

Legal Pot Industry Bugged by Lack of Pesticide Guidance

By Telisport W. Putsavage

In the last 10 years the United States has undergone a dramatic social and legal evolution with respect to attitudes toward marijuana. Both the Pew¹ and Gallup² polls continually have shown increasingly greater approval of marijuana use, whether for medical or recreational purposes. Approval levels now exceed 60 percent.

Social Evolution and State Legalization of Marijuana

Pioneered by a few states legalizing various methods of imbibing marijuana or its derivatives, medical marijuana in various forms is now legal in 28 states. While the coasts are heavily represented in this group, such states are spread across the country. Several of the original medical states then legalized adult, or recreational, use. Now eight states and the District of Columbia, including the entire west coast as well as Massachusetts and Maine, have followed suit and legalized adult use, with all providing for personal possession and cultivation and most providing for commercial cultivation and sale. While medical marijuana was legalized by a number of state legislatures, all states legalizing adult use did so by voter referendum. That approach may change as legislatures in New Jersey, Rhode Island and Vermont are considering legalizing adult use.

Industry is also taking note of the market opportunities being created. Scott's Miracle-Gro, a major lawn care and household pesticide producer, has made significant investments in hydroponic equipment and has been pushing EPA to alter its position on pesticide use on marijuana.

The result is that an estimated 60 percent of the U.S. population now lives in a jurisdiction where some form of marijuana use is legal under state law, including 20 percent who live in states where adult use is legal. Significant sums are being invested as states such as California gear up for commercial cultivation and adult use. To the delight of states and municipalities significant tax revenues are already being generated by the marijuana industry. Retail sales in 2016 in Colorado alone were \$1.3 billion.³ Ancillary industries, such as high tech greenhouse lighting, are blossoming. The scale of cultivation in the Denver metro area has impacted warehouse availability and energy conservation plans.

Pesticide Issue: The Label Is the Law

The need to use pesticides in the cultivation of marijuana was almost inevitable, notwithstanding the efforts by some growers to cultivate organically. Marijuana cultivation suffers from the same pest and disease pressure as any large commercial greenhouse operation. However, the circumstance unique to this setting is that any use of a pesticide in the cultivation of marijuana is a violation of federal law.

The use of pesticides is overseen nationally by the U.S. Environmental Protection Agency (EPA) under the authority of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).⁴ Under FIFRA every individual pesticide product must be registered and bear a label exactly as prescribed and approved by EPA.⁵ The label, the content of which is specified in great detail by FIFRA and EPA regulation, specifies the manner in which the product may be used. In the case of agriculture, the label specifies the crops upon which the product may be used. In addition, any pesticide ingredient to be applied to a food crop must have a "tolerance."⁶ A tolerance is a regulatory limit on the residue level of the pesticide allowed to be in any given food product upon which it is to be used. States are authorized under FIFRA to regulate pesticides, including more strictly than EPA if they choose to do so. In addition to registration with EPA, every individual pesticide product must also be registered with each state in which it is sold or distributed.⁷

It is a violation of FIFRA to use a pesticide in a manner inconsistent with its label.⁸ In the case of an agricultural pesticide, using a product on a crop not listed on the label would be inconsistent use and thus a FIFRA violation. The problem is that due to its classification as a controlled substance no registered pesticide bears a label specifying marijuana as an allowed crop for its use. Furthermore, marijuana is a food crop but no tolerance exists for any pesticide in marijuana. Since state laws also enforce use of pesticides consistent with their label, use on marijuana also violates state law.

Pesticide Confusion Is One of Many Legal Marijuana-Related Conflicts Between State and Federal Law

The wave of state legalizing marijuana has occurred in the face of federal law that forbids any possession or distribution of marijuana. The legal posture of marijuana is a result of the substance and its derivatives being listed by the U.S. Drug Enforcement Agency (DEA) on Schedule 1 under the Controlled Substances Act.⁹ Listing a substance on Schedule 1 is a binding legal determination that the substance is a drug for which there are no beneficial uses and which may not be possessed. Violation is a federal felony. Formal research, which might validate anecdotal claims of effectiveness, is severely limited. The DEA recently reviewed and confirmed the Schedule 1 listing,

TELISPORT W. PUTSAVAGE is a former environmental regulator for the states of New York and Maryland, and currently Principal at Putsavage PLLC, an environmental law firm, and Enviroreg, an environmental consulting practice, both based in Albany, NY.

so this topic is unlikely to be revisited in the near future. Notwithstanding this official federal posture, in January, 2017, the National Academies of Science, Engineering and Medicine issued a metastudy finding that some of the medical claims for marijuana have been validated and that generally there are not broad adverse impacts from adult use.¹⁰

The resulting quandary is virtually unprecedented: conduct legal under widespread state law is a significant Federal crime. As the marijuana industry has developed, it has confronted many issues resulting from this conundrum. Conflict areas have included legal representation, banking and income taxation. Since the commercial cultivation of marijuana is simply another form of large-scale commercial greenhouse agriculture, it is not surprising that conflicts have also arisen with respect to the regulation of pesticides by EPA and the administration of the National Organic Program by the U.S. Department of Agriculture.

Despite the increase in conduct constituting federal crimes, the federal government, as a result of Congressional action and administrative discretion, has with virtually no exception restrained from prosecuting such conduct. The Rohrabacher-Farr Amendment to the Continuing Budget Resolution will through December 8, 2017 preclude the expenditure of federal funds to enforce against state-compliant medical marijuana programs.¹¹ As of the writing of this article, it is uncertain whether this protection will be continued.

Under the previous administration the Departments of Justice¹² and Treasury¹³ issued guidance outlining parameters which would preclude prosecution by federal authorities of both medical and adult marijuana programs operating in compliance with state law. In response to Attorney General Sessions expressing hostility to any marijuana use, the governors of Alaska, Colorado, Oregon and Washington on April 3, 2017 wrote to the Attorney General and the Secretary of the Treasury urging that the administration continue the current posture. The Attorney General wrote back to each governor on July 24, 2017 citing crime statistics in each respective state alleged to be associated with marijuana.

The position of the current administration is expected to be reflected in the report of the Justice Department's Task Force on Crime Reduction and Public Safety, part of whose mission was to examine the current federal posture on state-legalized marijuana. Although a final report has been delayed, indications are that the Task Force is in fact not going to recommend any significant changes in the federal approach.

EPA and States Mutual Efforts to Accommodate Use of Pesticides in Marijuana Cultivation

To date both EPA and the impacted states have responded in a largely realistic fashion to the pressure to

accommodate the needs of marijuana cultivators operating under state law.

EPA has followed the overall approach of the administration to stand back. The EPA Office of Pesticide Programs issued guidance on the subject, advising that it would not disturb state efforts to devise regulatory structures.¹⁴ EPA also advised Colorado directly that if the state wanted to provide for the use of a pesticide on marijuana, it should issue a Special Local Needs (SLN) registration under FIFRA for the product.¹⁵ FIFRA authorizes a state to issue an SLN registration as a vehicle to amend the label of an EPA registered product to address a need unique to the state. In this instance the special local need would be the needs of the marijuana industry. The SLN registration would provide the opportunity for the state to add marijuana as a crop on the SLN label.

State Departments of Agriculture, the agencies in these states that regulate pesticides, recognized that an agricultural industry had been legalized under state law and was facing cultivation hurdles that needed to be accommodated. The initial state efforts to address pesticide issues were in the vanguard states of Colorado,¹⁶ Oregon¹⁷ and Washington.¹⁸ Each of these early-adopter states developed their own programs, facing many unanswered questions and ambiguities when trying to fit a permissive structure into a larger prohibitory regulatory structure. In doing so, each state has used its own set of criteria to develop an evolving list of pesticides deemed legal for use on marijuana. Mandatory product testing confirmed numerous uses of pesticides not approved, resulting in product recalls¹⁹ and confirming the need to fill a regulatory vacuum.

As the permitted uses of marijuana have broadened, the process of state pesticide approval has become increasingly complex. Edible products are increasingly popular, and although technically not foods, they present food use pesticide issues. While no tolerances exist for marijuana, states have looked to comparable crops to select products allowed to be detected in edible marijuana products. The use of pesticides on marijuana intended to be smoked presents issues akin to the use of pesticides on tobacco. Although some states have used approval for tobacco use as a basis for allowing use on marijuana, the problem is that there is laboratory data to confirm the effect in tobacco while no such data exists for marijuana. Furthermore, as a species, marijuana presents unique issues related to pesticide use, key among them its strong proclivity to absorb any materials applied to it or on the surrounding soil.

However, the states have not required pesticide registrants to secure state local needs registrations in order for their products to be used on marijuana. To the extent that states have already required that products have a tolerance for a similar crop in order to be approved, there would appear to be no problem with issuing a special local needs registration under FIFRA. Nonetheless it is an

additional administrative burden and to date neither EPA nor the states have required compliance with this process.

Facing an Uncertain Future

Tens of millions of dollars have been invested in the marijuana industry, which in 2016 generated \$6.7 billion in nationwide retail sales, but at this point there is uncertainty in every direction. The medical portion of the industry has two more months of protection under the Rohrabacher-Farr amendment, but the entire existence of the adult marijuana industry rests upon the discretion of the federal government heretofore exercised by the Obama administration. There is no sense yet Congress will renew the Rohrabacher amendment, and if so, whether it will be extended to adult use. It remains to be seen whether the Trump administration might continue to exercise discretion in the same manner as the Obama administration. It is within the administrative discretion of the DEA to remove marijuana from Schedule 1 and thus relax its criminal prohibitions and expand medical research opportunities but that is viewed as unlikely. Only a crystal ball could predict the future of the industry.

Endnotes

1. <http://www.pewresearch.org/fact-tank/2016/10/12/support-for-marijuana-legalization-continues-to-rise/>.
2. <http://www.gallup.com/poll/196550/support-legal-marijuana.aspx>.
3. <http://www.thecannabist.co/2017/02/09/colorado-marijuana-sales-2016/73415/>.
4. 7 U.S.C. §§ 136 *et seq.*
5. FIFRA § 3; 7 U.S.C. § 136a.
6. Federal Food, Drug and Cosmetic Act, § 408; 21 U.S.C. § 346a.
7. See for example New York Environmental Conservation Law § 33-0701.
8. FIFRA § 12(a)(1)(G), 7 U.S.C. § 136(a)(1)(G).
9. 21 U.S.C. §§ 801 *et seq.*
10. The National Academies of Science, Engineering and Medicine: *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research* [January 2017], <http://nationalacademies.org/hmd/reports/2017/health-effects-of-cannabis-and-cannabinoids.aspx>.
11. Continuing Appropriation Act 2018 and Supplemental Appropriation for Relief Requirements Act (September 8, 2017).
12. *Department of Justice Memorandum from Deputy Attorney General Cole to All United States Attorneys: Guidance on Marijuana Enforcement*, February 14, 2014, [https://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202014%2014%20\(2\).pdf](https://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202014%2014%20(2).pdf).
13. *Department of the Treasury Financial Crimes Enforcement Network Guidance*, FIN-2014-G001, February 14, 2014, <https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf>.
14. *Environmental Protection Agency Policy Statement: Pesticide Use on Marijuana*, January 27, 2016, <https://www.epa.gov/pesticide-registration/pesticide-use-marijuana>.
15. *Letter from Director of the EPA Office of Pesticide Programs to the Colorado Department of Agriculture*, May 19, 2015, https://www.epa.gov/sites/production/files/2016-01/documents/epa_letter_to_cda_5-19-15_slms_for_marijuana.pdf.
16. <https://www.colorado.gov/pacific/agplants/pesticide-use-cannabis-production-information>.
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18. <http://agr.wa.gov/pestfert/pesticides/pesticideuseonmarijuana.aspx>.
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