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OVERCOMING **FEDERAL** **OBSTACLES** TO THE SENSIBLE USE OF PESTICIDES ON **CANNABIS**



THE ISSUE

State-licensed and regulated hemp farmers and cannabis cultivators are severely limited in the types of effective products they can use to protect crops from pest damage. Despite effective state regulation and clean facilities overall, without the use of tried-and-tested plant protection products, growers do not have the same range of options to protect their harvest from insects, molds, and diseases. This problem has been made worse by the Environmental Protection Agency (EPA), which is actively preventing states from protecting public health by blocking the approval of safe and federally-registered pesticides for use on cannabis.

All substances intended to prevent, destroy, repel, or mitigate pests are considered pesticides by the EPA. Pesticides are registered by the federal government and approved for use on specific crops, which appear on the label. Applying the product out of compliance with the label's directions for use is a legal violation. In the absence of pesticides explicitly labeled for use on cannabis, states are left in a regulatory predicament and cultivators struggle to lawfully and effectively protect crop health, the public, and economic investments.

THE LAW

The Environmental Protection Agency regulates pesticides through the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) with further regulation by the states. This combination of overlapping federal and state authority puts state-legal cannabis businesses in a bind as they are regulated at the state level but considered illegal by the federal government.

Currently, some states work around this issue by publishing a list of pesticides that are either so low-risk they are exempt

from federal pesticide registration, known as "*Minimum Risk*," or have such a broad label they are permitted to be used on a wide variety of unspecified crops. These products must also be exempt from federal pesticide residue tolerance requirements, meaning any residual quantity of the chemical that remains on the final product is not considered a health hazard. These limited number of chemicals with broad labels and low-risk may be used on cannabis without violating federal pesticide law. But this leaves hemp and other cannabis cultivators with very few options. While these solutions can be helpful as part of an Integrated Pest Management Plan to prevent pest issues they have little curative impact when there is high pest pressure or a breakout.

FIFRA makes it unlawful "*to use any registered pesticide in a manner inconsistent with its labeling*,"¹ and since cannabis is not a federally legal crop, no pesticides are explicitly labeled for its use. To provide flexibility in the face of unique or major pest breakouts, beyond the broad label and Minimum Risk options described in the previous paragraph, FIFRA contains specific exemptions and special registrations. Section 24(c) of FIFRA allows state pesticide regulators, growers, chemical producers, research universities, and other authorized entities to apply for a Special Local Need (SLN) and register an additional crop use for an already federally-registered pesticide. The problem must be specific to a local state need that cannot be solved with currently federally-permitted pesticides. If the pesticide will be used on food or animal feed, then permitted residue levels must be within tolerances established by federal regulation.

A second exemption exists for emergency conditions when an urgent pest crisis emerges that requires the use of an unregistered pesticide or a pesticide not authorized for the

specific crop. This provision, known as the Section 18 emergency exemption, allows federal or state agencies to grant the use of a pesticide without registration for a limited period. If the emergency use requires treatment of a food crop, the EPA must establish maximum allowable levels for any pesticide residues remaining on the product. Any entity, other than the pesticide registrant, can apply for a Section 18 emergency exemption. But, unlike the Section 24(c) provision, pesticides exempted under FIFRA Section 18 may only be used for a limited time to treat an emergency infestation. As such, Section 18 exemptions are likely not the most effective regulatory option for dealing with the cannabis industry's ongoing pest problems.

THE DENIAL

In the Spring of 2017, the California Department of Pesticide Regulation, as well as regulators in Vermont, Washington, and Nevada, requested SLN registrations under FIFRA Section 24(c) from EPA for four different federally-registered pesticides from General Hydroponics to be used on cannabis. Just a few weeks later, EPA Administrator Scott Pruitt notified the states that the agency planned to disapprove their registration due to the Schedule I status of cannabis under federal law if the applications were not withdrawn. They also determined that no cost-benefit standard would permit the use of a pesticide *“in furtherance of an illegal act.”*²

To receive a 24(c) SLN registration from the EPA, applicants must show that the pesticide's use would have a *“similar use pattern”* as for crops already registered for that pesticide.³ As defined in regulation, *“similar use pattern”* means that the pesticide would not require a change in precautionary labeling and would be *“substantially the same as the federally registered use.”*⁴ Because cannabis is deemed generally unlawful, the EPA in their disapproval found that *“the general illegality of cannabis cultivation at the federal level makes pesticide use on cannabis a fundamentally different use pattern.”*

Despite this negative action, the EPA did not identify any public health risks with the registration itself and stated, *“the EPA would not have been inclined to disapprove these registrations were cultivation and sale of marijuana generally lawful in the United States.”* Around the same time, the EPA's Office of Pesticide Programs indicated the agency's willingness to consider the legality of pesticides for industrial hemp grown pursuant to the 2014 Farm Bill provisions.⁵

THE FUTURE

The cannabis industry and hemp cultivators across the country must be permitted to safely use federally-registered pesticides for crop protection. Limiting cultivators to just a few dozen inputs innocuous enough to be exempt from federal registration is not a viable long-term solution. Farmers and growers cannot continue to operate state-licensed businesses with pesticides that are only effective for preventive measures and not curative. Instead, EPA regulators must allow pesticides on legally-produced hemp and enact new federal laws or regulations

to explicitly permit SLN registrations to assist state regulators without regard to the crop's legal status under federal law.

EPA administrator Scott Pruitt can begin to breach this impasse by allowing state-licensed hemp cultivators to utilize 24(c) SLN registrations. As mentioned in the letter of disapproval, the reason for denial was based on the Schedule I status of cannabis and not because of potential public health dangers of utilizing certain registered pesticides. With the passage of the 2014 Farm Bill, hemp cultivated for research purposes pursuant to an agricultural pilot program or other academic research is no longer federally illegal. Allowing SLN registrations for hemp would be permissible under state and federal law and could help to provide necessary scientific data to determine efficacy and safety levels for pesticides used on the cannabis plant.

In addition, the Administrator of the EPA should reconsider the justification for disapproval of the earlier SLN registrations. Federal pesticide regulations do not explicitly prohibit SLN registrations just because the crop is federally unlawful. The definition of *“similar use pattern”* does not suggest that use on a Schedule I plant is fundamentally different than use on a crop with similar agricultural characteristics. In fact, former Director of the EPA's Office of Pesticide Programs Jack Housenger encouraged Colorado to apply for SLN registrations for cannabis in a letter to Director Michell Yergert in May of 2015, explicitly outlining which factors would cause a federally-registered pesticide to be regarded as having a similar use pattern.⁶ As such, it seems likely that future SLN registration for federally-registered pesticides would be approved by other administrations.

As a third action, the EPA should amend its regulations, specifically 40 C.F.R. § 162.154(a)(1), to explicitly state that the legal status of the crop under federal law shall not be a reason for denial if the crop is legal under the laws of the state in which the Special Local Need is asserted. The provision in question already includes language preventing the Administrator from denying a registration due to *“lack of essentiality,”* meaning the Administrator does not feel the registration is necessary, so such a limitation on the power to deny a SNL registration would not be unprecedented. If needed, Congress should require such a change through legislation that forces the EPA to allow SLN pesticide registrations for state-legal cannabis.

The cannabis industry has grown significantly over the last decade, generating hundreds of millions of dollars in tax revenue and employing tens of thousands of Americans. Currently nine states and the District of Columbia allow cannabis for adult-use and over half of the states permit the plant for medical uses. But without the ability to use effective and regulated pesticides, patients and consumers are at risk of consuming sub-standard products. The federal government has a duty to work with states to protect public health and help keep crops pest free. Accordingly, cannabis farmers and growers must be provided the same rights to utilize federally-registered pesticides as all other American farmers.

FOOTNOTES

1. 7 U.S.C. § 136j(a)(2)(G)
2. www.TheCannabisIndustry.org/EPANotice
3. 40 C.F.R. § 162.154
4. 40 C.F.R. § 162.151
5. <https://www.epa.gov/sites/production/files/2017-10/documents/session-5-cannabis-status-update.pdf>
6. www.TheCannabisIndustry.org/EPALetter



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