January 28, 2020

Docket Clerk
Marketing Order and Agreement Division
Specialty Crops Program, AMS, USDA
1400 Independence Ave. SW, STOP 0237
Washington, DC 20250-0237

RE: Comments on the Establishment of a Domestic Hemp Production Program
Fed. Reg. Doc 2019-23749, 84 Fed. Reg. 58522 (October 31, 2019).
Fed. Reg. Doc. 2019-27245, 84 Fed. Reg. 69295 (December 18, 2019)

Beginning in 2018, businesses and consumers in the State of Wisconsin have embraced the emergence of a new hemp industry in our state in ways that have shattered expectations. No other state in the country had such robust participation in their inaugural hemp season. The Wisconsin Department of Agriculture, Trade, and Consumer Protection licensed 250 growers and more than 100 processors in 2018, beginning only a few months after legislative action creating the program. In the second year, Wisconsin saw a six-fold increase in applications for licensure. Interest does not appear to be waning in the program for 2020.

After passage of the 2018 Farm Bill, hopes were extremely high for the future of this industry and the opportunities it would create for a wide variety of businesses. However, the interim rule issued by the U.S. Department of Agriculture (USDA) created significant concern among our organizations and others who want to see this industry succeed. This rule does not stop at creating a coordination structure for this industry at the federal level, as anticipated under the Farm Bill, but instead effectively takes over hemp regulation in almost all aspects. Under this rule, the states and Tribal governments that would like to obtain approval to administer hemp programs in their jurisdictions are not provided the

opportunity to do so. Instead, the rule offers them only the opportunity to act as agents of USDA and provides very little meaningful opportunity for state or Tribal programs to be crafted in a manner that works for the state or Tribe.

Specifically, the rule will likely be harmful to this industry in the following ways (references to specific rule provisions are provided where relevant).

1. **Reconditioning**. This interim rule significantly disadvantages growers located in states that do not allow the sale of medical or recreational cannabis. In those states, growers can produce high THC (and high CBD) cannabis *without federal enforcement*, extract the CBD, and inject that product into the hemp-derived CBD market. No effective system exists to track the source of CBD products. In states without medical or recreational cannabis programs, the USDA will *destroy any hemp crop* that exceeds 0.3% THC, with no opportunity to use such crops for non-consumptive beneficial use or to recondition the crop so that it meets the required THC threshold. The legal reason behind destruction of a hemp crop that exceeds the required THC threshold is that the crop is "marijuana" and cannot be possessed. Sure, destruction is one option, but so should be removal of the portions of the plants that contain the highest THC concentration, while salvaging the remainder. This change would, in a small but important way, help to offset the advantage of states that allow production of high THC cannabis.

2. **0.3% THC Calculation**. The regulatory standard across the country has been to calculate the THC in hemp by rounding the total THC concentration down to one decimal place. This means that hemp that does not cross the 0.4% THC threshold is considered compliant. This is very defensible from a legal standpoint and hemp genetics have been developed with this target in mind. The USDA's choice to not follow the state-developed standard in calculating THC concentration will have significant negative impacts on this industry.

3. **Sample and Harvest Timing**. Under § 990.3(a)(2)(i) and 990.24(a), a state, federal, local, or tribal law enforcement agency or other state, fed, or tribal-designated person must collect the compliance sample from a hemp crop within 15 days of the grower's anticipated harvest commencement date. Section 990.3(a)(2)(v) and 990.24(e) provide that a producer shall not harvest the cannabis crop prior to samples being taken. The comments section in the rule specifies that a second sample must be taken prior to harvest if the crop is not harvested within 15 days of sample collection [p. 58524]. However, in the actual text of the rule, this 15-day harvest requirement only applies to a producer under a USDA license, not to a producer under a state or Tribal program license [§ 990.26(a) and (b)]. Even though this is not a requirement in the rule, will this also be something the USDA expects in state or Tribal plans? After subtracting the time it takes to get a sample tested and the data reported to the grower, this is a very short window for people to complete harvest. Our two years of experience

in Wisconsin has shown that hemp is a difficult and time-consuming plant to harvest, and weather can have significant impacts on harvest timing. This rule will simply not provide growers with enough time to harvest their hemp crops. [See also the "sampling guidelines for hemp growing facilities" document produced by USDA states in Purpose #2 that "Hemp producers may not harvest hemp prior to the hemp being sampled and tested for THC concentration."]

4. **Definition of a "Lot" for Sampling**. The USDA's sampling guidelines for hemp growing facilities document, in Summary of Practice #2, provides that a separate THC concentration sample must be taken from each "lot" that will be "sold to a single buyer at a single time." It is not an exaggeration to say that this would be impossible to implement. Some producers process their own hemp and make and sell retail products. Most producers hold on to at least part of their crop to sell as markets dictate, and in widely varying batch sizes for which they have no information at harvest time. Producers simply will not know what will be sold where at the time of compliance testing.

5. **Flower Sampling**. Sections 990.3(a)(2)(i), 990.24(b), and 990.25(a) provide that a sample must be taken from the "flower material" of a hemp plant. This may be effective for hemp crops that are allowed to flower. However, some strains of hemp grown for purposes other than CBD oil extraction may be harvested prior to flowering (including some varieties grown for their fiber). Also, many growers use small "clones" or seedlings to start their crops, which they purchase from other parties. These immature plants will have no flower material to test. What will the USDA require for testing when flowers are not present in sampled hemp?

6. **Definition of Negligence**. Sections 990.6(b)(3) and 990.29(a)(3) in the rule violate the law and are outside of the scope of the agency's authority. These rule sections specify that a producer that grows cannabis that contains a THC concentration of 0.5% or more is negligent as a matter of law, regardless of whether the person made all reasonable effort to not grow cannabis with a THC concentration above 0.3% This requirement is directly contradictory of the enforcement limitations contained in the 2018 farm bill. "Negligence" is a well-established legal doctrine and the USDA may not go against the intent of Congress by artificially and arbitrarily declaring a THC threshold for negligence. Even the USDA's own definition of "negligence" in this rule recognizes the appropriate usage of this term [p. 58556].

7. **Re-Testing**. Section 990.26(f) provides that "[a]ny producer may request additional testing if it is believed that the original delta-9 tetrahydrocannabinol concentration level test results were in error." This applies to USDA licensees. There is no similar provision relating to licensees under state or Federal plans. In fact, § 990.990.3(a)(3)(i) at least implies that re-testing under state/Federal plans would not be allowed because after a test shows THC concentration above 0.3% the hemp "may not

be further handled, processed or enter the stream of commerce and the producer shall ensure the lot is disposed of in accordance with § 990.27." The rule must be clarified to provide that re-testing is allowable not only for USDA licensees, but also for state/Tribal licensees.

8. **Crop Destruction Personnel**. Sections 990.3(a)(3)(iii)(E) and 990.27(a) require destruction of a hemp crop that is over 0.3% by a person authorized under the Controlled Substances Act to handle marijuana, such as a DEA-registered reverse distributor or a duly authorized fed, state, or local law enforcement officer. This requirement is significant overkill and is unnecessary to accomplish the goals of the program. See also our comment above regarding "reconditioning."

9. **Lab Registration**. Requiring DEA registration of labs that will perform compliance testing is unnecessarily heavy-handed and will result in a shortage of available testing options to meet the USDA's extremely tight testing/harvest timelines. All accredited labs should be eligible to perform compliance testing. The possible additional requirement for lab approval by USDA is also unnecessary. We have heard from well-established labs that they are not interested in performing compliance testing if it requires DEA registration; instead, they will perform other testing services for hemp growers. If there are not enough willing labs to perform compliance testing, prices will skyrocket, deadlines will be missed, and a cornerstone of the USDA's proposed regulatory system will be missing.

10. **Timing of Revocation**. Section 990.4(e) allows a producer to continue under a state or Tribal plan even if that plan is revoked, but only for the remainder of the calendar year. This would be very challenging if the plan approval for a state or Tribe was revoked late in the year. We recommend a minimum of at least 90 days as a grace period in this circumstance.

11. **Hemp Storage**. Section 990.21(a)(1) specifies that a person may not "store" hemp without a USDA license in a jurisdiction where a state or Tribal plan is not in place. Many people will purchase hemp to process, sell, or use under the hemp legal system, all of whom will "store" hemp and none of whom is required to be licensed under this law. If it is intended here that this requirement for licensure apply to people who produce *and* store hemp, this should be clarified. Otherwise, references to "storing" hemp should be eliminated from this provision. See also the reference to "storage" in § 990.21(c).

12. **Multiple Licenses**. Section 990.22(c) provides that a person may have more than one USDA license to grow hemp if the person is producing hemp in more than one location. Does this mean that a person must get a separate USDA license for each location? How is "location" defined? Will two fields in the jurisdiction require two

licenses? What about two fields with different hemp strains? Whatever the answer here, is this also an expectation for state or Tribal plans?

After the passage of the 2018 Farm Bill, our state and many others were excited to move forward as quickly as possible with USDA approval of our programs. After seeing this interim rule, Wisconsin and other states have slammed on the brakes. We are holding back in hopes that this rule will be modified to give meaningful control to the states and Tribes over their hemp programs, in a manner that will actually help this emerging industry and not strangle it. Most importantly, if changes are not made to this rule states may simply walk away from this issue and let the USDA administer producer licensure in their jurisdictions.

We believe that modifying the interim rule to, at a minimum, accomplish what we have outlined above is critical for this industry and for the USDA to comply with the letter and intent of the 2018 Farm Bill.

Wisconsin Hemp Alliance
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Wisconsin Farm Bureau Federation
Wisconsin Farmers Union

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