



**REPORT ON POTENTIAL LEGISLATION TO
INCREASE THE PERMISSIBLE THC
CONCENTRATION IN VIRGINIA-GROWN
INDUSTRIAL HEMP AND
RESPOND TO THE FEDERAL REGULATION OF
HEMP PRODUCTION**

Jewel H. Bronaugh, Ph.D.
Commissioner
November 1, 2020

Report on Potential Legislation to Increase the Permissible THC Concentration in Virginia-Grown Industrial Hemp and Respond to the Federal Regulation of Hemp Production

PUBLICATION YEAR 2020

Document Title

Report on Potential Legislation to Increase the Permissible THC Concentration in Virginia-Grown Industrial Hemp and Respond to the Federal Regulation of Hemp Production

Author

Department of Agriculture and Consumer Services

Legislative Mandate

Chapters 659 and 660 of the 2020 Acts of Assembly

Executive Summary

Chapters 659 and 660 of the 2020 Acts of Assembly direct the Department of Agriculture and Consumer Services (VDACS) to report by November 1, 2020, to the Chairmen of the Senate Committee on Agriculture, Conservation and Natural Resources and the House Committee on Agriculture, Chesapeake and Natural Resources regarding recommended legislative or regulatory amendments necessary to (i) allow a registered industrial hemp grower to grow industrial hemp with a tetrahydrocannabinol concentration of no greater than one percent and (ii) authorize VDACS to modify its existing industrial hemp program as quickly and efficiently as possible to respond to any final regulation adopted by the U.S. Department of Agriculture regarding the domestic production of hemp.

BACKGROUND

Federal law and the Virginia Industrial Hemp Law (Va. Code § 3.2-4112 *et seq.*), by reference to federal law, define industrial hemp, in part, as *Cannabis sativa* L. with a delta-9 tetrahydrocannabinol (THC) concentration of not more than 0.3 percent.

The 2018 federal Farm Bill, which was signed in December 2018, includes hemp-related provisions that allow for the commercial production of hemp in the U.S. and require USDA to promulgate regulations regarding the production of hemp. The 2018 Farm Bill provides that states desiring primary regulatory authority over the production of hemp submit a hemp production regulation plan for USDA's approval after first consulting with the chief law enforcement officer and the Governor of the state. The 2018 Farm Bill also directs USDA to establish a hemp production regulatory program for farmers who desire to grow hemp in a state that does not have a USDA-approved hemp production regulatory plan.

In October 2019, USDA published an Interim Final Rule establishing its Domestic Hemp Production Program regulation ("USDA's Hemp Production Rule"), as required by the 2018 Farm Bill. This rule, in part, requires states desiring primary regulatory authority over the production of hemp to sample all hemp crops within the 15 days prior to the anticipated harvest date; to prohibit all hemp crops from moving into commerce before the results of the required THC test are known; to require the destruction of any crop that exceeds the acceptable THC level, which takes into account the testing laboratory's measurement of uncertainty; and to regularly report on changes to grower registration information, crop test results, and crop destruction. USDA's Hemp Production Rule also prescribes similar requirements for growers who plan to grow hemp in a state that does not have a USDA-approved hemp production regulation plan.

GROWING INDUSTRIAL HEMP WITH A THC CONCENTRATION OF NOT MORE THAN ONE PERCENT

USDA's Hemp Production Rule requires states to test the post-decarboxylation delta-9 THC (after the conversion of potential THC to actual THC) concentration of hemp crops. Upon publication of USDA's rule, VDACS began hearing concerns from growers and industry stakeholders that no hemp cultivar currently available in the U.S. that has a sufficient cannabidiol (CBD) concentration to be marketable to CBD extraction facilities can be grown in compliance with the THC concentration requirement. As noncompliant crops must be destroyed, the cost to grow one acre of a hemp crop for CBD production is approximately \$10,000, and many variables beyond a hemp grower's control impact a crop's cannabinoid profile, hemp growers face significant risk.

Nationally and within the Commonwealth, the hemp industry is responding to current hemp-related laws and risks associated with the cultivation of hemp by seeking allowances for a higher permissible THC concentration. The current limit of 0.3 percent THC is established in the U.S. Code, and Virginia Industrial Hemp Law adopt this limit by reference. To establish a THC

concentration other than that established in federal law, the Virginia Industrial Hemp Law would need to be amended as follows:

- Enact a new section establishing the desired THC concentration.
- In the definition for "industrial hemp" included in the Definitions section, replace the reference to federal law with a reference to the new section of the Virginia Industrial Hemp Law that establishes the desired THC concentration.
- Throughout the Virginia Industrial Hemp Law, replace the references to the THC concentration established in federal law with a reference to the new section of the Virginia Industrial Hemp Law that establishes the desired THC concentration.

EFFECT OF ESTABLISHING A PERMISSIBLE TETRAHYDROCANNABINOL (THC) CONCENTRATION FOR INDUSTRIAL HEMP THAT IS GREATER THAN THAT ALLOWED BY FEDERAL LAW

An increase in the permissible THC concentration of industrial hemp grown in Virginia beyond what the federal law allows will likely result in USDA declining to approve Virginia's Plan to Regulate Hemp Production. It is likely that USDA would refuse to administer a hemp regulatory program in a state that allowed the production of industrial hemp with a higher THC concentration than is permitted by federal law. Without access to a hemp regulatory program that complies with federal law and regulation, hemp growers will not be eligible for hemp crop insurance, federal grant programs, and certain financial products. Additionally, these growers will face greater risks when moving their hemp crop out of state.

VDACS would continue to administer the Virginia Industrial Hemp Law, providing registrations to applicants who wish to grow, process, or deal industrial hemp in Virginia and monitoring the industrial hemp grown, processed, or dealt for compliance with the permissible THC concentration established in Virginia law.

AUTHORIZING VDACS TO MODIFY ITS EXISTING INDUSTRIAL HEMP PROGRAM AS QUICKLY AND EFFICIENTLY AS POSSIBLE TO RESPOND TO ANY FINAL REGULATION ADOPTED BY THE U.S. DEPARTMENT OF AGRICULTURE REGARDING THE DOMESTIC PRODUCTION OF HEMP

Authority to adopt by reference federal hemp-related regulations via a regulatory process that is exempt from the Virginia Administrative Process Act (APA) would enable VDACS to modify the Industrial Hemp Program in response to USDA's final Hemp Production Rule as quickly as possible.

While the Virginia Industrial Hemp Law currently authorizes the Board of Agriculture and Consumer Services (Board) to adopt regulations necessary to register persons to grow, deal in, or process industrial hemp or to implement the provisions of the Law, the Board typically meets quarterly, which could delay the adoption of regulations in response to USDA's final Hemp Production Rule. One way to speed up this process would be amending the Virginia Industrial Hemp Law to authorize the Commissioner of Agriculture and Consumer Services to adopt a regulation that incorporates by reference any provision of USDA's Hemp Production Rule that

the Commissioner determines is necessary to administer a hemp production regulatory program that complies with USDA's Hemp Production Rule. The authority to adopt provisions of the federal regulation would also need to be accompanied by a provision exempting the Commissioner's regulation from the provisions of the APA and, as such, a regulatory process that can often take two years to complete. As USDA has held public comment periods during the development of its Hemp Production Rule, any federal provision the Commissioner incorporates by reference would have previously been subject to public review and comment.