Legislative Analysis

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INDUSTRIAL HEMP GROWERS ACT

Senate Bill 186 (S-1) with amendment as reported from House committee
Sponsor: Sen. Dan Lauwers
House Committee: Agriculture
Senate Committee: Agriculture
Complete to 3-16-21

SUMMARY:

Senate Bill 186 would amend the Industrial Hemp Growers Act to make a number of changes based on revised federal regulations. The act provides licensing, registration, and regulatory responsibilities for the Michigan Department of Agriculture and Rural Development (MDARD) with regard to the growing, processing, and handling of industrial hemp.[1]

The United States 2018 Farm Bill legalized industrial hemp and provides a federal framework for industrial hemp production.[2] States wishing to regulate industrial hemp must have a plan approved by the United States Department of Agriculture (USDA).[3] The Industrial Hemp Growers Act was enacted in 2020 to bring Michigan into compliance with USDA regulations governing industrial hemp production and provide MDARD with the framework necessary for USDA approval of Michigan's state hemp plan by codifying USDA requirements into state law, specifically the agency's interim final rule published on October 31, 2019.

On January 19, 2021, the USDA issued its final rule providing regulations for the production of hemp. The rule takes effect March 22, 2021. The final rule incorporates modifications to the 2019 interim final rule based on public feedback and the experience of the 2020 growing season.[4] Senate Bill 186 would amend the Industrial Hemp Growers Act to incorporate these changes into that act, as described below.

Chapter I – General Provisions and Definitions

The bill would add, replace, or amend several definitions that are used throughout the act. Several of these defined terms are described in context below.

Chapter II – Application and Registration

Currently under the act, an initial registration granted by MDARD expires at midnight on November 30 in the same year it was granted. All other registrations are valid for one year beginning on December 1 and expire at midnight on November 30 of the following year.

Under the bill, initial registrations would expire on the January 31 following the date the registration was granted. All other registrations would be valid for one year beginning on February 1 and expire at midnight on January 31 of the following year.

[1] http://legislature.mi.gov/doc.aspx?2020-SB-0852
[2] See MDARD's industrial hemp webpage: https://www.michigan.gov/mdard/0,4610,7-125-1569_74018---,00.html
[3] The USDA requires states and tribal authorities to submit industrial hemp program plans, https://www.ams.usda.gov/rules-regulations/hemp/state-and-tribal-plan-review
[4] https://www.ams.usda.gov/rules-regulations/hemp

The bill would change the registration renewal date from November 30 to January 31 and require that the $1,200 registration fee be paid for applications submitted on or before January 31. Applications submitted after January 31 would be subject to a late fee of $250.

An applicant's name, email address, and phone number can now be disclosed to a grower or another person authorized by MDARD, but only if the applicant provides express written consent. The bill would allow them to be disclosed to a grower or a processor-handler licensed under the Industrial Hemp Research and Development Act or a processor licensed under the Medical Marijuana Facilities Licensing Act.

Chapter III – Grower Registration

The bill would lengthen the time period for the requirement to report certain information to the USDA Farm Service Agency, from having to report the information immediately after receiving registration to having to report it after receiving registration and up to 60 days before planting any industrial hemp.

Grower Requirements and Responsibilities

The act would amend provisions concerning grower requirements and responsibilities as follows:

- Replace a current requirement to harvest the industrial hemp crop within 15 days after receiving a certified report, as outlined under Chapter IV, with a requirement to harvest the industrial hemp lot within 30 days after an ***official hemp sample*** is collected under Chapter IV. (***Official hemp sample*** would mean a sample that is collected by a designated sampling agent under Chapter IV in accordance with MDARD sampling protocols and is tested by a regulatory testing facility.)
- Add that a grower must dispose of or remediate, without compensation, any industrial hemp lot determined to be noncompliant under Chapter IV. (This replaces a requirement that the grower destroy all cannabis grown in the contiguous area where a sample was taken if the results of the total delta-9-THC test indicated a concentration of more than the acceptable THC level.)
- Require that the grower dispose of industrial hemp, without compensation, that is at a location that is not disclosed on the grower's application or that is grown in violation of the act.
- Change the date a grower must annually report certain information to MDARD from November 15 to November 30.
- Add that a grower may use only a ***compliance monitoring testing facility*** to test unofficial hemp samples for compliance monitoring to determine whether the hemp is in compliance with the act. (***Compliance monitoring testing facility*** would mean a laboratory that is registered with the DEA to conduct chemical analysis of controlled substances and performs routine compliance monitoring testing of unofficial hemp samples throughout the growing season.)
- Add that if MDARD is inspecting or investigating a complaint, the grower or the grower's authorized agent would have to be present and must do all of the following:
    - Allow MDARD to have access to all structures directly related to the production of industrial hemp, such as a barn, machine shed, greenhouse, or storage area.
    - Provide business records (including accounts, records, files and any other documents in print or electronic media) that MDARD determines are relevant or necessary for the inspection or investigation.

- Allow a law enforcement agency to accompany MDARD during an inspection or investigation.
- Allow MDARD to collect official hemp samples for the purpose of completing an inspection or investigation.

Grower Prohibitions

The act would amend grower prohibitions as follows:

- A grower currently cannot sell or transport, or permit the sale or transport of, viable industrial hemp plants or seed *to a location that is not disclosed on the grower's application or to a person in Michigan that is not a grower*. The bill would remove the italicized language to prohibit any sale or transport of hemp plants or seeds.
- Provide that a grower cannot harvest hemp before an official hemp sample is collected as outlined under Chapter IV. (This replaces a prohibition against harvesting before the grower receives the certified report of the total delta-9-THC test results.)
- Add that a grower could not sell raw industrial hemp to a person in Michigan that is not a processor-handler licensed under the Industrial Hemp Research and Development Act or a processor licensed under the Medical Marijuana Facilities Licensing Act.
- Revise a provision to prohibit a grower from disposing of hemp without submitting a notice of intent to dispose to MDARD under Chapter IV, except for industrial hemp affected by poor health, pests, disease, or weather or to prevent cross-pollination of male or hermaphrodite plants.
- Add that a grower could not sell an intermediary, in-process, or finished industrial hemp product or smokable hemp flower, unless the grower is licensed as a processor-handler under the Industrial Hemp Research and Development Act or as a processor under the Medical Marijuana Facilities Licensing Act.

Signage

Signage is currently required where industrial hemp is grown and must meet certain size requirements. The bill would add that the writing on the signs could not be smaller than 3/8 inch tall.

Maintaining Records

Currently under the act, a grower has to provide a record of sale to each person that purchases industrial hemp from the grower. The bill would change this so that a grower would have to provide a record of sale of raw industrial hemp to a licensed processor-handler or a licensed processor and would have to include the processor-handler's or processor's license number as well as their name.

Chapter IV – Sampling, Testing, and Disposal

Sampling

The bill would specify that a grower intending to harvest must contact MDARD not more than 30 days before the harvest, in addition to the current requirement that the contact not be less than 20 days before. Additionally, the current 15-day sampling requirement would be removed, and a ***designated sampling agent*** would instead have to collect an official hemp sample before the anticipated harvest. (***Designated sampling agent*** would mean a federal, state, or local law enforcement agent authorized by MDARD to collect official samples.)

The bill would further provide that a grower that requests the collection of an official hemp sample must be in good standing; a sample could not be collected until any outstanding fee or fine under the act is paid.

A grower could collect an ***unofficial sample*** and submit it to a compliance monitoring testing facility for compliance monitoring at any time to determine whether the hemp is in compliance with the act. (***Unofficial sample*** would mean a sample by a grower for routine compliance monitoring testing throughout the growing season for testing by a compliance monitoring testing facility.)

The bill would also allow MDARD to use performance-based sampling that allows for reduced or no regulatory sampling of specific certified seed, varieties yielding consistently compliant hemp, lots used for academic research by a college or university, historical performance of the grower, or other factors, which have the potential to ensure a 95% confidence level that no more than 1% of the plants in each lot would be noncompliant.

Testing

Throughout the act, the bill would differentiate among different testing facilities, such as regulatory testing facilities and compliance monitoring testing facilities. The bill would provide that MDARD is the official regulatory testing facility for testing official hemp samples. MDARD could contract with a third-party laboratory to conduct testing, but that lab would have to meet all of the following:

- Be registered with the Drug Enforcement Administration (DEA).
- Meet the standards in Chapter IV.
- Provide copies of any certified report that states the results of a total delta-9-THC test to MDARD within 24 hours after the test is completed.

The bill would add that a compliance monitoring testing facility or regulatory testing facility that performs total delta-9-THC testing must ensure that an official or unofficial hemp sample is not commingled with any other sample and assign a sample identification number to each official or unofficial hemp sample. These facilities also would have to report to the grower certain information listed in the act for each test performed and be registered with the DEA by December 31, 2022.

Reporting

Currently, a testing facility must provide the total delta-9-THC concentration level to the grower, MDARD, and USDA if the results indicate a concentration of up to the acceptable THC level. The bill would require a regulatory testing facility to provide the total delta-9-THC concentration level to only the grower and MDARD.

Additionally, if the results indicate a total delta-9-THC concentration greater than the acceptable level, a testing facility is now must provide a certified report to the grower and MDARD, and the grower must destroy the industrial hemp crop. The bill would require a regulatory testing facility to provide the certified report and require the grower to dispose of or remediate the noncompliant industrial hemp as outlined below.

Harvesting

The bill would expand the harvest days from 15 to 30 days after an official hemp sample is collected. A grower could submit a request to MDARD for a second sample if the grower were unable to harvest within the 30-day window for any of the following reasons:

- Weather.
- Agricultural practices.
- Equipment failure.
- Any other reason approved by MDARD.

The bill would add that a grower could not request a second official sample unless both of the following apply:

- The grower is in good standing with MDARD.
- The request to collect a second official sample is not for the purpose of delaying the harvest to increase cannabinoid concentration.

Disposal or Remediation

Currently under the act, a grower must destroy hemp with a total delta-9-THC concentration greater than the acceptable THC level. Under the bill, a grower that received a certified report that the test results indicate a total delta-9-THC concentration greater than the acceptable THC level would have to dispose of or remediate the noncompliant hemp within 30 days of receiving the report.

A grower disposing of the hemp would follow the current guidelines under the act for destroying the hemp but under the bill could no longer shred the hemp. If a grower remediates the hemp, the bill would require the grower to use one of the following methods:

- Remove all of the floral material and dispose of it in the same manner as disposing of the hemp.
- Shred the hemp plant into a biomass-like material.

Under the bill, if a grower remediates the noncompliant hemp lot, the grower would have to contact MDARD to collect an official hemp sample and be tested by a regulatory testing facility. If the results indicate a total delta-9-THC concentration less than the acceptable THC level, the grower would have 30 days from the sample collection to harvest the lot. If the results indicate a total delta-9-THC concentration greater than the acceptable THC level, the grower would have to dispose of the hemp. Additionally, the regulatory testing facility would have to provide a certified report stating the results to both the grower and MDARD.

Currently, a grower that destroys industrial hemp has to submit a notice to MDARD at least 48 hours before destroying the industrial hemp as well as a destruction report to the USDA and MDARD. The bill would change the reporting requirements and instead require that a grower submit a *notice of intent to dispose* industrial hemp to MDARD at least 48 hours before disposal. A grower would also have to submit a *notice of disposal* to MDARD within 48 hours of disposal and include the date and method of disposal, the total acreage or square footage disposed of, the reason for disposal, and photographic or video evidence of the disposal.

Under the bill, the grower would have to allow an agent of MDARD to be present during any disposal or remediation activities.

The bill would add that industrial hemp that is disposed of for any of the following reasons is not subject to the disposal requirements:

- Poor health.
- Pests.
- Disease.
- Weather.
- To prevent cross-pollination of male or hermaphrodite industrial hemp plants.

Chapter V – Administration

Fees

Currently, the fee required when submitting an application or a growing location modification request form must be paid with a check or money order payable to the state. The bill would change the method of payment to a method prescribed by MDARD.

Under the bill, a grower would have to pay a fee charged for testing under Chapter IV, or a fee charged for the collection of an official hemp sample (both as limited to the reasonable costs of conducting the testing or collecting the sample) within 15 days after receiving the invoice. MDARD could refer any fee that remained unpaid for more than 180 days to the Department of Treasury for collection.

Other Provisions

The bill would require MDARD to develop an enforcement response policy for use under Chapter VI. The enforcement response policy would have to provide for consideration and application of all of the following factors:

- Whether a grower has committee one or more violations.
- The severity of a violation.
- Whether a person has had previous contact with MDARD about violations or attempted violations.
- Past enforcement actions.
- Any other circumstances as determined by MDARD.

Chapter VI – Violations and Penalties

Negligent Violations

Certain actions by the grower are currently considered negligently violating the act. The bill would add that a grower is also negligently violating the act if the grower does any of the following actions:

- Grows industrial hemp that exceeds the acceptable THC level but does not have more than 1% total delta-9-THC on a dry weight basis.
- Any other violation that MDARD determines is negligent.

Upon determining that a grower negligently violated the act, MDARD would have to issue to the grower a notice of violation and the terms of a corrective action plan. The grower would have to comply with the terms of the plan. In determining whether a violation of the act is a negligent violation, MDARD would have to use the enforcement response policy created under Chapter V.

A grower would not be subject to more than one negligent violation per growing season.

Violations

Apart from the negligence violations described above, the bill would provide that a person violates the act if the person does any of the following:

- Intentionally grows or is in possession of cannabis with a total delta-9-THC content greater than the acceptable THC level.
- Makes a false or misleading statement, as determined by MDARD, to MDARD or a law enforcement agency.
- Fails to comply with an order from MDARD or a law enforcement agency.
- Commits any other violation of the act or a rule promulgated or order issued under the act.
- Materially falsifies information required for an application, as specified in Chapter II.

A grower that committed one of the five violations listed above would be ineligible to participate in the program.

Suspension and Revocation of Grower Registration

If a grower violated or was suspected of violating the first four violations listed above, MDARD would have to investigate and could suspend the grower's registration for up to 60 days or revoke the registration after a hearing and a finding that a violation was committed. If MDARD revokes the grower's registration, the revocation would be effective immediately and MDARD or a law enforcement agency would have to order the grower to dispose of all cannabis, as outlined in Chapter IV, that is in the grower's possession. The bill would remove the current requirement that MDARD or a law enforcement agency confiscate the cannabis.

The bill would add that a suspension, revocation, or denial of a registration of a person who is an individual could result in the suspension, revocation, or denial of any other registration held or applied for by that individual under the act. The registration of a corporation, partnership, or other association could be suspended when a registration or registration application of a partner, trustee, director or officers, member, or a person exercising control of the corporation, partnership, or other association is suspended, revoked, or denied.

Fines and Penalties

The bill would also provide that a grower that commits one of the five violations listed above is guilty of a misdemeanor punishable by imprisonment for up to 90 days or a fine of up to $5,000, or both. Additionally, a grower that commits a negligent violation or any of the violations listed above could be subject to an administrative fine. MDARD could also do any of the following:

- Issue a cease and desist order, which would be effective immediately and failure to comply with which could result in an administrative fine. MDARD would have to inform the grower of the reasons for the order.
- Bring an action to enjoin one of the five violations listed above (or an attempted violation) in the county where the violation occurred or is about to occur.
- Bring a civil action to restrain, by temporary or permanent injunction, one of the five violations listed above. The action could be brought in the circuit court for the county where the violation occurred. The court could issue a temporary or permanent injunction and issue other equitable orders or judgments.

However, if MDARD determined that a grower committed one of the five violations listed above and that it did not result in a significant harm to public health or the environment, then MDARD could issue a warning instead of imposing an administrative fine.

The attorney general could also file a civil action for one of the five violations listed above. A person that committed or attempted to commit one of those violations could be ordered to pay a civil fine of up to $5,000 for each violation. Additionally, the attorney general could bring an action in circuit court to recover the reasonable costs of the investigation from a grower that committed or attempted to commit one of those violations. Money recovered under this provision would be forwarded to the state treasurer for deposit into the Industrial Hemp Fund.

The bill states that the applicable provisions of the Revised Judicature Act would apply to any civil action filed by MDARD or the attorney general, as described above.

The bill would also provide that a person that violates the act is liable for all damages sustained by a purchaser of a product sold in violation of the act. In an enforcement action, a court could order, in addition to other sanctions, restitution to a party injured by the purchase of a product sold in violation of the act.

A grower could make an affirmative defense to any action filed under Chapter VI and present evidence that, at the time of the alleged violation or attempted violation, the grower was in compliance with the act and rules promulgated under the act.

In determining which of the above actions to pursue, MDARD would have to use the enforcement response policy.

Chapter VIII – Colleges and Universities

The bill would add a new chapter to govern hemp-related research activities at a college or university. Under the bill, a college or university that grows industrial hemp for research purposes would have to do all of the following:

- Register as a grower under Chapter II.
- Collect samples of each lot of industrial hemp and complete a total delta-9-THC test as required under Chapter IV. If the college or university adopts alternative methods for sampling and testing, then the college or university would not have to comply with the Chapter IV requirements. A test conducted under this provision would have to achieve a confidence level of 95% with respect to the acceptable THC level.
- Dispose of noncompliant hemp as described in Chapter IV.

The bill provides that this chapter would not take effect unless the Industrial Hemp Research and Development Act were repealed. (See **Background**, below.)

Finally, the bill would repeal section 701 of the Industrial Hemp Growers Act.

MCL 333.29103 et seq.

BACKGROUND:

The United States 2018 Farm Bill legalized industrial hemp and provided a federal framework for industrial hemp production. However, states wishing to regulate industrial hemp were required to have a plan approved by the United States Department of Agriculture (USDA).

2020 PA 220, the Industrial Hemp Growers Act, established a regulatory framework for industrial hemp production in Michigan under the Final Interim Rules for Hemp Cultivation issued by the USDA.[5] The act was intended to bring Michigan into compliance with USDA regulations governing industrial hemp production, and to provide the state with the framework necessary for USDA approval of Michigan's state hemp plan, by codifying in state law USDA requirements.[6] The act gave the Michigan Department of Agriculture and Rural Development (MDARD) statutory authority over the state's industrial hemp grower licensing and regulatory program.[7]

Michigan's industrial hemp production plan, reflecting federal regulations and provisions of 2020 PA 220, was approved by the USDA in August 2020 and implemented on December 1, 2020. The December 1 date aligns with MDARD's grower registration cycle.

For the 2020 growing season, growers were licensed under the Industrial Hemp Research and Development Act (2014 PA 547), as amended by 2018 PA 641. For the 2021 growing season, MDARD will license growers under the Industrial Hemp Growers Act in conformance with the USDA-approved state hemp plan.

Senate Bill 186 is intended to align the Industrial Hemp Growers Act with the Final Rules for Hemp Cultivation, as issued by the USDA on January 19, 2021.[8] The department indicates that the program updates made in Senate Bill 186 must be in effect no later than March 22, 2021, to be in compliance with USDA requirements.

Note on enacting sections

Senate Bill 186 repeals section 701 of the Industrial Hemp Growers Act, "Emergency Rules Codification." The emergency rules covered growers licensed under the Industrial Hemp Research and Development Act and were effective only through October 31, 2020. This repealer is effectively technical or housecleaning in effect.

Senate Bill 186 would add a new section 801 dealing with college and university industrial hemp research. The Industrial Hemp Research and Development Act contains similar provisions. Senate Bill 186 includes an enacting section that indicates that section 801 does not take effect unless the Industrial Hemp Research and Development Act is repealed, although Senate Bill 186 does not actually repeal that act.

MDARD representatives indicate that the Industrial Hemp Research and Development Act is still needed for the regulation of industrial hemp processors and the intention is for the Industrial Hemp Research and Development Act to be repealed after the enactment of an industrial hemp processing act. Making new section 801 contingent on the repeal of the

[5] http://legislature.mi.gov/doc.aspx?2020-SB-0852
[6] https://www.ams.usda.gov/rules-regulations/hemp/state-and-tribal-plan-review
[7] https://www.ams.usda.gov/sites/default/files/media/MichiganStateHempPlan.pdf
[8] https://www.govinfo.gov/content/pkg/FR-2021-01-19/pdf/2021-00967.pdf

Industrial Hemp Research and Development Act ensures that that there will not be two statutes governing the same subject.

MDARD indicates that the intention is to eventually have two acts governing industrial hemp: an act governing industrial hemp growers (this is the Industrial Hemp Growers Act, the act which Senate Bill 186 is amending) and an act governing industrial hemp processing. A bill to establish the industrial hemp processing act has not yet been enacted.

FISCAL IMPACT:

The bill would have an indeterminate fiscal impact on the state and on local units of government. Under the bill, a grower could commit violations of the Industrial Hemp Growers Act, of rules promulgated under the act, or of orders issued under the act, and could be found guilty of a misdemeanor, subjected to an administrative fine, or ordered to pay a civil fine, depending on the nature of the violation. New misdemeanor convictions would increase costs related to county jails and/or local misdemeanor probation supervision. Costs of local incarceration in county jails and local misdemeanor probation supervision, and how those costs are financed, vary by jurisdiction. Fine revenue paid for misdemeanor convictions would increase funding for public and county law libraries. Administrative fines would be paid to the Department of Agriculture and Rural Development and civil fines would be deposited into the Industrial Hemp Fund under section 609(4) of the bill. The fiscal impact on local court systems would depend on how provisions of the bill affected court caseloads and the related administrative costs.

The Department of Attorney General (AG) would incur administrative expenses in enforcing the act and collecting fines. Costs would be dependent on the frequency to which violations of the act, or rules promulgated under the act, are reported to the AG. If the AG is not able to provide the services required under the bill with its existing personnel, it may need to hire an additional full-time or part-time employee. The annual cost of an FTE position for a state attorney is $200,000. If AG expenses require additional support, they would be supported through appropriations to the AG or through a transfer from MDARD.

MDARD had previously estimated that the industrial hemp program would require 6.0 full-time equated (FTE) positions with ongoing annual costs of $1.0 million. Program funding has previously been established in the MDARD budget. The department indicates that Senate Bill 186 would have a relatively small increase in program responsibility, which could be absorbed with current resources.

Note that testing and registration fees were previously established under 2020 PA 220, as well as administrative fines for certain violations of the act. The fees and fines established in the act are credited to the Industrial Hemp Fund.

MDARD had estimated that the registration fees established in the act would generate from $600,000 to $700,000 in annual revenue, depending on the number of licenses each year. The testing and sampling fees, and any administrative fines assessed and collected, would provide additional program revenue. Although revenue from fees and fines may be less than total program costs, MDARD anticipates that subsequent legislation will provide for fees to be assessed on processors.

MDARD indicates that the intent is for the industrial hemp program to be supported by restricted revenue from the fees assessed on producers and processors.

MDARD indicated that in FY 2019-20, it collected $836,500 in licensing revenue and an additional $36,375 in hemp testing fees.

POSITIONS:

Representatives from the Michigan Department of Agriculture and Rural Development testified in support of the bill. (3-10-21)

The Michigan Farm Bureau indicated support for the bill. (3-10-21)

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