Processing Hemp.
- N. **“Produce”** means to grow or cultivate Hemp plants for market.
- O. **“Producer”** means a Person licensed by the Department to Produce Hemp.
- P. **“Production License”** means a license issued by the Department to Produce Hemp.
- Q. **“Propagative Material”** means viable seeds, clones, unrooted and rooted cuttings, and tissue cultures.
- R. **“Raw Hemp Materials”** means unprocessed biomass from the Hemp plant.
- S. **“Registered Land Area”** means a contiguous lot, parcel, or tract of land registered with the Department on which a licensee Produces Hemp. A Registered Land Area may include land and buildings that are not used to Produce Hemp.
- T. **“Regulating Entity”** means the [STATE] agency responsible for regulation of the [MANUFACTURING AND/OR SALE] of Hemp Products and Hemp Ingredients.

II. **DEPARTMENT OPERATIONAL CONSIDERATIONS**

- A. **Staff and Department Resources**: The Department should ensure that it has appropriate funding and staffing to support the Hemp Program. The following Hemp Program staffing needs and resources should be considered:

- (1) Whether existing employees will have to be re-allocated and/or be retrained to ensure compliance with the Hemp Program and federal requirements; and/or
- (2) Whether the Department may need to request additional funds or institute user fees to hire new full-time employees and/or seasonal employees to ensure that all applications, inspections, and sampling timeframes can be met.

B. Fee Setting: The Department should consider the following regarding necessary and appropriate fees when creating a Hemp Program:

- (1) Fees should be reasonably calculated to not exceed the cost of administering and enforcing the Hemp Program;
- (2) The Department may require that each Applicant submit an application fee along with an application;
- (3) The Department may set and collect additional fees, including license, renewal, and testing fees, in amounts that are reasonable and necessary to cover the costs of administering and enforcing the Hemp Program;
- (4) Application fees should not cover or include the cost of obtaining and submitting a criminal background check report; and
- (5) All fees should be reasonable and should not unduly burden farmers who, as a result of the IFR, have increased testing, compliance and other costs.

C. Due Process: The Department should ensure that each Applicant or Producer receives adequate due process regarding the denial of an application or license renewal, suspension or revocation of a license, or findings of a violation of the Hemp Program. The following should be considered when drafting provisions related to appealing Department decisions:

- (1) Applicants should be entitled to appeal if the Department denies an application or renewal, suspends or revokes a license, or finds that there has been a negligent violation;
- (2) The Department should ensure that the appeal process follows the requirements in the [STATE] administrative procedure act;
- (3) The Department should ensure that appeals are processed expeditiously and given the highest Department priority; and
- (4) If a Harvest Lot tests over the Acceptable THC Level, the Producer should be entitled to request that the Department retest the Harvest Lot before any disposal is ordered.

D. Data Management: The following data management considerations should be taken into account:

- (1) A digital application portal that makes data collection and transmission more efficient;
- (2) If applications and reports are not collected in digital form, all applications should be scanned and stored on a computer;
- (3) Data storage methods should be capable of storing a large amount of data, backed up regularly, and easy to update; and
- (4) Data management systems should be capable of easily retrieving and producing records when required or requested by the public, USDA, or law enforcement.

E. Interagency Considerations: The following interagency considerations should be taken in account when creating a Hemp Program:

- (1) Collaboration and information sharing between the various agencies responsible for regulation over different segments of the Hemp supply chain;
- (2) The location of Registered Land Areas should be reported to law enforcement agencies to allow them to distinguish these areas as legal Hemp Production locations;
- (3) The appropriate Regulating Entities should have primary regulatory authority over Hemp Products and Hemp Ingredients. For example, Hemp Products intended for human ingestion should be regulated as food or dietary supplements, and Hemp Products intended for cosmetic use should be regulated as cosmetics (see section V below);
- (4) The Department, in conjunction with law enforcement agencies, should develop resources, guidelines, and establish training for law enforcement officers on Hemp identification and differentiation from marijuana; and
- (5) The Department should consult with law enforcement when developing documents required to accompany Raw Hemp Materials and Propagative Material in transport (see section IV below).

III. DEPARTMENT PROGRAMMATIC CONSIDERATIONS

A. License, Registration, or Endorsement: The Department may choose to issue licenses, registrations or endorsements for the following:

- (1) Handler;
- (2) Storage/warehouse
- (3) Processor; or
- (4) Research.

B. Seed Certification: Voluntary seed certification or authorization programs within the Hemp Program provide Producers certainty and flexibility. The following should be considered:

- (1) Due to the lack of availability of certified Hemp seed, a seed certification or authorization program should not require that Producers use certified seed;
- (2) Establish or incorporate Hemp into a voluntary domestic seed certification program, including an optional state licensing and/or registration program for seed breeders through institutions of higher education, and pursuant to the certification program established by the Association of Official Seed Certifying Agencies;
- (3) The Department should explicitly allow for the use of a fully germinated seedling, mature plant, clone, cutting or tissue culture including the transportation of said plant parts from out-of-state into State; and
- (4) Any seed certification program or authorized seed list should be created as soon as possible, but definitely well before planting season so that Producers have access to the program or list with enough time to order and receive seeds, and will need to be updated regularly as new varieties are developed and certified or authorized for use.

C. Land Use: The following land use considerations should be taken into account when creating a Hemp Program:

- (1) Agricultural tax exemption laws and programs should be amended to explicitly include Hemp as an agricultural crop;
- (2) The Department should ensure that any right to farm laws that protect farmers from nuisance lawsuits or similar protections are extended to Hemp Producers;

- (3) Department grants and conservation programs should be amended to allow Hemp to qualify as an eligible land use and/or agricultural activity; and
- (4) If the Department chooses to include zoning or setback requirements within a Hemp Program, it should ensure that requirements do not limit the geographical area in which Hemp may be Produced more than it is limited for traditional crops.

IV. INTERSTATE TRANSPORT CONSIDERATIONS

- A. Legal Protections: Legal protections should be provided for the transport of Hemp, inclusive of Raw Hemp Materials, Hemp Ingredients, and Hemp Products in compliance with Federal law.³
- B. Law Enforcement Resources: The Department, in conjunction with law enforcement agencies, should develop resources, guidelines, and, establish training for law enforcement officers on Hemp identification and differentiation from marijuana.
- C. Required Documentation for Raw Hemp Materials and Propagative Material: The Department should require that all Raw Hemp Materials and Propagative Material transported using public roads be accompanied by specific documentation to ensure that law enforcement is aware that the material is lawful Hemp. The following documentation should be considered:
 - (1) A uniform bill of lading or travel manifest that contains the destination for the Raw Hemp Materials or Propagative Material and the Producer's information, including the license number, and identifying information for each Harvest Lot in transport that can be matched with the Harvest Lot number on the lab report (see the Sample Bill of Lading at the end of this document);
 - (2) Lab reports for each Harvest Lot in transport that confirms the Raw Hemp Materials or Propagative Material has tested within the Acceptable THC Level;
 - (3) A copy of the Hemp Producer License that corresponds to the Registered Land Area from which the Raw Hemp Materials or Propagative Material originated;
 - (4) Phytosanitary certificates for Propagative Material to mitigate risk of such material introducing invasive pests, plant disease, and/or weeds;⁴ and

³ No State or Indian Tribe may prohibit the transportation or shipment of hemp or hemp products lawfully produced under an approved State or Tribal plan, under a license issued by USDA, or under 7 U.S.C. 5940 through the State or territory of the Indian Tribe. *See* 7 CFR 990.63.

⁴ States that are particularly concerned with the introduction of pests and diseases should consider phytosanitary certificates.

- (5) A chain of custody transcript.

D. Requirements for Imports of Raw Hemp Materials and Propagative Material from Out of State: The Department should consider the following when drafting requirements for importation of Raw Hemp Materials or Propagative Material into the state:

- (1) Phytosanitary certificates issued in the jurisdiction or origin should be required to ensure imported Propagative Material does not introduce pests, plant disease, and/or weeds;
- (2) Existing laws, regulations and/or policies that specify the permitted varieties or cultivars of Hemp that can be grown in the state; and
- (3) The ability to mitigate the risks of fraud and forgery.

E. Requirements for Exporting Raw Hemp Materials and/or Propagative Material Out of the State: The Department should consider the following when drafting requirements for exportation of Raw Hemp Materials or Propagative Material out of the state:

- (1) Phytosanitary inspections and certifications for exported material should be required to ensure and document that exported Propagative Material is free of insects, nematodes, plant diseases and/or weeds.
- (2) The sale and/or transport of Raw Hemp Materials to businesses located outside of the state should not be prohibited or restricted.

V. **REGULATING ENTITY, PRODUCT REGULATION AND CONSUMER HEALTH CONSIDERATIONS**

A. Regulating Entity: Authority to regulate the manufacture and sale of Hemp Ingredients and/or Hemp Products shall be accorded to the state agency responsible for regulation of the commodity to which the Hemp Ingredient or Hemp Product is most alike (the Regulating Entity). For example, Hemp Products intended for human ingestion should be regulated as food or dietary supplements, and Hemp Products intended for cosmetic use should be regulated as cosmetics. Any regulations adopted by the Department and such other agencies must, at a minimum reflect the following principles:

- (1) Allow phytocannabinoids, terpenes, and other plant compounds to be extracted from Hemp pursuant to federal and state-mandated manufacturing requirements applicable to the intended finished-product-type to ensure such products are adequately tested and regulated.
- (2) The Department should ensure that inclusion of Hemp Ingredients in a Hemp Product shall not by itself render the Hemp Product misbranded or adulterated;
- (3) The Regulating Entity should make available any and all customary authorizations to any Person that Produces or Processes Hemp;

- (4) Retailers of Hemp Products should be provided fair notice of potential violations, as well as due process and opportunities to cure violations if made unintentionally or negligently before a product embargo, stop-sale, cease-and-desist, or similar order is issued; and
 - (5) The Regulating Entity should require that all manufacturers producing hemp-derived food, dietary supplements, and/or cosmetics comply with all generally applicable Federal laws for these product categories.
- B. Labeling Requirements:** The Regulating Entity should require that Hemp Products intended for ingestion or topical application be labeled in accordance with federal labeling requirements for the specific product type.

Sample Transport Manifest

[Remainder of page intentionally left blank]

[STATE] HEMP BILL OF LADING

Pursuant to the [STATE HEMP LAWS AND REGULATIONS]:

- All hemp in [STATE] being transported by a person other than a licensee must be transported with the information contained on this form as well as a copy of the certificate of analysis pertaining to the lot(s) of hemp being transported or other documentation affirming the hemp was produced in compliance with the 2018 Farm Bill.

NAME OF TRANSPORTER:	
NAME OF ORIGINATING PERSON/BUSINESS:	NAME OF RECEIVING PERSON/BUSINESS:
LICENSE NUMBER OF ORIGINATING PERSON/BUSINESS:	LICENSE NUMBER OF RECEIVING PERSON/BUSINESS:
ADDRESS OF ORIGINATING PERSON/BUSINESS:	ADDRESS OF RECEIVING PERSON/BUSINESS:
APPROXIMATE QUANTITY OF HEMP BEING TRANSPORTED:	
HEMP LOT NUMBERS:	
_____	_____
_____	_____
_____	_____
_____	_____

I hereby attest that the information provided on this form is true, complete, and accurate.

SIGNATURE OF LICENSEE OR DESIGNATED REPRESENTATIVE:

Signature

Date of Signature

Printed Name