

MAINE HEMP LICENSING PROGRAM

L.D. 33 Resolve Report to the Maine Legislature

December 15, 2021



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SUMMARY OF FINDINGS

During the First Legislative Session of the 130th Legislature, L.D. 33, An Act To Improve the Laws Governing Hemp by Bringing Them into Compliance with Federal Law, became a Resolve. The Resolve required staff from the Department of Agriculture, Conservation and Forestry's (DACF) Hemp Licensing Program (the Program) to gather information and ideas from stakeholders about the type of hemp licensing program that would be best for Maine growers. The Resolve also directed the Program to research how other states were going to license hemp in 2022.

The Program conducted a number of Stakeholder Information Gathering Meetings (SIGMEs). Stakeholder participation was low, and stakeholder feelings were mixed regarding preferred licensing schemes. The Program also conducted online surveys with growers and hemp stakeholders that also yielded mixed and, at times, conflicting feedback. Nevertheless, there were several prominent takeaways from this information gathering:

- Hemp growers do not want to be licensed *directly* by USDA.
- Hemp growers would like the Total THC threshold for hemp to increase.
- Access to lending institutions, crop insurance, and federal assistance programs is important to growers.
- Access to out-of-state markets is important.

The Program's analysis of other states shows that 40 have USDA-approved plans. Five states have turned their programs over to USDA, meaning USDA is the sole licensing authority for hemp activities in those states. No state has decided to go on their own with a non-USDA compliant program. Maine may be the last state to decide how hemp will be regulated. This will be discussed in greater detail later in this report.

BACKGROUND ON MAINE'S CURRENT LICENSURE OF HEMP, USDA'S FINAL RULE, AND L.D. 33

Maine's Program

Maine presently regulates hemp cultivation through a licensing program pursuant to 7 MRS § 2231 and 001 DACF c. 274. DACF has been licensing hemp growers since 2016 under the 2014 federal Farm Bill authorization and has been defining hemp as any variety of *Cannabis sativa* L. with a delta-9-tetrahydrocannabinol (delta-9-THC) concentration that does not exceed 0.3% on a dry weight basis.

Maine has been able to retain this definition of hemp because it participated in the hemp pilot program under the 2014 Farm Bill. As of January 1, 2022, these 2014 Farm Bill pilot programs will no longer be able to continue and must conform to USDA's Final Rule, authorized by the 2018 Farm Bill (and discussed in greater detail below). The USDA Final Rule has a stricter definition of hemp using Total THC. For a cannabis sample to be considered hemp as defined by the USDA Final Hemp Rule, both delta-9-THC and THC acid (THCA), a precursor of delta-9-

THC, must be taken into consideration. This is because when cannabis is heated, a chemical reaction called decarboxylation takes place, which converts THCA into delta-9-THC, at an efficiency of 87.7%. Therefore, to calculate the Total THC of a hemp sample, this equation is used: Total THC = delta-9-THC + (0.877 X THCA). In short, Total THC as defined under the Final Rule is more stringent than Maine's current delta-9-THC definition.

USDA Final Rule

In December of 2018, the federal Agriculture Improvement Act included a provision making hemp production legal in all 50 states. The Act directed the USDA to develop rules to provide consistency in hemp regulation throughout the country. USDA's Agricultural Marketing Service (AMS) Final Rule, 7 CFR, Part 990 became effective March 22, 2021. As part of the Final Rule, USDA-AMS requires approved plans from states that want to license hemp growers. USDA-AMS approved Maine's State Plan based on the Interim Final Rule on September 2, 2020. However, to implement a new State Plan based on the Final Rule, the legislature must enact Maine statutory changes to conform with the federal rules.

L.D. 33

Last legislative session, DACF brought forward L.D. 33, An Act To Improve the Laws Governing Hemp by Bringing Them into Compliance with Federal Law. L.D. 33 was intended to change current Maine law so that Maine's hemp licensing program could align itself with [USDA requirements](#) by the January 1, 2022 deadline. L.D. 33 ultimately became a Resolve directing DACF to seek additional input from stakeholders on the future of the state's hemp program. At present, Maine cannot implement its State Plan and is one of four states that has not had its state plan approved by USDA after the Final Rule was published. USDA recently advised DACF that "Maine may be the only State in the U.S. to not have an approved hemp plan in place by the end of the year." (See Appendix A).

L.D. 33 specifically states that:

[T]he Department of Agriculture, Conservation and Forestry shall meet with and seek input from stakeholders on the United States Department of Agriculture Domestic Hemp Production Program requirements. The department shall study and monitor other state hemp programs, including states that are following federal hemp program regulations and states that are not in compliance with federal hemp program regulations. The department shall submit a report with findings and recommendations to the Joint Standing Committee on Agriculture, Conservation and Forestry no later than December 15, 2021. The joint standing committee may submit a bill to the 130th Legislature relating to the subject matter of the report.

STAKEHOLDER INPUT

To meet the charge of L.D. 33’s Resolve, Program staff planned to hold one virtual and four in-person Stakeholder Information Gathering Meetings (SIGMEs); however, staff had to modify its plans in response to rising COVID-19 virus cases during the latter half of 2021. For example, staff planned to hold a SIGME in conjunction with a presentation on hemp at MOFGA’s Common Ground Country Fair on Saturday, September 25, 2021, but the fair was canceled. All previously licensed growers and individuals interested in hemp who subscribe to the GovDelivery list were invited to attend the SIGMEs.

The SIGMEs were organized to gather input from hemp growers and others invested in Maine's hemp industry. Staff asked for feedback about the current existing Hemp Program and the pros and cons of having a USDA-approved state program, having only USDA licensure, or having a non-USDA approved state program (a “rogue” option).

Stakeholder Information Gathering Meetings

<u>Date</u>	<u>Type of Gathering</u>	<u>Number of participants</u>
7/8/2021	Old Town; in-person	9
8/31/2021	Virtual	4
9/10/2021	Whitefield; in-person	13
10/12/2021	Virtual	4

Growers, as well as individuals interested in hemp who subscribe to DACF’s hemp bulletin, were also invited to communicate directly with staff.

Because turnout to the SIGMEs was low, DACF created an anonymous online survey in November and sent it to two groups by email. One group contained hemp license holders from the past several years (approximately 260 people), and the other group was made up of subscribers to the hemp bulletin on GovDelivery (approximately 1900 people). Because of cross-over membership within the two groups, we asked respondents to complete just one survey. We received 29 completed surveys from hemp growers and 20 from the GovDelivery list.

RESULTS

Confusion about regulations

Participants brought different levels of understanding about hemp and marijuana regulations to the discussions, and some were interested in topics unrelated to how Maine’s hemp growers would be licensed in future years. Staff, therefore, spent significant time setting the stage for input that, in the end, was not always expressed by SIGME participants. Interestingly, not all

stakeholders understood that Maine’s definition of hemp was different from many other states.¹ Stakeholders also showed significant interest in the origins of CBD products that are being sold in local markets, an aspect of the hemp industry that the hemp licensing program does not regulate. CBD products are regulated by the DACF Quality Assurance & Regulations Division and Maine CDC.

One hemp grower felt that although Maine growers benefit from Maine’s delta-9-THC definition of hemp (the Federal definition includes both delta-9-THC and THC Acid, which will convert to delta-9-THC with heating. This is also known as Total THC), it is confusing to both grower and consumer that Maine is not following USDA standards, like most other states. In addition, because of this discrepancy between definitions, this grower was unable to advertise their hemp on a popular social media platform. There was concern that continuing to define hemp differently than USDA could prolong such prohibitions.

USDA felony ban is objectionable but not necessarily applicable

Participants agreed that USDA’s felon ban was unwelcome, but they also wondered if such a ban would impact anyone who has been farming hemp in Maine. DACF does not have access to data to address that question. However, it can be noted that none of our currently licensed growers or those attending the SIGMEs have shared that the felony ban would impact their ability to get a license. This was supported in the online survey data as well. One hundred percent of Maine licensed hemp growers taking the online survey, and all but two survey takers from the larger list, indicated that the USDA felony ban would not affect their ability to get a license.

Defining hemp using the 0.3% Total-THC threshold is impractical

No one expressed support for USDA’s THC definition (0.3% Total THC). A 1.0% Total THC threshold would be looked upon favorably by Maine hemp growers. It would allow plants to develop their phytochemical array more completely (maximizing yields) and be a more efficient approach to farming this type of hemp. We were told that processors also prefer working with raw material having greater cannabinoid content. Some growers expressed frustration that the varieties of hemp preferred by customers would be most at risk for exceeding the USDA threshold. A few growers expressed some concern about being barred from doing business with Massachusetts processors since they will not accept Maine Hemp until the state is following USDA rules.

Markets are a mixed bag

Local markets are a significant source of sales for Maine hemp producers. However, SIGME participants also acknowledged having out-of-state buyers and selling their products online, out-of-state. It is not clear from our information gathering whether Maine’s small craft hemp producers can succeed by selling exclusively within Maine. One participant said that having a so-called “rogue” Maine hemp program (not sanctioned by USDA) with a 1% Total THC

¹ In those states, which have USDA (2018 Farm Bill) approved plans or USDA licensure in place, 0.3% **Total THC** is the metric used to define hemp.

standard would be very desirable provided the State required all sales outlets, including big box stores, to sell only Maine-grown CBD.

Maine-grown hemp faces processing hurdles. Massachusetts processors have declined to process Maine hemp because Maine continues to operate under the 2014 Farm Bill and has opted to continue to use the 0.3% delta-9-THC threshold for hemp instead of USDA's 0.3% Total THC threshold. Further, because Maine does not license hemp processors, it is unknown how many actual processors are based in Maine.

The market for hemp seedlings for personal (non-commercial) garden plants would go away under a USDA-approved program, because the Final Rule has no allowances for personal use plants. A handful of Maine hemp growers have been selling seedlings to the public in late May-June. Conversely, sales of mature hemp plants at pick-your-own operations could see an increase in sales to satisfy the demand for raw hemp for personal consumption.

Access to financial institutions and federal programs is problematic

Hemp growers have had problems attaining banking services and insurance due to those industries' hesitancy around federal marijuana policy (despite hemp *not* being marijuana). As shared during the SIGMEs, one grower noted that a liability insurance policy was \$400 for microgreens and \$3000 for hemp. Another told of their bank closing their account. Although the Program hopes that, if passed, the federal SAFE Banking Act will bring stability to the financial services industry relative to hemp, progress at the federal level has been slow.

The surveys also revealed the importance of financial institution stability. Sixty-eight percent of growers felt that access to federal assistance programs is important, and 72% said access to banks and loans is important.

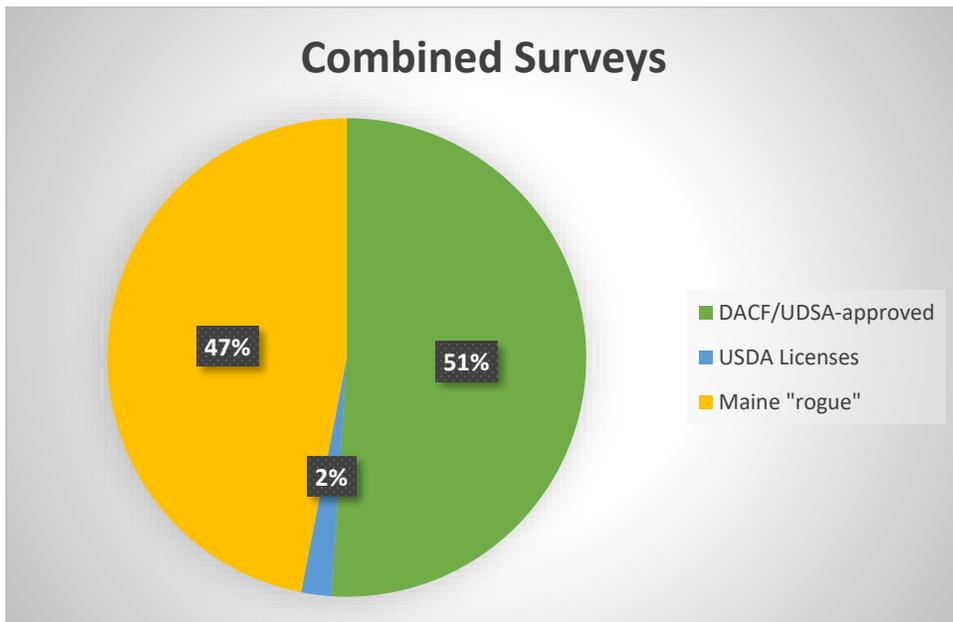
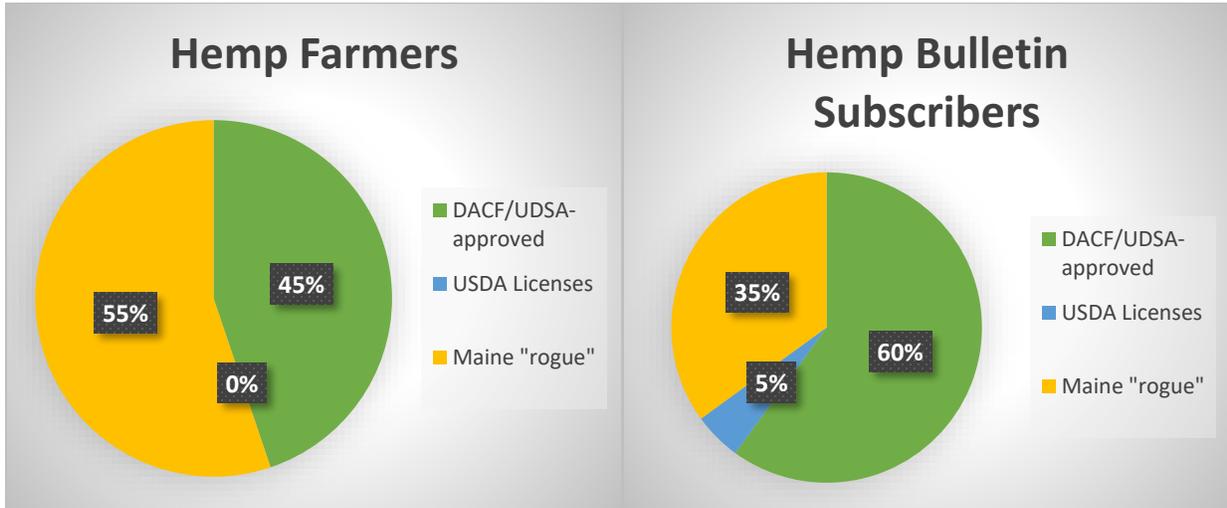
Given the identified need to access sound financial lending, not having a USDA-approved State Plan will have negative ramifications for Maine growers. USDA has advised that without such approval, "[Maine] farmers **will not be able to take advantage** of USDA funded insurance and other risk management products, nor apply for conservation and other types of grants." (Emphasis Added) (See Attachment A).

Some support for having a parallel licensing authority

SIGMEs also discussed whether a parallel licensing program in Maine would be preferable. This would entail allowing Maine hemp producers selling out-of-state to be licensed directly by USDA. Meanwhile, those Maine producers solely with in-state markets would prefer to be licensed by the Maine Hemp Program, with a new 1% Total THC threshold for defining hemp (this would be federally non-complaint. The potential ramifications of this scenario are discussed further below). Overall, many SIGME participants appear to favor this parallel scheme. As discussed further below, a reduced pool of state-licensed hemp growers would reduce the Program's funding stream and new strategies will be needed to financially support it.

MAINE SURVEY RESULTS REGARDING LICENSING AUTHORITY

As mentioned, the Program also issued surveys to hemp constituents to gather feedback beyond the SIGME process. Survey takers were split between wanting two types of licensing authorities: either the USDA-approved Maine Program or the “rogue” non-compliant Maine licensing program.



SURVEYING OTHER STATE PROGRAMS

L.D. 33 also required the Hemp Program to report back on how many states would have USDA-approved programs and whether states may offer options for hemp grower licensing. See Table 1 below. Staff learned that four states (HI, MS, NC, and WI) have joined New Hampshire in turning over their hemp licensing programs to USDA. Three other states (NM, MT, AK) have not decided whether they will continue their state programs. As of December 3, 2021, all undecided states except Alaska submitted plans for USDA in case they decide that pursuing a USDA-approved program is their path forward. Utah, which already has a USDA-approved plan in place for 2022, said it is now considering ceasing having its own state hemp licensing program and having USDA be the licensing authority.

No state has indicated that they are pursuing a rogue program or parallel licensing authority. One of the states still debating their path forward said: *“Operating under a hybrid plan (options for growers licensed under a State Plan outside of USDA rules; or growers licensed under USDA) may interject complications with respect to interstate movement; USDA loans; banking, etc.”*

Table 1. Results of the state survey on hemp licensing authority in 2022. Five states have relinquished their licensing authority to USDA. Three states remain undecided and are indicated as “TBD”.

State	State Program - USDA Approved	USDA Hemp Producer License	Non-compliant State Program
Hawaii		X	
Mississippi		X	
New Hampshire		X	
North Carolina		X	
Wisconsin		X	
Alabama	X		
Arizona	X		
Arkansas	X		
California	X		
Colorado	X		
Connecticut	X		
Delaware	X		
Florida	X		
Georgia	X		
Idaho	X		
Illinois	X		
Indiana	X		
Iowa	X		
Kansas	X		
Kentucky	X		
Louisiana	X		
Maryland	X		
Massachusetts	X		
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Nebraska	X		
Nevada	X		
New Jersey	X		
New York	X		
North Dakota	X		
Ohio	X		
Oklahoma	X		
Oregon	X		
Pennsylvania	X		
Rhode Island	X		
South Carolina	X		
South Dakota	X		
Tennessee	X		
Texas	X		
Utah	X		
Vermont	X		
Virginia	X		
Washington State	X		
West Virginia	X		
Wyoming	X		
Alaska	TBD	TBD	
Montana	TBD	TBD	
New Mexico	TBD	TBD	

CONSIDERING THE OPTIONS FOR HEMP LICENSING IN MAINE

L.D. 33's public outreach and review process resulted in a number of regimes being considered for licensing hemp production in Maine: a USDA-only program; a USDA-approved Maine program; and/or a "rogue" program. The Hemp Program believes it is important to provide additional context and information for the Legislature to consider regarding Maine's potential path(s) forward.

- Programmatic funding impacts: DACF's Hemp Program is funded solely through licensing fees. With declining license numbers under the current system, the Program has about a year's worth of funds to continue operations, assuming fees remain unchanged. Fee revenue would further decline if the USDA licensed those producers who sold out-of-state. If state licensure is to continue in any fashion, serious consideration must be given to how the Program can be adequately and sustainably funded. This could be in the form of direct, annual state government appropriation, or could entail licensing hemp processors and/or raising licensing fees on Maine producers.
- Potential pros of Maine licensing hemp as a USDA-compliant program:
 - A single nation-wide standard is less confusing to the public, producers, and consumers.
 - Maine hemp can be sold and transported throughout the U.S.
 - Growers will have access to federal farm assistance programs.
 - Growers can be expected to have greater access to financial institutions for banking, loans, and insurance.
 - DACF continues providing services such as inspections, Integrated Pest Management assistance, educational programming, and advocacy to help build the industry.
 - DACF acts as buffer with USDA. DACF approves producers' corrective action plans, not USDA.
 - DACF uses Performance-Based Sampling:
 - This is a concept introduced in the Final Hemp Rule that allows certain hemp lots and grower situations to skip compliance testing. It can allow for the unfettered sale of hemp microgreens and hemp seedlings. It is something only State programs can implement. If USDA becomes the licensing authority for Maine, this relaxation in testing requirements will not be available to growers.
- Potential cons of DACF licensing hemp as a USDA-compliant program:
 - Some of the required statute and rule changes may run contrary to Maine precedence and perspective regarding grow site confidentiality and treatment of individuals with prior controlled substance felony records.
 - Growers would have to meet USDA's stricter THC requirements.
 - Program must be able to support itself through fees.

- Potential pros of Maine ceasing to license hemp producers and USDA directly licensing instead (5 states have chosen this path):
 - Maine hemp can be sold and transported throughout the U.S.
 - Growers can be expected to have greater access to federal farm assistance programs.
 - Growers can be expected to have greater access to financial institutions for banking, loans, and insurance.
 - USDA currently does not have licensing fees.
 - The State does not have to spend resources regulating hemp.

- Potential cons of Maine ceasing to license hemp and USDA directly licensing instead:
 - Growers must pay for USDA-trained contractors to sample all hemp lots.
 - Growers must pay labs for THC tests.
 - Growers interact directly with USDA.
 - USDA does not do Performance-Based Sampling.
 - USDA license oversight of hemp in a marijuana-legal state may be complicated.
 - During the recent U.S. hemp regulators conference, we heard from states with legal marijuana programs who expressed reservations about inviting the USDA to license hemp growers. Marijuana growers are reluctant to report the location of their grow sites which may be at the same address as their hemp grow sites.

- Potential pros of a “rogue” Maine program, whereby DACF remains the licensing authority and does not change the program to become compliant with the USDA Final Rule. (It appears that USDA *would* license those growers who wanted USDA oversight).
 - Popular elements of Maine’s current program (e.g., no criminal background checks, three-plant exemption from licensing) would be retained.
 - The Maine Legislature might consider increasing the THC standard to 1% Total THC or establish some other way to differentiate hemp.
 - Growers would not need to report to USDA-FSA.

- Potential cons of the “rogue” program:
 - Maine would be in violation of federal law. Although the potential ramifications of being in violation are not entirely clear, enforcement authority would lie with the federal Drug Enforcement Agency. As a result, non-USDA licensed growers in Maine could be subject to federal enforcement actions.
 - USDA has advised: “...[T]he Department of Justice, specifically the Drug Enforcement Administration, will be notified of the potential for unlicensed hemp growing locations in your State.” (See Attachment A).
 - Markets would be reduced. Maine-grown hemp would have to be processed and sold within Maine.
 - Financial and insurance services would become more difficult to access.
 - There would be no grower access to USDA cost-share assistance programs.
 -
 - A dual licensing authority may present difficulties for local law enforcement.

- DACF would have information on a portion of Maine hemp growers. USDA and the Farm Service Agency would have information on the rest. Would location data in the State's list of licensed growers remain protected information while location information for USDA licenses be public?

DACF HEMP PROGRAM RECOMMENDATION

DACF's Hemp Program appreciates that hemp licensure is a complicated and nuanced subject area. Hemp growers have been living in an unstable regulatory climate since the 2018 Farm Bill passed four years ago. Coupled with the hemp flower (CBD) market glut which occurred in 2019 (after the 2018 Farm Bill allowed many more states to license hemp growers and hemp acreage skyrocketed across the country), many of Maine's largest growers ceased growing hemp because they could not find markets for their raw hemp.

Because Maine growers have not expressed support for being licensed by the USDA, but do desire access to loans, grants, crop insurance, NRCS cost-share programs, and state-provided inspection services, educational programming, and other critical support, DACF recommends that the Legislature act quickly to pass the original L.D. 33 to bring state statutes into conformance with the USDA Final Rule. Passing L.D. 33 will allow the Maine Hemp Program to continue to be managed by the state, to move forward an approved USDA Plan, and to allow for necessary rulemaking before the 2022 growing season. This will bring certainty to hemp licensing within Maine, continue financial support for the Program, avoid federal enforcement concerns, and allow grower access to federal farm assistance.

We look forward to discussing this report and our recommendations with the Legislature during the Second Regular Session in 2022.

ATTACHMENT A

From: Richmond, William - AMS <william.richmond@usda.gov>
Sent: Thursday, December 9, 2021 12:43 PM
To: Horton, Emily K <Emily.K.Horton@maine.gov>
Subject: Maine Hemp Plan

EXTERNAL: This email originated from outside of the State of Maine Mail System. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Ms. Horton,

On Friday, December 3, the President signed another Continuing Resolution (<https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/03/bill-signed-h-r-6119/>) to keep the government operational until February 18th. This Continuing Resolution did not contain language extending the hemp Pilot Program authority from the 2014 Farm Bill. In order to continue your State hemp program, you must have a USDA approved hemp plan by December 31, 2021.

We have been closely coordinated with the Maine hemp industry and DACF since the passage of the 2018 Farm Bill. We heard your concerns loud and clear following the issuance of the Interim Final Rule and worked hard to include flexible and straightforward regulations in the Final Rule issued earlier this year. We think the Final Rule is significantly less burdensome than the interim regulations and it was a direct result of the common sense suggestions from Maine growers.

There are potential negative implications to Maine hemp farmers if the State does not have an approved plan. Most importantly, your farmers will not be able to take advantage of USDA funded insurance and other risk management products, nor apply for conservation and other types of grants. Additionally, the Department of Justice, specifically the Drug Enforcement Administration, will be notified of the potential for unlicensed hemp growing locations in your State. Based on the best information we have today, Maine may be the only State in the U.S. to not have an approved hemp plan in place by the end of the year.

We are eager to do whatever necessary to work through the approval process with DACF in the coming weeks. We are always available to provide additional information or answer questions to your legislators, farmers, or other stakeholders. We are standing by and hope we can get the Maine plan approved in the coming weeks to beat the statutory deadline.

Thank you,

Bill Richmond

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<https://www.ams.usda.gov/rules-regulations/hemp>