

**Maryland General Assembly
Department of Legislative Services**

**Proposed Regulations
Department of Agriculture
(DLS Control No. 20-054)**

Overview and Legal and Fiscal Impact

These regulations implement the Hemp Farming Program (Program), administered by the Department of Agriculture, in accordance with Chapter 228 of 2019.

The regulations present no legal issues of concern.

The regulations implement Chapter 228 of 2019 (House Bill 1123), which established the Hemp Farming Program administered by the Maryland Department of Agriculture (MDA). There is no fiscal impact on State or local agencies beyond that estimated in the fiscal and policy note for House Bill 1123. However, as discussed below, the fiscal impact on both State expenditures and State revenues was delayed, and the increase in State expenditures is lower than originally anticipated due to current budgetary restrictions.

Regulations of COMAR Affected

Department of Agriculture:

Office of the Secretary: Hemp Farming Program: COMAR 15.01.17.01 through .19

Legal Analysis

Background

Hemp can be used in the production of a variety of consumer goods, including paper products, textiles, nutritional supplements, medicines, construction materials, and livestock feed. While grown commercially in the United States until after World War II, hemp became regulated along with marijuana under the federal Controlled Substances Act (CSA) and its cultivation has since been prohibited.

The 2018 federal Farm Bill, among other things, removes hemp from being prohibited under the CSA and allows a state to be the primary regulatory authority over the production of hemp in the state. A state must submit a qualifying plan for monitoring and regulating the production of hemp to the U.S. Secretary of Agriculture. The plan must include, among other required content (1) licensing provisions; (2) provisions for maintaining relevant producer and land information; (3) provisions for accurate and effective sampling testing; (4) procedures for the disposal of plants; (5) inspection procedures; (6) provisions for collecting information;

(7) provisions to comply with enforcement procedures; and (8) a certification that the state has resources and personnel to carry out required practices and procedures. The plan must be approved by the U.S. Secretary of Agriculture before a state may regulate the production of hemp under the plan.

Chapter 228 of 2019 established the program to serve as the State's regulatory framework for the commercial production of hemp. The department, in consultation with the Governor and the Attorney General, is required to establish a plan to monitor and regulate the production of hemp in the State and submit the plan to the U.S. Secretary of Agriculture for approval. Among other things, the plan must include (1) a practice to maintain relevant information for at least three years regarding the land on which hemp is produced, including a legal description of the land; (2) a procedure for testing the delta-9-tetrahydrocannabinol (THC) concentration levels of hemp produced in the State, as specified; (3) a procedure for the effective disposal of plants and products derived from plants that violate the Act's requirements; (4) a procedure to enforce the Act's requirements; and (5) a procedure for conducting annual inspections that include, at minimum, a random sample of hemp producers to verify that hemp is being produced in accordance with the Act's requirements.

Chapter 228 also required the department to establish a procedure for licensing the production of hemp in accordance with the plan. A person may not produce hemp in the State unless the person is licensed by the department or the U.S. Department of Agriculture (USDA). Under Chapter 228, the department is authorized to set reasonable fees for the issuance and renewal of licenses and other services the department provides under the program, and all fees are deposited into the Hemp Farming Fund, a special fund administered by the department.

Additionally, under Chapter 228 the department must report a person that knowingly violates specified provisions to the Attorney General and the U.S. Attorney General. If the department determines that a person negligently violates these provisions, the department must require the person to correct the violation, as specified. If a person is found by the department to have negligently violated these provisions three times in a four-year period, the person may not produce hemp in the State for a period of five years, as specified.

Lastly, Chapter 228 required the department to adopt regulations to implement the program. The department must also, in consultation with the Natalie M. LaPrade Medical Cannabis Commission, adopt regulations to protect licensed hemp growers and licensed medical cannabis growers from the risk of cross-pollination.

According to the department, the Governor and the Attorney General have approved the plan, and USDA completed an initial review of the plan and these regulations and indicated that they are consistent with the 2018 Farm Bill.

Summary of Regulations

These regulations implement the program in accordance with Chapter 228 of 2019. More specifically, the regulations, among other things:

- prohibit a person from cultivating or producing hemp under the program unless the person is licensed by the department;
- exempt an institution of higher education and a person who produces hemp under the Hemp Research Pilot Program from regulation under the Program;
- establish procedures for obtaining and modifying a license to cultivate or produce hemp under the Program;
- specify the terms and duration of a license;
- specify the grounds for denying a license;
- establish application, license, testing, and site modification fees;
- establish various prohibitions for licensed growers, including prohibiting a licensed grower from (1) growing or storing hemp in a structure that is used for residential purposes; (2) planting, growing, or storing hemp on any site that is not located within a licensed area; (3) co-mingling, transporting, transferring, selling, marketing, processing, or otherwise disposing of hemp without a THC analysis by the department or an authorized laboratory; and (4) offering for sale any hemp grown in a lot that has a noncompliant THC level;
- specify that a distance requirement, limitation, or buffer zone between licensed growers and between licensed growers and medical cannabis growers licensed under § 13-3306 of the Health – General Article may be established only with the department’s evaluation, in consultation with the Natalie M. LaPrade Medical Cannabis Commission, of specified scientific data showing crop impacts resulting from cross-pollination;
- specify various reporting requirements, including field planting reports, indoor planting reports, pre- and post-harvest reports, destruction reports, annual production reports, drug felony conviction reports, and reports to USDA’s Farm Service Agency;
- establish a process for conducting inspections of hemp operations and sampling and testing of regulatory samples of hemp;
- specify the sampling methodology and testing requirements that will be used for any samples collected by the department or an authorized agent;
- require that, before hemp may be offered for sale, test results confirm that the final product batch contains not more than 0.3% THC on a dry weight basis;
- establish a process for addressing hemp that has failed a test (*i.e.*, nonmarketable hemp, or hemp that has more than 0.3% THC on a dry weight basis);

- establish protocols for the disposal of nonmarketable hemp;
- authorize the department to deny a license application or suspend or revoke a license under specified circumstances, including if the person fails to comply with the department's plan for regulating hemp production, provides false or misleading information on a license application or in any report, or hinders or obstructs the inspection of a licensed area or the collection or sampling of hemp;
- authorize the department to issue a corrective action plan for negligent violations;
- require that the department take specified actions, including referral to the U.S. Attorney General, the Maryland Attorney General, or the State's Attorney, if the department determines that a person violated the Program with a culpable mental state greater than negligence;
- establish a process for notice, hearings, and appeals of a decision made by the department;
- require the department to file specified reports with and submit certain information to USDA;
- state that the records held by the department are subject to inspection and release as provided under the Maryland Public Information Act;
- specify that a person who violates the regulations may be subject to specified criminal penalties; and
- require the department to report a person that knowingly takes specified actions to the U.S. Attorney General and the Maryland Attorney General.

Legal Issues

The regulations present no legal issues of concern.

Statutory Authority and Legislative Intent

The department cites § 14-307 of the Agriculture Article as statutory authority for the regulations. This section requires the department to adopt regulations to carry out Title 14, Subtitle 3 of the Agriculture Article, which establishes the program. The program was established by Chapter 228 of 2019, as discussed above.

This authority is correct and complete. The regulations comply with the legislative intent of the law.

Technical Corrections and Special Notes

In response to suggestions from the Department of Legislative Services and USDA, staff for the department agrees to make the following changes to the regulations:

- numerous technical corrections throughout the regulations for clarity and accuracy;
- specifying the number of days the department or other law enforcement agency may enter and inspect property after a license has expired, is suspended, or is surrendered under Regulation .04D(2);
- clarifying in Regulation .06D that the \$250 fee for sampling and testing hemp applies to official samples only;
- clarifying that the establishment of any distance requirement, limitation, or buffer zone under Regulation .07B applies between licensed growers and between licensed growers and medical cannabis growers licensed under § 13-3306 of the Health – General Article;
- splitting Regulation .09 into two separate regulations, .09 and .10, to distinguish between regulatory inspections performed by the department and sampling and testing which may be performed by the department or an authorized agent;
- requiring, rather than authorizing, the department to conduct annual inspections of hemp operations under Regulation .09;
- specifying that a licensed grower can request that the department or an authorized agent collect official samples of hemp for testing under Regulation .10;
- in Regulation .13, clarifying the methods that may be used to dispose of hemp deemed noncompliant with the regulations; and
- clarifying in Regulation .16C that the requirement that the department notify USDA of any occurrence of hemp plants that do not meet the regulatory definition of hemp includes products derived from hemp plants that do not meet the regulatory definition of hemp.

Additionally, the department has added a definition of “nonmarketable hemp” and used the term in lieu of the phrase “non-compliant hemp” under Regulations .12 and .13.

Fiscal Analysis

The regulations implement Chapter 228 of 2019 (House Bill 1123), which established the Hemp Farming Program administered by the Maryland Department of Agriculture (MDA). There is no fiscal impact on State or local agencies beyond that estimated in the fiscal and policy note

for House Bill 1123. However, as discussed below, the fiscal impact on both State expenditures and State revenues was delayed, and the increase in State expenditures is lower than originally anticipated due to current budgetary restrictions.

Agency Estimate of Projected Fiscal Impact

In its economic impact statement, MDA advises that special fund expenditures for the department increase, beginning in fiscal 2021, to hire personnel and purchase equipment to implement the regulations. MDA also advises that special fund revenues increase by an unknown amount from application, licensing, and testing fees. However, in response to follow-up questions from the Department of Legislative Services (DLS), MDA now advises that, since the regulations merely implement Chapter 228, the regulations have no fiscal impact on State or local agencies beyond that which was estimated in the fiscal and policy note for House Bill 1123. DLS concurs, as discussed below.

Violations of the regulations (and Chapter 228) are subject to existing statutory criminal penalty provisions; however, the application of those penalty provisions is not anticipated to materially affect State finances.

Expenditures

DLS notes that, although the regulations do not have any new impact on MDA expenditures, the timing of the impact estimated in the fiscal and policy note for House Bill 1123 was delayed from fiscal 2020 to fiscal 2021. Additionally, MDA's current estimate of expenditures reflects the fiscal 2021 budget and is lower than the costs estimated in the fiscal and policy note. The fiscal and policy note for House Bill 1123 estimated that general/special fund expenditures for MDA would increase by approximately \$434,400 in fiscal 2020, and by at least \$289,700 annually thereafter, to hire three full-time, permanent staff and several part-time employees and to purchase equipment and supplies necessary to implement the bill. MDA now advises that general/special fund expenditures for fiscal 2021 are \$324,398 to hire two full-time employees and purchase equipment to implement the Hemp Farming Program. MDA notes that additional staff are still likely necessary in the out-years as the program expands.

Revenues

Chapter 228 authorized MDA to set reasonable fees to defray the costs of administering and enforcing the Hemp Farming Program. The fiscal and policy note for House Bill 1123 estimated that special fund revenues would increase, likely beginning at the end of fiscal 2020, from fees. This impact has been delayed, and special fund revenues from program fees are now likely to increase beginning in fiscal 2021. A reliable estimate of any increase in special fund revenues was unknown at the time the fiscal and policy note was written, and this is still the case since actual revenues depend on the level of interest in the program and the number of samples that are collected and tested by MDA on an annual basis.

Specifically, the regulations establish (1) a \$50 annual application fee; (2) a \$500 annual license fee; (3) a \$500 fee for each additional location that is owned or controlled by a grower with a different mailing address; (4) a \$250 fee for each time MDA samples and tests “official samples” for THC; and (5) a \$250 site modification fee if the GPS coordinates in an application are changed. The regulations require growers to reapply annually and pay both the annual application fee and the annual license fee each year. MDA notes that the fee for testing official samples will not be charged for samples taken during the course of a regulatory inspection. However, licensees are required to sample and test each product batch that is placed into the stream of commerce. This testing can either be conducted by MDA or by an authorized laboratory. DLS notes that at the time the fiscal and policy note was written, MDA anticipated charging \$80 per sample of hemp tested; the fee to sample and test hemp under the regulations is higher.

Impact on Budget

There is no impact on the State operating or capital budget.

Agency Estimate of Projected Small Business Impact

The department advises that the regulations have minimal or no economic impact on small businesses in the State. DLS concurs because any impact on small businesses has already been accounted for in the fiscal and policy note for House Bill 1123. DLS notes that the fiscal and policy note for House Bill 1123 anticipated the bill would have a meaningful impact on small businesses by establishing a meaningful opportunity for small businesses to get involved in the production and possibly the processing of hemp.

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