

United States Senate

WASHINGTON, DC 20510

November 20, 2019

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

Dear Secretary Perdue:

As authors of the Hemp Farming Act of 2018 that was included in the Agriculture Improvement Act of 2018 (2018 Farm Bill), we are pleased to see the United States Department of Agriculture (USDA) issue an interim final rule for the U.S. Domestic Hemp Production Program, and we hope this will allow sufficient time for states and farmers to prepare for the 2020 growing season. While we believe this interim rulemaking is a necessary step to establish a domestic federal hemp production program, we write with several concerns about the unintended and potentially harmful effects this interim final rule would have on hemp production in Oregon and across the country.

Below, in no particular order, are concerns that have been raised by Oregon hemp farmers, researchers, and regulators. We appreciate your careful consideration of these concerns, and are happy to provide assistance as USDA establishes the new U.S. Domestic Hemp Production Program and issues its final rulemaking.

- USDA's interim final rule 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 are very 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, particularly if there are a limited number of registered laboratories with sufficient expertise to perform the necessary tests.
 - **Requested Fix: We encourage USDA to follow the Oregon model and extend the timeline for testing before harvest to a more realistic timeframe, and provide a reasonable timeframe for post-testing harvest.**
- Currently, Oregon hemp producers, and hemp producers across the country, use independent labs to test hemp crops. The interim final rule requires hemp farmers to submit their crops to a Drug Enforcement Administration (DEA)-registered laboratory for testing. This is concerning for two reasons:
 - The 2018 Farm Bill gave USDA and the Food and Drug Administration sole regulatory authority over hemp production. Hemp is a legal agricultural commodity and, like all other legal agricultural commodities, should not be subjected to prohibitive DEA regulations.
 - Requiring DEA-registered labs could cause tremendous bottlenecks and unnecessary delays for hemp producers in Oregon and across the country. Though there are numerous DEA analytical labs across the country that are registered and

have the authority to perform chemical analyses on Schedule I controlled substances, the DEA does not know how many of those labs are actually equipped or experienced in testing for the presence of THC, nor do they know how many can actually quantify the amount of THC in a sample.

- **Requested Fix:** Given these concerns, we recommend the USDA remove the requirement that testing labs must be DEA-registered.
- The 2018 Farm Bill requires testing for delta-9 tetrahydrocannabinol (THC) using “post-decarboxylation or other similarly reliable methods.” Reliable testing methods have emerged that do not necessitate decarboxylation to accurately measure THC concentrations. Instead of allowing similarly reliable non-decarboxylation tests to be used to measure delta-9 THC, the interim final rule introduced a new requirement, contrary to the specific language in the 2018 Farm Bill, that hemp samples must be tested using methods where the “THC concentration level reported accounts for the conversion of delta-9-tetrahydrocannabinolic acid (THCA) into THC.” As authors of the Hemp Farming Act of 2018 that was included in the 2018 Farm Bill, we believe strongly that this is a complete reversal of the Congressional intent expressed in that law, and requires testing that Congress specifically did not include.
 - **Requested Fix:** Given the 2018 Farm Bill specificity, and because it allows for flexibility in testing methods by allowing “other similarly reliable methods,” we encourage USDA to allow testing for delta-9 THC using methods that do not involve the application of heat or decarboxylation, and to remove all requirements for converting THCA into THC.
- The 2018 Farm Bill does not dictate which parts of the hemp plant are required to be sampled, yet USDA’s sampling guidelines for hemp require a sample from the flower or bud located at the top one-third of the plant. However, many farmers will be utilizing the entire hemp plant including stalks, leaves, and stems.
 - **Requested Fix:** We encourage USDA to follow 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.”
- As the interim final rule 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 interim final rule establishes a negligence threshold for hemp at 0.5% THC. We have heard concerns from growers and researchers that a 0.5% THC negligence threshold is an arbitrary amount and far too low because a reasonably prudent hemp producer could take the necessary steps and precautions to produce hemp, such as using certified seed, using seed that has reliably grown compliant plants in other parts of the country, and engaging in other best practices, yet still produce hemp plants that exceed this 0.5% THC concentration. If the USDA is concerned that a producer would intentionally try to grow illicit marijuana plants under the guise of the U.S. Domestic Hemp Production Program, the rule should reflect the actual potency of cannabis samples confiscated by the DEA, rather than this exceptionally low 0.5% delta-9 THC concentration. We recommend that you review recent data on the actual potency of cannabis confiscated by the DEA. The April 1, 2016 issue of Biological Psychiatry

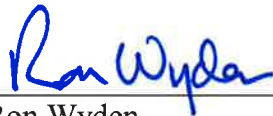
includes scientific, peer-reviewed research on cannabis potency and data showing that the average cannabinoids concentration of cannabis samples confiscated by DEA in 2014 was 11.84% delta-9 THC, which is significantly above the interim final rule established negligent level of 0.5% THC.

- **Requested Fix:** We therefore request that – if a negligence threshold for THC content must be set – the threshold be greater than 1%.

Again, we appreciate USDA's commitment to hemp producers across the United States, and are pleased by your efforts to grow and support domestic hemp production. 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