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Comments of the Wisconsin Farm Bureau Federation and the Wisconsin Hemp Alliance regarding Emergency Rule ch. ATCP 22.

## BACKGROUND

On December 2<sup>nd</sup>, 2017, an historical enactment of the Wisconsin State Legislature went into full force and effect. 2017 Wisconsin Act 100 ended a nearly 60-year ban on the cultivation and processing of a historically significant crop in our state's and nation's history: industrial hemp.

Act 100 created a state industrial hemp program that not only allows the cultivation of industrial hemp in this state, but specifically directs the Wisconsin Department of Agriculture, Trade, and Consumer Protection (DATCP) to generally maximize opportunity for people in Wisconsin to plant, grow, cultivate, harvest, sample, test, process, transport, transfer, take possession of, sell, import, and export industrial hemp to the greatest extent authorized under federal law.

Farmers in Wisconsin are struggling to make ends meet much less turn a profit under current commodity prices. Many farmers have shown a significant interest in adding industrial hemp to the suite of products that they can choose to produce to maximize the profitability of their operations, and many other people have expressed a strong interest in setting up processing facilities in this state to turn Wisconsin-grown industrial hemp into the many types of products for which there currently is consumer demand.

Some of the key provisions in Act 100 include the following:

**What substances does the new law cover?** The definition of "industrial hemp" was carefully crafted under this law to include not only low-TCH Cannabis plants, but also any individual component of these plants, including seeds. Therefore, this definition includes a wide range of materials that might be derived from this plant, including cannabinoids such as CBD (cannabidiol) and related products, and viable industrial hemp seed. This definition also provides flexibility under state law if the allowable percentage of THC under federal law is increased, up to a state-imposed maximum of 1.0% THC.

The definition of "industrial hemp" specifically does not include Cannabis plants, plant parts, or products that are not included under either the state or federal controlled substances laws. In other words, this law creates a legal umbrella for people to operate under with respect to substances and materials that are otherwise illegal under state or federal law; however, when industrial hemp is

processed into a component or product that is not included under one of these controlled substances laws, it is no longer subject to this state regulatory system.<sup>1</sup>

**What authority was provided to DATCP under the new law?** In addition to generally designating DATCP to be the agency to set up the state's industrial hemp program, the new law requires DATCP to ensure the quality of industrial hemp grown or processed in this state, the security of activities related to industrial hemp, and the safety of products produced from industrial hemp, including any necessary testing, compliance verification, and law enforcement. DATCP may also impose a fee on regulated individuals to cover its costs to regulate these activities. DATCP is also directed to facilitate a voluntary industrial hemp seed certification program. Finally, the agency is authorized to seek federal approval to serve as an importer of industrial hemp seed, an authority which we understand the agency is pursuing.

**How does the industrial hemp "pilot program" fit within the state industrial hemp program?** As discussed above, the new law requires DATCP to maximize the opportunity for people in Wisconsin to participate in industrial hemp-related activities, to the extent allowed under federal law. Currently, the only opportunity to engage in these activities, other than with hemp derivatives that are not included under the federal controlled substances law, is pursuant to a state industrial hemp pilot program authorized under the 2014 Federal Farm Bill. Consistent with this law, DATCP is required to establish a Wisconsin pilot program to study the growth, cultivation, and marketing of industrial hemp.

**Who can participate under this pilot program?** DATCP is required to issue licenses under this pilot program that authorize the planting, growing, cultivating, harvesting, sampling, testing, processing, transporting, transferring, taking possession, selling, importing, and exporting of industrial hemp. Licensees are required to meet certain requirements under this program, including the identification of all hemp growing locations and passing a criminal background check.

DATCP is also required to create a system to register people who will sample, test, process, transport, transfer, take possession, sell, import, or export industrial hemp. Registrants are also required to pass a criminal background check.

**What legal protections apply to participants in this program?** As noted above, Act 100 requires DATCP to create opportunities for people to seek licensure or registration under the pilot program for a very broad range of activities at all levels of this new industry. This was intended to provide opportunity for people engaged in just about any activity related to this crop to subject themselves to

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<sup>1</sup> Examples of components or products of an industrial hemp plant that would not be subject to regulation under either the state or federal controlled substances laws and therefore would not fall under the state's industrial hemp regulatory program include, fiber or other products produced from the stalks (except for resin from the stalks), oil or cake made from the seeds, and sterilized seeds, even if they contain some residual amount of THC.

the legal protections of the program, from production of industrial hemp through processing, distribution, retail sale, and consumer purchase of industrial hemp products.

To protect people in each subsequent level of this product stream, Act 100 requires DATCP to create a form, which includes THC testing results and the chain of custody of the product, to accompany any transfer of industrial hemp until it is processed in such a way that it no longer meets the definition of industrial hemp, at which time the form must be submitted to DATCP. This means that for certain hemp products, like fiber, cake or oil produced from seeds, and sterilized seeds, this regulatory protection must only apply until such point in the process at which industrial hemp is processed into one of these derivatives. Because these products are legal in their own right under both state and federal controlled substances law, even when they contain some residual THC content, no additional regulatory control is required or provided for under Act 100. For other products, such as CBD oils, the regulatory umbrella of the pilot program must continue to apply through all levels of the distribution chain until the product is used or consumed.

**What penalties apply to violations under the industrial hemp program?** The Act specifies that the penalty for violations of the industrial hemp law is a forfeiture of \$200 to \$5,000 for a first offense and a forfeiture of \$400 to \$10,000 for a second or subsequent offense within five years. The Act also creates a penalty enhancer applicable to anyone who attempts to conceal the commission of a drug-related crime while purportedly operating under the industrial hemp program, which increases the maximum term of imprisonment for a misdemeanor by up to six months and the maximum term of imprisonment for a felony by up to three years.

**What legal protections apply to people operating under the pilot program with respect to controlled substances laws?** In addition to the express statutory approval for people to engage in the broad range of activities allowed under this program, Act 100 creates a significant safe harbor for participants by specifically exempting a broad range of program-related activities from prosecution under state and municipal drug laws. Another key protection under Act 100 prevents prosecution of a person who engages in certain activities related to industrial hemp in violation of a DATCP rule unless DATCP refers the person to the appropriate district attorney or local law enforcement.

**What does the new law require if a farmer inadvertently grows a crop that exceeds the THC threshold concentration for industrial hemp?** A farmer is protected from prosecution if he or she DOES NOT use certified seed and the THC concentration of the crop is 1.0% or less OR the crop was grown from seed certified to be from plants with a THC concentration below 0.3%, regardless of the realized THC concentration in the crop.

Any crop that tests higher than 1.0% THC (under current federal law) must be destroyed, whether grown from certified seed or not. If the THC concentration is 1% or below, Act 100 allows the farmer to recondition the crop to lower its THC concentration below the allowable 0.3% threshold, for

instance by destroying certain parts of the plants which are typically highest in THC concentration. No sale or transfer of the crop is allowed until it is reconditioned to the appropriate THC concentration.

## **EMERGENCY RULE CHAPTER ATCP 22**

DATCP was provided with only 90 days to prepare the first round of administrative rules to give effect to Act 100. The Legislature understood that this was an almost impossible task to assign to the agency under this timeline, but believed that it was critical to do so in an attempt to get at least the bare bones of the program up and running in time to provide opportunity for growers to produce their first crop in 2018 and to avoid losing a whole growing season.

The leadership and staff at DATCP performed this task in time and in a manner which exceeded many people's expectations, and they deserve a great deal of credit for that accomplishment. Any success realized by this new industry in 2018 will largely be thanks to these efforts.

The Wisconsin Farm Bureau and the Wisconsin Hemp Alliance believe that Emergency Rule Chapter 22 will provide excellent opportunity for growers and processors to take their first steps in creating this new industry in Wisconsin. The process for obtaining licensure is relatively simple and inexpensive, and it creates no obstacles that are insurmountable.

Our organizations ask for only a few relatively minor changes to this rule package as the agency moves this program forward, possibly through additional emergency rules over the upcoming months, and certainly in the eventual permanent rules. These requested changes include the following:

1. The emergency rules provide that hemp crops must be destroyed if two tests show that the crop has higher than 0.3% THC content. This runs counter to Act 100. Under this new law, hemp crops that test higher than 0.3% THC content but below 1.0% THC content need not be destroyed. Act 100 provides that it is illegal for a grower to sell or otherwise transfer such crops until they are reconditioned to meet the 0.3% threshold, but does not require their destruction. Only crops that test higher than 1.0% THC must be destroyed.

Related to this point, information posted on the DATCP website indicates that farmers are exempt from prosecution under state controlled substances laws if they grow certified seed AND the hemp they cultivate tests below 1.0% THC. To the contrary, Act 100 protects farmers from prosecution under drug laws if EITHER 1) the farmer grows certified hemp seed (regardless of the THC content of the crop) OR 2) the farmer grows non-certified seed and the THC content of the crop is 1.0% THC or below. A crop must be destroyed if it tests higher than 1.0% THC under either circumstance, but the farmer is protected if he or she uses certified seed to produce such a crop.



2. The grower license under the emergency rules does not allow for the breadth of activities allowed under such an approval by Act 100. Under ATCP 22, a licensed grower may “possess, cultivate, grow, and harvest industrial hemp.” Under Act 100, a grower is authorized to “plant, grow, cultivate, harvest, sample, test, process, transport, transfer, take possession of, sell, import, and export” industrial hemp. We ask that DATCP expand the list of authorized activities for these licensees in its next round of rulemaking, or explain in the documentation related to its rulemaking why any of these actions is not authorized.
3. Act 100 requires DATCP to create a “registration system” for people who would like to sample, test, process, transport, transfer, take possession of, sell, import, or export industrial hemp. All of these activities are also authorized under the new law for a grower license (as described above, the grower license also allows planting, growing, and harvesting). The new law anticipated an easier, more streamlined process for people who wanted to engage in any of the broad range of hemp-related activities it authorizes other than producing the crop, because security becomes less of an issue once a crop is grown, passes inspection and testing, and is harvested and accompanied by THC testing documentation.

Under the emergency rule, the only activities authorized under this second approval system are storing, handling, and converting industrial hemp into a marketable form. In addition, the application materials and their explanations that have been created by DATCP indicate that this second type of approval is fairly narrowly focused on hemp processing entities. This is likely to be sufficient to get this industry jump started over the next few months, but we will very quickly come to a time when our first state hemp crop is harvested and processed and people are looking to conduct marketing research beyond the processing level. This may include wholesale or retail operations, or even end customers seeking the legal assurances provided by pilot program coverage.

We believe it is absolutely critical to the development of this industry and the usefulness of any marketing research conducted under our state pilot program that DATCP act as soon as is reasonable to simplify this second-tier approval (and create a simpler “registration” program) and expand the list of authorized activities for these approvals to match the list authorized under Act 100. If DATCP believes that any of the statutorily-authorized actions are not required to be allowed under state law, we hope that it will allow us and other interested parties to engage in discussions regarding this issue.

4. As noted above, Act 100 specifically lists a range of activities that are allowable under the grower’s license and the registration system for other market participants. If NO OTHER activity is added to allowable activities recognized by the emergency rule in the short term, we believe

it is imperative that the agency at least modify the rule to specify that “sales” and other transfers of industrial hemp are expressly allowed under both approval types.

The authorization of a grower or processor to sell industrial hemp and hemp products derived from industrial hemp is necessarily implied from the emergency rules, Act 100, and the purposes of the law creating the federal pilot program, which contemplates “marketing” research which can hardly occur unless a market is allowed to develop post-processing. However, the emergency rule only *briefly acknowledges* that these participants may sell their products (see page 8, lines 222-223). We request that DATCP include a provision in a subsequent emergency rule and in the final rule that expressly recognizes the authority of licensees to sell their products.

5. On page 10, line 301, it appears that the term “contractor” should be replaced with “processor”.

We appreciate the opportunity to comment on these emergency rules, and we hope that we can be a constructive part of the agency’s efforts to continue to move this program forward. As you know, there is much work to be done; there are numerous additional matters to be tackled in subsequent administrative rules, including product safety and prosecutorial referrals, to name a few, and we are already identifying a list of matters that will require legislative cleanup in order to eliminate unnecessary obstacles to the growth of this industry. We ask that you provide us and other interested parties with the opportunity to stay engaged as you carry this task forward, and let us know if there are opportunities for us to help advocate for the tools and resources that you need to do so.

Sincerely,

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