

SFIREG Issue Paper: Pesticide Use on Cannabis – State Established Pesticide Residue Action Levels

Introduction to Issue: In recent years, with the approval of medical and recreational use of marijuana in several Western states, state agencies that regulate the Cannabis industry have enacted regulations that provide them the authority to develop “action thresholds” that establish pesticide residue levels that when exceeded can result in some level of enforcement against the grower. The problem with this regulatory approach however is that the Cannabis industry takes this to mean that so long as they do not exceed an established pesticide residue level it is acceptable to use the product, regardless of what the label restrictions may be. In addition, when illegal residues are found under the action threshold the primary Cannabis regulatory agency may not report the illegal residues to the SLA.

SLA’s with delegated authority to regulate pesticide use now find themselves in a situation where their existing regulations are of little consequence to the Cannabis industry. State and federal laws intended to ensure the safe use of pesticides and protection of the public and environment are bypassed by the development of “action levels” that ensure no action or no significant action will be taken against the grower/applicator for the use of any pesticide unless the residue exceeds the arbitrarily established action level. This encourages illegal pesticide use and the potential for adverse effects to people and the environment.

Background:

Medicinal use of marijuana has been allowed in many states since 2000 and in 2012 recreational marijuana use was approved in Colorado and Washington. Since that time over half of the states in the U.S. have approved some level of recreational or medicinal use of Cannabis. As each state has developed their regulatory structure, multiple agencies have been delegated the authority to regulate the manner in which Cannabis is cultivated and distributed.

Marijuana regulatory lead agencies (i.e.: the Colorado Department of Revenue, Marijuana Enforcement Division) and state health departments have been the primary agencies to develop regulations that establish licensure and distribution requirements, as well as establishing pesticide residue thresholds or “action levels”. The intent of establishing “action levels” was to provide these agencies the authority to take some action, such as seizing or destroying crops, when it is determined that they are adulterated with a pesticide residue that could pose a public health threat.

However, these agencies do not understand how pesticides are regulated, they have not been delegated authority to regulate pesticide use, nor do they have the authority to establish tolerances for registered pesticides for new crop uses. These agencies lack the expertise in pesticide registration and necessary risk assessments processes and yet, have established these

“action level” regulations with little or no input from their SLA responsible for pesticide enforcement.

The problem we now see is that the Cannabis industry takes these established “action levels” as an unspoken allowance to use pesticides that are not labeled for use on Cannabis. There is a mindset out there that so long as you don’t get caught above the action level, there will be no consequences. In addition, since Washington, Oregon, Nevada and now California have taken this approach, other states are being pushed to accept this same approach; to establish action thresholds that guarantees through regulations that no harm will come to their crop so long as they keep detectable residue levels below the established “action” levels. None of these active ingredients have tolerances established for use on Cannabis and in some instances the residue action levels are set above existing tolerances that have been established through risk assessments for other crops.

A secondary problem to this is that even when states are detecting illegal pesticides, lead Cannabis agencies are enacting regulations that allow the grower to retest their crop after a period of time to allow the residues to deteriorate below detectable limits. A negative retest may allow the grower to then release their crop to the public for consumption. However, since the crop has been held and lost its “fresh” appeal; growers use this product to produce extracts, which the extraction process will concentrate any low level pesticide residues back to levels of detection which could be potentially harmful. In Colorado, we are unable to take samples of extracts when conducting second sampling, due to the manner in which the lead Cannabis agency has issued their final enforcement action.

The approach of states establishing action thresholds essentially bypasses the intent of FIFRA and state pesticide regulations. It also bypasses EPA’s authority and the intent of FIFRA for EPA to be the sole regulatory body to establish pesticide residue tolerances for a new crop. Even though SLA’s with delegated authority may be able to take an enforcement action for pesticide misuse, due to the revenue that can be generated from Cannabis production state civil penalties for pesticide misuse are not a financial deterrent. An enforcement action from an SLA as a result of being caught misusing pesticides becomes the cost of doing business; so long as their crop is not seized, destroyed and/or removed from the market. This has created the scenario where Cannabis cultivators can and are using pesticides that can leave illegal pesticide residues on marijuana that could pose a public health threat when consumed. SLA’s have no viable deterrent due to the regulatory structure and regulations created in their states that encourage misuse through established “action levels”.

Section 27 of FIFRA:

Some state's legislatures have adopted statutes that allow pesticides that can be used on crop group 19 to be used on marijuana. For a state to expressly allow this use in statute and/or to establish residue levels that allow or encourage the misuse of a pesticide at any level would appear to be in conflict with FIFRA Section 27. Since EPA has been informed of these issues in the past it should be taking some action in accordance with Section 27.

FAILURE BY THE STATE TO ASSURE ENFORCEMENT OF STATE PESTICIDE USE REGULATIONS.

(a) REFERRAL.—Upon receipt of any complaint or other information alleging or indicating a significant violation of the pesticide use provisions of this Act, the Administrator shall refer the matter to the appropriate State officials for their investigation of the matter consistent with the requirements of this Act. If, within thirty days, the State has not commenced appropriate enforcement action, the Administrator may act upon the complaint or information to the extent authorized under this Act.

(b) NOTICE.—Whenever the Administrator determines that a State having primary enforcement responsibility for pesticide use violations is not carrying out (or cannot carry out due to the lack of adequate legal authority) such responsibility, the Administrator shall notify the State. Such notice shall specify those aspects of the administration of the State program that are determined to be inadequate. The State shall have ninety days after receipt of the notice to correct any deficiencies. If after that time the Administrator determines that the State program remains inadequate, the Administrator may rescind, in whole or in part, the State's primary enforcement responsibility for pesticide use violations.

(c) CONSTRUCTION.—Neither section 26 of this Act nor this section shall limit the authority of the Administrator to enforce this Act, where the Administrator determines that emergency conditions exist that require immediate action on the part of the Administrator and the State authority is unwilling or unable adequately to respond to the emergency.

The marijuana industry is very aggressive about obtaining the legal use of pesticides and when they see an example of something that happens in one state and there are no negative consequences, they grab those ideas. Both, the adoption of pesticides that can be used on crop group 19 and the establishment of tolerances for these pesticides for use on marijuana were drafted for statute revisions in Colorado in 2017. However, we argued against this legislation and avoided these being passed into law. However, we will likely see both of these come back next year. The drafted statute in Colorado was cut and pasted out of Nevada's statute word for word. The tolerance idea was also taken directly from other state's established action levels. With California now establishing a similar approach in 2017 we fear that this will set the precedent nationally.

When this happens and there is no negative reaction from EPA under its existing authority, it implies states can legislate whatever pesticide use they want. When the health agency in the

state develops or adopts tolerances/action thresholds and EPA remains silent, the entire premise and intent of FIFRA and state regulatory structures are at risk. The argument that "the label is the law" is void because now the label is not the law; the state statute says and allows something different.

Federal Food, Drug and Cosmetic Act

Cannabis products, now that they are also sold for recreational use are no longer limited to the "medicinal use" designation that would allow for certain exemptions from tolerances under the FFDCa. These recreational products range from drinks, to a multitude of edibles that meet the definition of food in the FFDCa, which is:

"The term "food" means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article."

The FFDCa outlines exemptions for pesticide residues and when a food will be deemed "unsafe" under Section 408, which states:

TOLERANCES AND EXEMPTIONS FOR PESTICIDE CHEMICAL RESIDUES

SEC. 408. 21 U.S.C. 346a (a) REQUIREMENT FOR TOLERANCE OR EXEMPTION.—

(1) GENERAL RULE.—Except as provided in paragraph (2) or (3), any pesticide chemical residue in or on a food shall be deemed unsafe for the purpose of section 402(a)(2)(B) unless—

(A) a tolerance for such pesticide chemical residue in or on such food is in effect under this section and the

quantity of the residue is within the limits of the tolerance; or

(B) an exemption from the requirement of a tolerance is in effect under this section for the pesticide chemical residue. For the purposes of this section, the term "food", when used as a noun without modification, shall mean a raw agricultural commodity or processed food.

Cannabis itself meets the definition of a raw agricultural commodity that would be considered "food" under the FFDCa. Therefore, in accordance with Sec . 408 of the FFDCa, any pesticide residue that does not have an established tolerance on Cannabis should be deemed unsafe.

Recommendations:

It is recommended that SFIREG recommend that AAPCO submit a formal request to EPA to:

Take action under Section 27 of FIFRA to begin the process of informing states of potential conflicts in their current regulatory approach by establishing and/or allowing action thresholds that create a regulatory system that encourage misuse and/or bypass pesticide use requirements in the cultivation of Cannabis. This will begin to provide lead SLAs the needed support to address these issues in their state.

To begin discussions with the FDA to determine a consistent national approach to address illegal pesticide residues on Cannabis, a raw agricultural commodity, and partner with FDA to begin communicating with state lead agencies to bring their regulations into line with federal law, for both FIFRA and FFDCA.

Respectfully submitted,

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