

Industrial Hemp White Paper

Executive Summary

The Agriculture Improvement Act of 2018 (2018 Farm Bill), paved the way for industrial hemp to be grown not just by “established agricultural research institutions” (EARIs) but by citizens seeking to enter the industrial hemp industry. Although the Farm Bill allows industrial hemp production, there are important regulations at the State level that must be put in place before an individual or company (other than an EARI) can legally grow industrial hemp. For instance, County registration with the agricultural commissioner to grow industrial hemp is allowed as of January 1, 2019 but the regulations laying out the specifics have not been approved. Also needed are the regulations describing the testing and sampling procedures which are required before a crop can be legally harvested. (Ref. No. 2)

Absent completed regulations, some counties have chosen to place a temporary emergency moratorium on industrial hemp production until reasonable regulations are in place. Among their concerns, counties sight the definition of an EARI is not clearly defined and could allow industrial hemp growers to claim exemption from regulations using educational institutions with questionable credentials.

Until more regulations are approved, it is unclear at this time what the status would be for a crop that is planted prior to the approval of regulations governing the testing and sampling procedures that growers must follow to harvest their crop.

Absent a moratorium, county agricultural commissioners will be required by state law to register industrial hemp growers and seed breeders once the registration regulations are approved, which could be as early as spring of 2019. (Ref. No. 6)

Background

The Federal Agricultural Act of 2014 (2014 Farm Bill) established that an institution of higher education (see EARI definition) may grow or cultivate industrial hemp for purposes of agricultural or academic research if the cultivating of industrial hemp is allowed under the laws of the State in which such institution is located. Hemp remained classified as a Schedule 1 drug under the Federal Controlled Substance Act. (Ref No. 1)

The California Industrial Hemp Farming Act (Senate Bill 566, Chapter 398, Statutes of 2013) authorized the commercial production of industrial hemp and provided for the registration of growers. The bill also established general requirements for registration, required testing and sampling industrial hemp before it could be harvested, excluded industrial hemp from the definition of marijuana, set the maximum tetrahydrocannabinol (THC) level for hemp at .3%, restricted growing patterns, the purposes (grain and fiber) for which hemp could be grown and excluded EARIs from THC limitations and county registration. This law was inoperative unless federal laws allowed industrial hemp production. The passage of Proposition 64, November 2016 removed the inoperative statement making the Act effective January 1, 2017. (Ref No. 3, 4)

Although the cultivation of industrial hemp was allowed under Federal and State law, research did not take off in any significant way in California with EARIs, partly out of concern that it might jeopardize their federal funding. Also, regulations needed to govern industrial hemp production and marketing had not been put in place which caused a lot of uncertainty and hesitation for those wanting to participate in this new industry.

Some counties have placed temporary and emergency moratoriums on industrial hemp production until the adoption of reasonable state regulations. Concerns include, threats to existing agricultural industry, creation of a public nuisance, the lack of a clear definition of an EARI which could allow hemp growers to claim exemption from regulations by working with educational institutions with questionable credentials, and law enforcements inability to investigate each EARI to ensure it is not growing cannabis. Current law allows an EARI to cultivate or possess industrial hemp with a THC level above .3%, causing such plant to no longer conform to the legal definition of industrial hemp, thereby resulting in such "research" plants constituting cannabis.

Agricultural Commissioners have been approached by companies seeking information and/or support for growing hemp. Although, individuals have made statements they are working with an EARIs, few have provided records that confirm they are indeed approved or contracted to work with such an institute. Without clarity from the state as to what qualifies as an EARI, or a moratorium on hemp production, it might be difficult to prohibit the production of industrial hemp in conjunction with an "EARI".

Recent changes

Senate Bill 1409

Senate Bill 1409 was approved by the Governor on September 30, 2018 and went into effect on January 1, 2019. This bill expands industrial hemp cultivation in CA, and the California Department of Food and Agriculture (CDFA) is working on the fees and process for the new registration requirements. All growers of industrial hemp for commercial purposes must register with the county agricultural commissioner prior to cultivation. Registration is not yet available. The fees and process for registration have been developed by CDFA and are currently under review for submittal to the Office of Administrative Law.

The bill provides requirements for sampling and testing of THC level and requires a laboratory test report on the sample to be issued by a department-approved laboratory and would require the sample to be tested using a department-approved testing method.

The bill deleted the requirement that an application for registration include information about whether a seed cultivar is being grown for its grain or fiber, or as a dual-purpose crop.

This bill authorized the CDFA, as part of the industrial hemp registration program, to establish and carry out, by regulation, an Industrial Hemp Agricultural Pilot Program. CDFA has developed an outline for an Industrial Hemp Agricultural Pilot Program that will ultimately need to receive approval from the United States Department of Agriculture (USDA).

SB 1409 also removed certain limitations, including a requirement that industrial hemp be grown as a densely planted fiber or oilseed crop.

It established that EARIs are exempt from registration but are required to provide the Global Positioning System coordinates of the planned cultivation site to the agricultural commissioner of the county in which the site is located.

SB1409 further amends Health and Safety 11018.5 to clarify that the legislative intent is to remove barriers to the cultivation of industrial hemp as an agricultural product or for academic research.

Additionally, SB 1409 allows the board of supervisors of a county to establish reasonable fees, in an amount necessary to cover the actual costs of the County Agricultural Commissioner to implement, administer, and enforce the provisions pertaining to industrial hemp.

SB 1409 does not address Counties allowing or not allowing industrial hemp cultivation. It does state in FAC 81003 (b): If the commissioner determines that the requirements for registration pursuant to this division are met, the commissioner shall issue a registration to the applicant.

2018 Farm Bill

The 2018 Farm Bill was signed into law by the President on December 20, 2018. The 2018 Farm Bill included provisions regarding the cultivation, shipment, and sale of industrial hemp. It exempts “hemp” from the definition of marijuana under the Federal Controlled Substances Act and defines hemp as an agricultural commodity. Industrial hemp will be eligible for crop insurance protection like many other agricultural commodities.

The USDA is responsible for providing regulatory guidelines to the States regarding hemp production, sampling and testing etc. CDFA will need to submit a California Industrial Hemp Program plan to the USDA for ultimate approval. As such, California’s final program (laws/regulations) must be in line with all federal requirements. Meanwhile, CDFA intends to move forward with developing regulations and the Calif. Industrial Hemp Program Plan because it is expected that the federal regulations/guidelines may take some time.

Federal and State law requires that any hemp commodity introduced into the marketplace must be tested for THC levels. Since those provisions of the regulations have not been worked out there is no guarantee that a grower would be allowed to harvest a crop absent a legal lab test.

The farm bill allows a state to have more stringent laws than the Federal law, but the definition of hemp may not be altered. There are no references to County regulations.
(Ref. No. 2)

What is Being Worked Out

Registration:

It appears that the entire CA regulation package will be completed in several legislative packages over a period of time. The registration regulation is the first piece and the remaining regulations will be in subsequent rulemaking packages that will be published later this year by CDFA.

Procedures:

Some of the issues yet to be worked out in regulation are sampling and testing procedures, enforcement authority and destruction of a commodity exceeding the maximum allowable THC level of .3%.

CDFA/CACASA MOU:

A Memorandum of Understanding (MOU) with the California Agricultural Commissioners and Sealer Association (CACASA) is being worked out regarding collection of registration fees and reimbursements to County Agricultural Commissioners for administration and inspection costs.

CDFA anticipates the draft MOU to be distributed to the Industrial Hemp Working Group in January 2019. CDFA will enter into a MOU with the CACASA that will define the enforcement and administration responsibilities of CDFA and the commissioners, and the method for reimbursement of county costs.

Pilot Program

CDFA has developed an outline for an Industrial Hemp Agricultural Pilot Program. They continue to develop the pilot program that will ultimately need to receive USDA approval.

Established Agricultural Research Institutions (EARIs)

CDFA is also developing regulations towards a more refined definition for “established agricultural research institution” and other activities needed for county industrial hemp registration activities. There is no current estimated time frame for the future regulations.

Farm Bill Compliant State Program

Current law and all future approved and proposed regulations will be what is ultimately submitted by CDFA to USDA for consideration and authorization for the California Industrial Hemp Program. USDA still needs to develop regulations for implementation of the federal program. Kentucky has already submitted their proposal to the USDA Secretary for consideration.

Status - Cultivation and Importation

Cannabis is defined in California Business and Professions Code (BPC) Section 26001(f). The BPC Section 26001(f) definition explicitly states that cannabis does not include industrial hemp. Food and Agricultural Code, Division 24 provides for the cultivation of industrial hemp by registered growers and EARIs.

All growers of industrial hemp for commercial purposes must register with the county agricultural commissioner prior to cultivation. Registration is not yet available. There is no state registration to grow industrial hemp. However, the fees and process for registration have been developed and further regulations pertaining to cultivation will need to be developed by CDFA. CDFA will consider recommendations from the Industrial Hemp Advisory Board. These regulations will be promulgated through the regular rulemaking process in accordance with the California Administrative Procedure Act.

California law does not provide for cultivation of industrial hemp for personal use like the Adult Use of Marijuana Act provides for cannabis.

The 2018 Farm Bill, effective January 1, 2019, removed industrial hemp from Schedule I of the Federal Controlled Substances Act. Thus, hemp is no longer federally regulated as a controlled substance. California law does not currently have any restrictions specific to the importation of industrial hemp seed/plants or unprocessed hemp material into California. Hemp material imported into the state must meet all plant pest quarantines and may be subject to an agricultural inspection for plant pests. Many processed hemp materials may also move freely in accordance with federal law.
(Ref. No. 8)

Status - Food Products

In California, the California Department of Public Health (CDPH) Manufactured Cannabis Safety Branch (MCSB) regulates medicinal and adult-use manufactured cannabis products. However, food products derived from industrial hemp are not covered by MCSB regulations. Instead, these products fall under the jurisdiction of CDPH-Food and Drug Branch (FDB).

Seeds derived from industrial hemp, industrial hemp seed oil or hemp seed oil derived from industrial hemp will be allowed in food (without any claim for health benefits).

The following will NOT be allowed in food:

- Any CBD products derived from cannabis
- Any CBD products including CBD oil derived from industrial hemp
- Hemp oil that is not derived from industrial hemp seeds
- Industrial hemp seed oil enhanced with CBD or other cannabinoids

In California, foods containing industrial hemp are not considered cannabis products (products that are subject to Proposition 64). Per the FDA, CBD is an unapproved food additive and NOT allowed for use in human and animal foods and thus it is not approved in California.

There is currently no regulatory agency that provides oversight over the production of CBD oil from industrial hemp. However, CDPH-FDB has authority oversight over food additives, dietary use products, food labeling, and good manufacturing practices for food. Industrial hemp used as a food additive or dietary supplement falls under the authority of CDPH-FDB.

(Ref. No. 9)

Counties with No Industrial Hemp Ordinances

Once the hemp registration regulations are approved, existing State law says that County Agricultural Commissioners shall issue a registration to a hemp grower if they meet the requirements of the industrial hemp law. (Ref. No. 3, 4)

Considerations if a County Wants to Prohibit Industrial Hemp Production

Enact a temporary moratorium to prohibit commercial hemp production for a specific duration of time until state regulations are in place and the state receives federal approval of its pilot program. It would probably be a one-year moratorium.

Considerations if County Wants to Allow Industrial Hemp Production

The county might consider placing restrictions, parameters and additional requirements beyond what it spelled out specifically in California and Federal law. For instance, the County might consider restricting growing to certain areas, require buffers, prohibit growing near certain sensitive areas such as school sites, limiting acreage size, only allowing indoor production or only allowing growing for fiber and non-human and animal consumption (not sure how the latter could be enforced or if it would be legal for such restrictions).

The county might also postpone any decision until the MOU between CDFA and County Agricultural Commissioners is developed and agreed upon, possibly in March or April 2019 but it may be longer. CDFA seems to support a county's right to delay registration until there is clarity and agreement on what CDFA is asking agricultural commissioners to do besides registration of growers.

The County could choose to do nothing and address issues as they arise on a case by case basis. This approach may lead to commercial cannabis growers claiming hemp exemptions for their illegal cultivation.

Agricultural Commissioner's Role

Accept, evaluate and approve or deny registration application information from industrial hemp growers and seed breeders (EARI are exempt from registration).

Receive and evaluate GPS coordinates of the planned cultivation sites of EARI, growers and seed breeders.

Transmit registration information and fees to the state (CDFA)

Agricultural Commissioners may be asked to take samples or oversee the collection of samples to ensure adherence with maximum .3% THC level

CACs may establish inspection fees via approval of the Board of Supervisors above and beyond the registration fee to cover work required of the commissioner.

Agricultural Commissioner's Concerns

The California Department of Food and Agriculture is moving deliberately in developing accompanying regulations. Absent these regulations, there is no clarity regarding many significant items of concern including:

1. What are the requirements for the end product generated by EARIs that may exceed the .3% THC limit?
2. Beyond collecting a registration fee and location information, what additional workload will be required of the county agricultural commissioner?
3. What entity is responsible for conducting and overseeing THC testing?
4. What are the protocols for THC testing?
5. What entity is responsible for overseeing crop destruction for non-compliant cultivation (failed THC tests)?
6. Beyond "the registrant shall destroy", what authority does the county have to ensure or require that this crop destruction is carried out?
7. Potential nuisance odor complaints similar to cannabis.
8. Beyond a registration with the agricultural commissioner, what ability does the county have to enact land use requirements to reduce conflict and ensure neighborhood health and safety? As an agricultural product, there is no limit on the acreage for hemp.
9. What agency is responsible for ensuring that the requirements of FAC 81006 (Industrial Hemp) provisions are followed?

References

1. The Agricultural Act of 2014 ("2014 Farm Bill")
2. The Agriculture Improvement Act of 2018 ("2018 Farm Bill")
3. California Senate Bill 1409, Industrial Hemp, approved September 30, 2018
4. The California Industrial Hemp Farming Act (Senate Bill 566, Chapter 398, Statutes of 2013) Effective Date: January 1, 2017
5. Adult Use of Marijuana Act (Proposition 64, November 2016)
6. California Food and Agricultural Code Division 24, Industrial Hemp
7. Adult Use of Marijuana Act (Proposition 64, November 2016)
8. California Department of Food and Agriculture FAQ, California Industrial Hemp Program, <https://www.cdfa.ca.gov/plant/industrialhemp/faq.html>
9. California Department of Public Health • Food and Drug Branch, FAQ – Industrial Hemp and Cannabidiol (CBD) in Food Products, Revised July 6, 2018 <https://www.cdph.ca.gov/Programs/CEH/DFDCS/CDPH%20Document%20Library/FDB/FoodSafetyProgram/HEMP/Web%20template%20for%20FSS%20Rounded%20-%20Final.pdf>
10. California Department of Food and Agriculture, INDUSTRIAL HEMP ADVISORY No. 01-2019, Guidelines on Enforcement of California Food and Agricultural Code Section 81011, Dated January 11, 2019

Definitions

Industrial hemp - According to California Health and Safety Code (HSC) Section 11018.5: "Industrial hemp" means a crop that is limited to types of the plant *Cannabis sativa* L. having no more than three-tenths of 1 percent tetrahydrocannabinol (THC) contained in the dried flowering tops, whether growing or not; the seeds of the plant; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin produced therefrom.

California Food and Agricultural Code (FAC) Section 81000(d) adopts the HSC Section 11018.5 definition of "industrial hemp."

Established agricultural research institution - Under California Food and Agricultural Code (FAC) Section 81000(c): "Established agricultural research institution" means any institution that is either:
(1) A public or private institution or organization that maintains land or facilities for agricultural research, including colleges, universities, agricultural research centers, and conservation research centers; or
(2) An institution of higher education (as defined in Section 1001 of the Higher Education Act of 1965 (20 U.S.C. 1001)) that grows, cultivates or manufactures industrial hemp for purposes of research conducted under an agricultural pilot program or other agricultural or academic research.

Food - California Health & Safety Code section 109935 defines "food" as follows:

- (a) Any article used or intended for use for food, drink, confection, condiment, or chewing gum by man or other animal.
- (b) Any article used or intended for use as a component of any article designated in subdivision (a).

[The definition of food includes pet food but does not include products containing cannabis (which are, instead, cannabis edibles). Meat, dairy, poultry or eggs are regulated by the California Department of Food and Agriculture (CDFA)].