

# United States Senate

WASHINGTON, DC 20510

July 29, 2020

The Honorable Sonny Perdue  
Secretary, United States Department of Agriculture  
1400 Independence Ave. SW  
Washington, DC 20250

Dear Secretary Purdue:

As authors of the Hemp Farming Act of 2018 that was included in the Agriculture Improvement Act of 2018 (2018 Farm Bill), we were pleased to see the United States Department of Agriculture (USDA) announce in February it will use enforcement discretion to delay enforcement of the requirement to use laboratories registered with the Drug Enforcement Administration (DEA) for testing (7 C.F.R §§ 990.3(a)(3)(i) and 990.26(e)) and the requirement that producers use a DEA-registered reverse distributor or law enforcement to dispose of non-compliant plants (7 C.F.R. §§ 990.3(a)(3)(iii)(E) and 990.27) until October 31, 2021 or until final rules are published.

We appreciate that USDA has recognized some of the challenges producers are facing with the interim final rule (IFR) and the need for additional time for USDA to work with industry to address the issues. These two temporary changes help to reduce the burden on farmers this year while USDA figures out the details of a final rule that will work for farmers and the industry.

However, we have recently noticed that USDA has posted on its website the list of Hemp Analytical Testing Laboratories registered with the DEA. This signals that there is no intent to remove this unnecessary requirement in the final rules. We urge USDA to consider the 2020 production season and the several successful production seasons under the 2014 Farm Bill agricultural pilot program authority as precedent for not needing DEA registered laboratories for testing, or DEA-registered reverse distributors or law enforcement to dispose of non-compliant plants.

We note that there are no laboratories listed for Oregon, despite the state having the fourth highest number of hemp producers in the country and the state's hemp acreage ranks fifth nationwide this year. We therefore recommend USDA remove both the DEA laboratory registration requirement and the requirement for a DEA-registered reverse distributor or law enforcement to dispose of non-compliant plants in the final rule. We further urge USDA to ensure that the final rule offers producers options for disposing of noncompliant crops that reflect normal farming practices and support soil health, such as composting or disking.

We are also concerned about several additional areas related to the accuracy of THC testing raised by producers in Oregon and nationwide and want to urge you to consider using the following enforcement discretion to address these critical issues, which could result in huge financial losses by Oregon farmers:



- USDA's IFR requires growers to test hemp plants within 15 days of anticipated harvest. Under current rules, the Oregon Department of Agriculture (ODA) requires crop testing within 28 days of harvest. We remain concerned that 15 days is an impossible obstacle for growers to overcome and does not provide enough time before harvest to test, submit testing, and receive a response. We urge USDA to accommodate the Oregon model by using enforcement discretion with regards to the timeline for testing before harvest. We further recommend that USDA provide for a reasonable timeframe for post-testing harvest and extend the testing timeline to at least 28 days in the final rule.

Despite the 2018 Farm Bill's specific language requiring testing for delta-9 tetrahydrocannabinol (THC), USDA's IFR effectively requires testing for total THC levels. Given the 2018 Farm Bill specificity, and because it allows for flexibility in testing methods, we urge USDA to use enforcement discretion to allow testing for delta-9 THC when the testing methods are capable of such measurements, and remove all requirements for testing total THC in the final rule.

- Section 6.3 of the USDA sampling guidelines for hemp growing facilities specifies that only flowering material from the top third of the hemp plant should be sampled. The 2018 Farm Bill clearly defines hemp as the plant Cannabis with not more than 0.3% delta-9 THC. A recent study by the Institute for Advanced Learning and Research in Virginia demonstrated that THC levels vary in different sections of the plant and confirmed that the only way to produce an accurate average THC level is to sample and homogenize the entire plant or plants being sampled. Many farmers will be utilizing the entire hemp plant including stalks, leaves and stems, and accuracy of the sampling process is critical to producers given the large investments that are at risk if a test determines the crop is non-compliant. We continue to urge USDA to modify the hemp sampling guidelines by following the state of Oregon's pre-harvest sampling protocol that a "sample shall be obtained from flowering tops when flowering tops are present, and shall be approximately 8 inches in length" rather than just the top third.
  - We also recommend inclusion of language adopting limited pre-harvest testing requirements and an exempted cultivar list for certified hemp varieties that are distinct, uniform, stable, and will consistently produce plants with a THC concentration of 0.3% THC or less, and are approved by a responsible authority, such as the Association of Official Seed Certifying Agencies (AOSCA), Association of American Seed Control Officials (AASCO), or American Seed Trade Association (ASTA).
- As the IFR notes, the 2018 Farm Bill includes procedures to identify and attempt to correct certain negligent acts, such as failure to obtain proper licensing. However, the IFR establishes a negligence threshold for hemp at 0.5% THC. We have heard concerns from producers across the country that a 0.5% THC negligence threshold is arbitrary. We therefore request that USDA use its enforcement discretion to delay this requirement until it can be improved and if a negligence threshold for THC content must be set, the threshold should be greater than 1%.

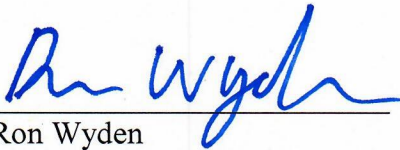
Importantly, in light of these serious issues with the IFR and testing protocols, we request USDA allow Oregon and other states with hemp programs established under the 2014 Farm Bill to continue operating under the 2014 pilot program until January 1, 2022.

We appreciate USDA's commitment to hemp producers across the United States and we are hopeful that you will agree to the proposed changes we have presented here for both enforcement discretion this year and for changes in the final rule.

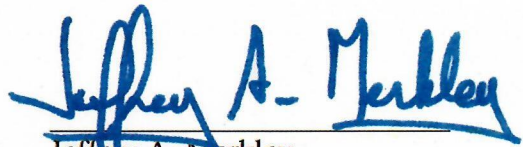
We fear that without these changes, our past work and efforts to support hemp farmers and the industry across the country may be for naught and we will not be able to achieve the growth and success we all know is possible with the right support and policies in place. Farmers in Oregon and across the country are on the precipice of an agricultural boom that, with the right regulatory framework, stands to boost rural economies in every corner of the country.

We look forward to your careful consideration of our recommendations.

Sincerely,



Ron Wyden  
United States Senator



Jeffrey A. Merkley  
United States Senator