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Industrial Hemp/CBD Issues

Background

Session Law 2015-299 established the North Carolina Industrial Hemp Commission and initiated a pilot program to study the feasibility of industrial hemp as a crop in NC. Industrial hemp is the plant species *Cannabis Sativa*, which is the same species as marijuana. Industrial hemp contains low levels of tetrahydrocannabinol (THC), which is the psychoactive ingredient in marijuana, a Schedule VI controlled substance in NC. Industrial hemp is engineered to contain high levels of cannabidiol (CBD), which is not psychoactive and has many alleged health benefits including treatment for some forms of epilepsy. It should be noted that the FDA recently approved a pharmaceutical CBD drug called Epidiolex, which can be prescribed by a physician for epilepsy. This is the only FDA approved use of CBD for a medical condition.

There are several types of industrial hemp:

1. One variety is grown for seed oils. Oil is extracted from the seeds and used in various food products such as bread, shampoos, and granola products;
2. One variety looks like long stalks of bamboo and is grown for fiber for textiles and rope; and
3. One variety looks like marijuana and grows "buds" just like marijuana. CBD is extracted from the buds. This type looks just like marijuana, including the leaves and buds, and it smells the same as marijuana. In fact, there is no way for an individual to tell the difference by looking at the plant; one would need a chemical analysis to tell the difference.

The NC Department of Agriculture (NC DAG) oversees the growers of industrial hemp in NC by providing licenses to growers who qualify. NC DAG performs inspections of fields and indoor grown space and takes plant samples which are tested to determine the percentage of THC. If the percentage of THC is determined to be greater than 0.3%, NC DAG burns the plants. NC DAG's lab has the capability to determine the percentage of THC; however, they outsource the testing to a private lab in Durham due to the high number of samples that are submitted.

Due to the popularity of CBD, the overwhelming majority of NC licensees are growing the CBD producing variety of hemp, rather than the variety for clothing and rope. As of July 2018, there were 348 licensed growers on 4548 licensed acres and in 1,630,485 square feet of indoor greenhouse space. As of January 2019, there were well over 500 licensed growers in NC. There are a number of large processing facilities that have recently opened in NC. Hemp grown in NC, as well as many other states, are processed into various CBD containing products in these facilities. These products include balms, lotions, salve, oils, capsules, cigarettes, cigars, and "buds." There are CBD dispensaries that have opened in NC in order to sell these products; in addition, the products are sold in hundreds of tobacco shops, convenience stores, and pharmacies. CBD liquids are sold for vaping. Food products labeled to contain CBD are sold in stores across NC in the form of gummies, trail mix, lollipops, and many other food products. These products are expensive; with a small 4-ounce bottle of CBD oil sold for \$80.00 or a small bag of CBD trail mix for \$40.00. These products are being sold in large quantities, with little oversight by a regulatory body. Recently the FDA banned CBD from food products, dietary supplements, and products claiming medicinal benefits. Currently, the NC DAG is sending letters to notify store owners that they cannot sell food products containing CBD.

Issues for Law Enforcement

There is no easy way for law enforcement to distinguish between industrial hemp and marijuana. There is currently no field test which distinguishes the difference.

Hemp and marijuana look the same and have the same odor, both unburned and burned. This makes it impossible for law enforcement to use the appearance of marijuana or the odor of marijuana to develop probable cause for arrest, seizure of the item, or probable cause for a search warrant. In order for a law enforcement officer to seize an item to have it analyzed, the officer must have probable cause that the item being seized is evidence of a crime. The proposed legislation makes possession of hemp in any form legal. Therefore, in the future when a law enforcement officer encounters plant material that looks and smells like marijuana, he/she will no longer have probable cause to seize and analyze the item because the probable cause to believe it is evidence of a crime will no longer exist since the item could be legal hemp. Police narcotics K9's cannot tell the difference between hemp and marijuana because the K9's are trained to detect THC which is present in both plants. Law enforcement officers cannot distinguish between paraphernalia used to smoke marijuana and paraphernalia used to smoke hemp for the same reasons. The inability for law enforcement to distinguish the difference between hemp and marijuana is problematic in all marijuana prosecutions, from small amounts to trafficking amounts of plant material. There is at least one District Attorney's Office in NC which is currently not prosecuting marijuana cases due to the inability of law enforcement to distinguish the difference between hemp and marijuana.

While NC DAG oversees the hemp growers in NC to ensure that the THC levels are within legal limits, there is currently no regulation of hemp and CBD products. This is particularly concerning because processors in NC are making hemp and CBD products using hemp grown all over the US. We do not verify that hemp grown in another state contains less than the percentage THC required by law, which means that products made in NC may contain a higher percentage of THC than what is allowed by law. Retail products currently sold in NC include hemp "buds" or plant material, hand rolled hemp cigarettes and hemp cigars, CBD/Hemp oils, and edible candies, gummies, and food products. Law enforcement has encountered employees in some businesses who encourage the purchase of hemp products as a legal marijuana alternative. Consumers can currently purchase hemp buds and rolling papers in the same store and then roll a hemp "joint" and smoke it. (Note: On the last page of this document is a series of photographs of "hemp" products sold in stores in NC).

The North Carolina State Crime Laboratory does not conduct testing to differentiate between hemp and marijuana. The State Crime Lab, as well as most municipal crime labs in NC, perform a qualitative analysis on plant material to determine whether THC is present. All hemp and CBD products contain some level of THC; therefore, the crime labs will report these products as containing marijuana or THC, which are both Schedule VI controlled substances. While it has been suggested that additional funds be allocated to the Crime Lab in order to add additional chemists and equipment to conduct the quantitative analysis described above, this will not resolve the issue. As previously mentioned, law enforcement cannot seize an item without probable cause that the item is evidence of a crime. Not being able to distinguish between hemp and marijuana defeats the previous basis for probable cause to seize items believed to be marijuana.

Many products for sale in commercial businesses are intentionally mislabeled to contain CBD, but they contain harmful Schedule I controlled substances, synthetic cannabinoids, "bath salts," and other adulterants such as rat poison. Law enforcement cannot rely on the product labels to accurately identify the ingredients or percentages. For example, if a package of hemp "buds" has a label that states it contains less than 0.3% THC, law enforcement cannot rely on the label to be accurate. The product could contain marijuana or another controlled substance. But law enforcement does not currently have the legal right to seize the product and the crime labs do not have the ability to confirm the percentages. The crime labs can only identify THC or other controlled substances.

According to the FDA, CBD cannot be contained in food products such as gummies, lollipops, etc. This is particularly concerning for several reasons: first, children could purchase these products as there is no purchasing age limit;

secondly, these products may be mislabeled and contain other psychoactive substances such as THC or Schedule I synthetic cannabinoids.

The FDA approved a product called Epidiolex, which contains CBD, for use in cases of epilepsy and this product can be prescribed by a physician. There are many hemp and CBD products on the market, and individuals are self-prescribing these products for things such as pain management, anxiety, sleep disorders, and autism, even though CBD has not been scientifically proven or approved for use with these conditions. Users of these products will test positive for THC during employer random narcotics screening and their employment may be terminated for unlawful drug use. A narcotics screening only tests for the presence of THC, not the percentage of THC.

Possible Solutions

The North Carolina Farm Act of 2019 (Senate Bill 315), which was filed on March 20, 2019, formalizes NC's Industrial Hemp program and the Industrial Hemp Commission moving forward. This bill adds Chapter 106-568.67, which requires no license to possess, handle, transport, or sell hemp products or extracts. This bill modifies the definition of marijuana in Chapter 90-87 to exclude hemp, hemp products, or hemp extracts.

The unintended consequence upon passage of this bill is that marijuana will be legalized in NC because law enforcement cannot distinguish between hemp and marijuana and prosecutors could not prove the difference in court. Every quantity of hemp and/or marijuana is important for police investigations, from the cigarette to the "dime" bag to a bale.

There are several possible solutions which allow farmers in NC to grow industrial hemp, but also allow the criminal justice system to continue to seize marijuana, and charge and prosecute marijuana offenses. Below is a listing of possible solutions:

1) Limit the varieties of hemp that can be grown in NC to those which are used in rope, clothing, and paper. Do not allow the variety of hemp that produces "buds" similar to marijuana.

2) Modify the definition of marijuana in 90-87(16) as follows:

(16) "Marijuana" means all parts of the plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin, but shall not include the mature stalks of such plant, fiber produced from such stalks, oil, or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination. The term does not include industrial hemp as defined in G.S. 106-568.51, when the industrial hemp is produced in compliance with rules issued by the North Carolina Industrial Hemp Commission and provided to a processor. The possession or sale of hemp in any other circumstance, unless in lawful possession pursuant to the North Carolina Epilepsy Act, is unlawful.

In addition to 1) and 2), the following conditions are warranted:

- **An individual must be 18 or older to purchase or possess hemp, hemp extract, and CBD products.**
- **Provide immunity for law enforcement officers who seize hemp and hemp products during the course of an investigation, even if the products fall within the legal limits of THC and CBD.**
- **Clarify that all paraphernalia used to smoke plant-based materials (whether hemp or marijuana) is illegal.**

Alternative solutions may include:

- **Plant based materials and plant based commercial products cannot be made in hemp processing facilities in NC. Only oils, balms, lotions, salves, etc. can be made in these facilities.**
- **Hemp in plant form cannot leave processing facilities.**

- Hemp in plant form cannot be sold by processors or commercial businesses. It can only be sold by NC farmers with a license from the NC Department of Agriculture.
- Mandate that only growers and processors with a license from the NC Industrial Hemp Commission can possess hemp or hemp plants. Any other person who possesses hemp or hemp plants will be charged with possession of a Schedule VI controlled substance.
- Hemp and CBD containing edibles such as candies, gummies, lollipops, brownies, etc. cannot be sold or possessed in NC. No edible hemp and CBD food products. (this follows FDA regulations)
- Place a ban on smoking hemp, hemp products, hemp extracts, and CBD products.
- Regulate CBD oils to ensure they oils sold in NC are produced by NC farmers, tested by the Department of Ag to fall within legal limits of THC and CBD. The oil products could have a label and tax stamp. Any CBD products without this tax stamp would be illegal to manufacture, sell, or possess.
- Place a tax stamp on all hemp grown in NC and CBD products manufactured in NC. This stamp could go on all products by NC licensed growers and processors. This tax stamp would allow for the product to be followed from the field to the processor to the store. It would ensure that hemp grown by NC farmers is being sold to NC processors, and then sold in NC retail stores. It also ensures that the products fall within the legal THC limits. Any hemp and CBD products without the tax stamp would be illegal to manufacture, sell, or possess.
- License hemp/CBD retail stores in NC. A store must be on the approved list to sell hemp and CBD products.
- Add Epidiolex to Schedule V so it can be prescribed by physicians in NC. This is an FDA approved pharmaceutical form of CBD which is already a Federal Schedule V controlled substance.

Photos of Commercially Sold Products



CBD gummies



CBD cookies



CBD lollipop



Hemp cigarette



Hemp cigar



Hemp "buds"



Hemp "buds"



Hemp "buds"