

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 1063 State Hemp Program

SPONSOR(S): State Affairs Committee, Agriculture & Natural Resources Subcommittee, Drake and Massullo

TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 1876

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Agriculture & Natural Resources Subcommittee	11 Y, 0 N, As CS	Harrington	Moore
2) Agriculture & Natural Resources Appropriations Subcommittee	8 Y, 0 N	White	Pigott
3) State Affairs Committee	22 Y, 0 N, As CS	Harrington	Williamson

SUMMARY ANALYSIS

Hemp is an agricultural commodity that is defined as the plant *Cannabis sativa L.* and any part of that plant, whether growing or not, with a delta-9 tetrahydrocannabinol (THC) concentration that does not exceed 0.3 percent on a dry weight basis. In 2019, the Legislature created the state hemp program within the Department of Agriculture and Consumer Services (DACS) to regulate the cultivation of hemp and required DACS to seek federal approval of the state hemp plan once certain rulemaking has been completed. Currently, DACS is still engaged in the rulemaking process and has not sought federal approval for the state hemp plan.

The bill amends provisions related to the state hemp program. Specifically, the bill:

- Provides that hemp extract is a “food” for purposes of the Florida Food Safety Act;
- Provides that a minor food outlet that sells hemp extract is not exempt from certain food permit requirements;
- Removes the requirement that licensees only use certified hemp seed and cultivars;
- Amends the definition for the term “hemp extract” to clarify that it does not include synthetic cannabidiol or seeds or seed-derived ingredients that are generally recognized as safe by the United States Food and Drug Administration and to provide that it includes substances and compounds intended for ingestion or inhalation containing more than trace amounts of cannabidiols;
- Amends the packaging requirements for hemp extract to provide that the label must include the number of milligrams of each marketed cannabinoid per serving, rather than the number of milligrams of hemp extract, and removes from the label the statement that the product does not contain more than 0.3 percent THC on a dry weight basis;
- Provides that hemp extract distributed or sold in the state in violation of the hemp extract labeling requirements is considered adulterated or misbranded;
- Requires DACS to add the total acreage of hemp planted, harvested, and if applicable, disposed of for each licensee to its monthly report to the United States Department of Agriculture (USDA);
- Directs DACS to adopt, by rule, a testing procedure that ensures a representative sample is physically collected before the anticipated harvest;
- Clarifies that members of the Industrial Hemp Advisory Council serve as the sole advisory body for DACS and serve 4-year staggered terms;
- Requires DACS to submit a report to the Legislature recommending a fee or fees for participation in the program, which must take into consideration inspections, testing, and other necessary costs; and
- Provides that if the state plan is denied federal approval and revisions can be made to the plan without statutory changes, DACS, in consultation with and final approval from the Administration Commission, must submit an amended plan to the USDA.

The bill may have an insignificant negative fiscal impact on DACS that can be absorbed within existing resources and does not appear to have a fiscal impact on local governments. See Fiscal Comments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Hemp

Hemp, also called industrial hemp, is defined as the plant *Cannabis sativa L.* and any part of that plant, including seeds, derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers thereof, whether growing or not, with a delta-9 tetrahydrocannabinol (THC) concentration that does not exceed 0.3 percent on a dry weight basis.¹ While hemp and marijuana are both grown from the *Cannabis sativa L.* plant, they are different varieties that have been genetically bred and grown for different uses. Hemp can be distinguished from marijuana² by its lower concentrations of THC, and higher concentrations of cannabidiol (CBD).³

Hemp is an agricultural commodity grown and used worldwide to produce a variety of industrial and commercial products, including rope, textiles, clothing, shoes, food, paper, bioplastics, insulation, biofuel, cosmetic products, animal bedding, animal and bird feed, and human food and nutritional supplements.⁴ At least 30 countries in Europe, Asia, and North and South America currently permit farmers to grow hemp. In the United States, large-scale commercial production does not exist and the hemp market is largely dependent on imports, both as finished hemp-containing products and as ingredients for use in further processing.⁵

Historically, hemp was produced in the United States with peak production occurring in the 1940s, during World War II, when it was used by the armed forces.⁶ The Marijuana Tax Act of 1937⁷ and competition with developing synthetic fiber sources negatively impacted hemp production, which sharply declined to the point of elimination by the mid-1950s.⁸ The federal Controlled Substances Act of 1970 (Controlled Substances Act)⁹ created a single comprehensive statute that placed the control of select plants, drugs, and chemicals under federal jurisdiction.¹⁰ It further defined all varieties of cannabis, regardless of the THC level, as marijuana and classified them as Schedule I controlled substances.¹¹

Agriculture Improvement Act of 2018

Section 10113 of the Agriculture Improvement Act of 2018 (2018 Farm Bill) created the Hemp Farming Act to allow the cultivation of hemp. The 2018 Farm Bill removed hemp-derived products from

¹ 7 U.S.C. s. 5940 (2014); 7 U.S.C. s. 1639o (2018); *see also* s. 581.217, F.S.

² Marijuana is identified in the United States drug laws as cannabis having high THC levels that are associated with psychotropic effects and is typically made from the flowering tops and leaves of the *Cannabis sativa L.* plant (sativa or indica varieties). The Controlled Substances Act was enacted as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. 84 s. 1236 (1970).

³ National Conference of State Legislatures (NCSL), *State Industrial Hemp Statutes*, available at <http://www.ncsl.org/research/agriculture-and-rural-development/state-industrial-hemp-statutes.aspx> (last visited Jan. 29, 2019).

⁴ Congressional Research Service (CRS), *Hemp as an Agricultural Commodity*, CRS Report 7-5700 (June 22, 2018), available at <https://fas.org/sgp/crs/misc/RL32725.pdf> (last visited Jan. 30, 2020).

⁵ *Id.*

⁶ University of Florida Institute of Food and Agricultural Sciences (IFAS) Research, *The Potential for Industrial Hemp Production in Florida*, (Sept. 15, 2015) available at https://www.votehemp.com/PDF/Potential%20for%20Industrial%20Hemp%20Production%20in%20Florida_9-15-2015.pdf (last visited Jan. 29, 2020).

⁷ 50 s. 551 (1937).

⁸ Mindy Bridges and Karmen Hanson, *Regulating Hemp and Cannabis-Based Products*, NCSL (October 2017), available at <http://www.ncsl.org/research/agriculture-and-rural-development/regulating-hemp-and-cannabis-based-products.aspx> (last visited Jan. 29, 2019).

⁹ 84 s. 1236 (1970).

¹⁰ 21 U.S.C. s. 801; CRS, *Hemp as an Agricultural Commodity*, CRS Report 7-5700 (June 22, 2018) available at <https://fas.org/sgp/crs/misc/RL32725.pdf> (last visited Jan. 29, 2020).

¹¹ 21 U.S.C. s. 801; 21 C.F.R. s. 1308.11.

Schedule I of the Controlled Substances Act. While the law legalized hemp as an agricultural product, the law did not legalize CBD generally.¹² CBD derived from hemp is considered legal if the hemp is grown by a licensed grower, produced in a manner that is consistent with the 2018 Farm Bill, and complies with other federal and state regulations.¹³

The 2018 Farm Bill defined “hemp” to mean the plant *Cannabis sativa L.* and any part of that plant, including the seeds thereof, and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis.¹⁴

The 2018 Farm Bill allows a state department of agriculture or an Indian tribe to submit a plan to the Secretary of the United States Department of Agriculture (Secretary) and apply for primary regulatory authority over the production of hemp in their state or tribal territory. A state or tribal plan must include:

- A procedure for tracking land upon which hemp will be cultivated, including a legal land description and global positioning coordinates;
- A procedure for maintaining records for at least three years and reporting to the Secretary;
- Testing procedures that use post-decarboxylation or other similarly reliable methods for determining THC concentration levels of hemp;
- Procedures for methods to effectively dispose of hemp plants, growing or not, and products made from hemp plants grown in violation of the 2018 Farm Bill;
- Annual inspection procedures;
- Violations and corrective actions;
- Enforcement procedures;
- A procedure for submitting information on land where hemp is cultivated to the Secretary not more than 30 days after the date on which the information is received by the state or tribe;
- Certification that the state or tribe has the resources and personnel to carry out the practices and procedures in the state or tribal plan; and
- Any other practice or procedure established by the state or tribe that is consistent with the 2018 Farm Bill.¹⁵

The 2018 Farm Bill requires the Secretary to approve or disapprove a state or tribal plan within 60 days of receipt. It further requires the Secretary to consult with the United States Attorney General when carrying out the requirements associated with state and tribal plans. The Secretary is authorized to provide technical assistance to states and tribes in the development of a state or tribal plan. The 2018 Farm Bill further authorizes the Secretary to conduct compliance audits of state and tribal plans. If noncompliance is determined, the Secretary is required to collaborate with the state or tribe to develop a corrective action plan in the case of a first instance of noncompliance. The Secretary is authorized to revoke the approval of a state or tribal plan in the case of a second or subsequent instance of noncompliance.¹⁶

The Secretary must establish a United States Department of Agriculture (USDA) plan to be used where a state or tribal plan is not approved. The 2018 Farm Bill directed the Secretary to promulgate regulations and guidelines to implement the 2018 Farm Bill requirements for hemp production as expeditiously as possible.¹⁷

USDA Domestic Hemp Program Rules

On October 31, 2019, the USDA published an interim final rule (USDA rule) to administer and oversee the domestic hemp program established by the 2018 Farm Bill.¹⁸ The USDA rules provide specific

¹² 7 U.S.C. s. 1639o (2018).

¹³ John Hudak, *The Farm Bill, hemp legalization and the status of CBD: An Explainer*, Brookings Dec. 14, 2018, available online at: <https://www.brookings.edu/blog/fixgov/2018/12/14/the-farm-bill-hemp-and-cbd-explainer/> (last visited Jan. 30, 2020).

¹⁴ 7 U.S.C. s. 1639o (2018).

¹⁵ 7 U.S.C. s. 1639p (2018).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 7 C.F.R. s. 990(1) (2019). A copy of the USDA rules can be found online at: <https://www.ams.usda.gov/rules-regulations/hemp> (last visited Jan. 30, 2020).

details for both federally regulated hemp production and state-approved plans. The USDA rules include provisions for maintaining information on the land where hemp is produced, testing the levels of delta-9 THC, disposing of plants not meeting the definition of hemp, and ensuring compliance with the federal law. Although the USDA rule largely mirrors the 2018 Farm Bill provisions, the USDA rule also requires:

- Monthly updates on the total acreage of hemp planted, harvested, and if applicable, disposed of by a licensee.
- Sampling procedures that ensure a representative sample of hemp is physically collected and delivered by a drug enforcement administration (DEA)-registered laboratory for testing. Such sample must be taken within 15 days of the anticipated harvest by a federal, state, local, or tribal law enforcement agency.
- Disposal of plants grown in violation of the program in accordance with the Controlled Substances Act and DEA regulations because the material constitutes cannabis.

State Hemp Program

In 2019, the Legislature created the state hemp program (program) within the Department of Agriculture and Consumer Services (DACS) to regulate the cultivation of hemp in Florida.¹⁹ Consistent with federal law, the program defines the term “hemp” as the plant *Cannabis sativa L.* and any part of that plant, including the seeds thereof, and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers thereof, whether growing or not, that has a total delta-9 THC concentration that does not exceed 0.3 percent on a dry-weight basis.²⁰

The program prohibits the cultivation of hemp without a license. As such, any person seeking to cultivate hemp must apply for a license with DACS and provide specified information concerning the legal land description and global positioning coordinates of the area where hemp will be cultivated.

The program provides that a licensee may only use hemp seeds and cultivars certified by a certifying agency or a university conducting an industrial hemp pilot project.

The program allows hemp extract to be distributed and sold in the state only if the product has a certificate of analysis that states the batch does not exceed the total delta-9 THC concentration for hemp and does not contain contaminants unsafe for human consumption. In addition, the packaging for a product containing hemp extract must include a scannable barcode or quick response code linked to the certificate of analysis by an independent testing laboratory, the batch number, the Internet address of a website where batch information may be obtained, the expiration date, the number of milligrams of hemp extract, and a statement that the product contains a total delta-9 THC concentration that does not exceed 0.3 percent on a dry-weight basis.

DACS must maintain a registry of land on which hemp is cultivated, including the global positioning coordinates and legal land description for each location where hemp has been grown within the past three calendar years and submit monthly to the Secretary a report that includes such location and the contact information for each licensee.

DACS must enforce the program and every state attorney, sheriff, police officer, and other appropriate county or municipal officer must enforce, or assist any agent of DACS in the enforcement of, the program and rules adopted by DACS. DACS or its agent may enter any public or private premises during regular business hours in the performance of its duties related to hemp cultivation and DACS must conduct random inspections, at least annually, of each licensee to ensure that only certified hemp seeds are being used and that hemp is being cultivated in compliance with the program.

The program required DACS, in consultation with the Department of Health and the Department of Business and Professional Regulation, to initiate rulemaking by August 1, 2019. The program requires DACS to seek approval of the state plan from the Secretary within 30 days after adopting rules.

¹⁹ Chapter 2019-132, L.O.F.; codified as s. 581.217, F.S.

²⁰ Section 581.217(3)(d), F.S.

On June 6, 2019, DACS initiated rulemaking by publishing a Notice of Rule Development in the Florida Administrative Register. The USDA rules were published after DACS initiated rulemaking and include requirements that may necessitate revisions to the DACS proposed hemp rules. Although rulemaking was timely initiated by DACS, the rules governing licensure and the regulation of the cultivation of hemp have not been finalized or adopted.²¹ Because the rules have not been adopted, DACS has not submitted the state plan for federal approval and cannot issue licenses for the cultivation of hemp.

The Industrial Hemp Advisory Council

The Industrial Hemp Advisory Council (advisory council) was created to provide advice and expertise to DACS with respect to plans, policies, and procedures applicable to the administration of the program.²²

The advisory council must meet at least once annually and is composed of the following members:²³

- Two members appointed by the Commissioner of Agriculture;
- Two members appointed by the Governor;
- Two members appointed by the President of the Senate;
- Two members appointed by the Speaker of the House of Representatives;
- The dean for research of the Institute of Food and Agricultural Sciences of the University of Florida or his or her designee;
- The president of Florida Agricultural and Mechanical University or his or her designee;
- The executive director of the Department of Law Enforcement;
- The president of the Florida Sheriffs Association or his or her designee;
- The president of the Florida Police Chiefs Association or his or her designee;
- The president of the Florida Farm Bureau Federation or his or her designee; and
- The president of the Florida Fruit and Vegetable Association or his or her designee.

Current law specifies that a majority of the members constitutes a quorum and that the members must serve without compensation and are not entitled to reimbursement for per diem or travel. The law, however, does not specify the terms of the members.

Florida Food Safety Act

The Florida Food Safety Act (act)²⁴ is intended to safeguard the public health and promote the public welfare by protecting the consuming public from injury by product use and from merchandising deceit.²⁵

The act prohibits the manufacture, sale or delivery, holding, or offering for sale of any food that is adulterated or misbranded.²⁶ The act also prohibits the adulteration or misbranding of any food.²⁷

For purposes of the act, the term “food” is defined to include:

- Articles used for food or drink for human consumption;
- Chewing gum;
- Articles used for components of any such article;
- Articles for which health claims are made, which claims are approved by the Secretary of the United States Department of Health and Human Services and which claims are made in accordance with federal law, and which are not considered drugs solely because their labels or labeling contain health claims; and
- Dietary supplements.

The term includes any raw, cooked, or processed edible substance; ice; any beverage; or any ingredient used, intended for use, or sold for human consumption.²⁸

²¹ See Rule 5B-57.014 titled “Hemp Program.” The Notice of Proposed Rule was published on October 10, 2019, and a notice of correction was filed on October 11, 2019. Since then, the rule has not been changed or filed for adoption. A copy of the notices for the hemp program rule can be found online at: <https://www.flrules.org/gateway/ruleNo.asp?id=5B-57.014> (last visited Jan. 30, 2020).

²² Section 581.217(14), F.S.

²³ *Id.*

²⁴ Chapter 500, F.S., is cited as the “Florida Food Safety Act.”

²⁵ Section 500.02(1), F.S.

²⁶ Section 500.04, F.S.

²⁷ *Id.*

²⁸ Section 500.03(1)(n), F.S.

The act requires a food permit to be issued from DACS before any person may operate a food establishment or retail food store.²⁹ The act, however, provides the following exceptions to the permit requirements:

- Persons operating minor food outlets selling food that is commercially prepackaged, not potentially hazardous, and not time or temperature controlled for safety, if the shelf space for those items does not exceed 12 linear feet and no other food is sold by the minor food outlet;
- Persons subject to continuous, onsite federal or state inspection;
- Persons selling only legumes in the shell, either parched, roasted, or boiled; and
- Persons selling sugar cane or sorghum syrup that has been boiled and bottled on a premise located within the state. Such bottles must contain a label listing the producer's name and street address, all added ingredients, the net weight or volume of the product, and a statement that reads, "This product has not been produced in a facility permitted by [DACS]."³⁰

Effect of the Bill

The bill amends provisions related to the state hemp program.

The bill provides that hemp extract is a "food" for purposes of the Florida Food Safety Act. It also provides that a minor food outlet that sells hemp extract is not exempt from certain food permit requirements.

The bill removes the requirement that licensees only use certified hemp seed and cultivars. As a result, licensees will be able to use hemp seeds from any source.

The bill amends the definition for the term "hemp extract" to clarify that it does not include synthetic CBD or seeds or seed-derived ingredients that are generally recognized as safe by the United States Food and Drug Administration and to provide that it includes substances and compounds intended for ingestion or inhalation containing more than trace amounts of cannabidiols. Because of this change, the labeling requirements relating to the distribution and retail sale of hemp extract will not apply to certain foods that do not contain more than trace amounts of cannabidiols, such as hemp seeds.

The bill amends the packaging requirements for hemp extract to provide that the label must include the number of milligrams of each marketed cannabinoid per serving, rather than the number of milligrams of hemp extract. The bill also removes from the label the statement that the product does not contain more than 0.3 percent THC on a dry-weight basis. The bill provides that hemp extract sold or distributed in the state in violation of the hemp labeling requirements is considered adulterated or misbranded.

To comply with the USDA rules, the bill requires DACS to add the total acreage of hemp planted, harvested, and if applicable, disposed of for each licensee to its monthly report to the USDA.

The bill allows DACS to contract with entities to provide sample collection, laboratory testing, and disposal services to implement the program. The bill adds provisions to DACS rulemaking requirements under the program. Specifically, the bill directs DACS to adopt, by rule, a testing procedure that allows for a measure of uncertainty and ensures a representative sample is physically collected before the anticipated harvest by a federal, state, local, or tribal law enforcement agency.

The bill clarifies that members of the Industrial Hemp Advisory Council serve as the sole advisory body for DACS and serve 4-year staggered terms. The bill provides a mechanism to provide for the initial staggering of the terms of the council. It also provides that the chair must serve for a term of one year.

²⁹ Section 500.12(1)(a), F.S.

³⁰ *Id.*

The bill requires DACS to provide a report to the Legislature recommending a fee or fees for participation in the program, which must take into consideration costs associated with inspections and testing and any other necessary costs.

The bill provides that if the state plan is denied by the Secretary and revisions can be made to the plan without statutory changes, DACS, in consultation with and final approval from the Administration Commission, must submit an amended plan.

B. SECTION DIRECTORY:

Section 1 amends s. 500.03, F.S., revising the definition of the term “food” to include hemp extract.

Section 2 amends s. 500.12, F.S., providing that a person operating a minor food outlet that sells hemp is subject to certain food permit requirements.

Section 3 amends s. 581.217, F.S., relating to the state hemp program.

Section 4 provides an effective date of upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill clarifies the definition of “hemp extract” to provide that it does not include synthetic CBD or seeds or seed-derived ingredients generally recognized as safe by the United States Food and Drug Administration and must contain more than trace amounts of cannabidiol. As such, the required labeling provisions will not apply to certain food products currently sold and consumed that do not contain more than trace amounts of cannabidiol, such as hemp seeds.

D. FISCAL COMMENTS:

The bill may require DACS to update its hemp rules; however, DACS’s rulemaking appears to be ongoing and the updates, if necessary, can be made within the existing resources of the department. The bill also requires DACS to provide a report to the Legislature recommending fees for participation in the program; the costs associated with the report should be minimal and can be absorbed within existing resources.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill adds provisions to DACS' rulemaking requirements under the program. Specifically, the bill directs DACS to adopt, by rule, a testing procedure that allows for a measure of uncertainty and ensures a representative sample is physically collected before the anticipated harvest.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 4, 2020, the Agriculture & Natural Resources Subcommittee adopted a proposed committee substitute (PCS) and reported the bill favorably as a committee substitute. The PCS removed provisions from the bill that required DACS to adopt rules relating to contaminants unsafe for human consumption, changed the THC concentration levels for hemp extract, provided that mislabeled hemp extract is considered adulterated, and required DACS to conduct random annual inspections. The PCS added the following provisions to the bill:

- If the state plan is denied and revisions can be made without statutory changes, the PCS required DACS to, in consultation and with final approval from the Administration Commission, submit an amended plan;
- The PCS required DACS to report the total acreage of hemp planted, harvested, and if applicable, disposed of for each licensee to the USDA;
- The PCS required DACS to, by rule, adopt a procedure for sampling hemp and for disposing of hemp grown in violation of the law;
- The PCS revised provisions related to the advisory council and provides for staggered terms; and
- The PCS required DACS to provide a report to the Legislature recommending fees sufficient to cover the costs of implementing and administering the program.

On March 2, 2020, the State Affairs Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment added the following provisions to the bill:

- Provided that hemp extract is a "food" for purposes of the Florida Food Safety Act;
- Provided that a minor food outlet that sells hemp extract is not exempt from certain food permit requirements;
- Provided that hemp extract does not include synthetic CBD or seeds or seed-derived ingredients that are generally recognized as safe by the United States Food and Drug Administration;
- Revised hemp labeling requirements to only require the label provide information on each marketed cannabinoid per serving, rather than every cannabinoid, and removed from the label the statement that the product does not contain more than 0.3 percent THC on a dry-weight basis;
- Provided that hemp extract distributed or sold in the state in violation of the hemp extract labeling requirements is considered adulterated or misbranded;
- Authorized DACS to contract with entities for sampling, laboratory testing, and disposal services; and
- Required DACS to adopt rules to create a procedure for testing THC that allows for a measure of uncertainty.

This analysis is drafted to the committee substitute as approved by the State Affairs Committee.