



Washington
State Department of
Agriculture

Preliminary Assessment of Allowing Industrial Hemp to be Sold or Transferred to Marijuana Processors

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A Report to the Legislature in response to

ESSB 5131,
Chapter 317, Laws of 2017,
65th Legislature,
2017 Regular Session

Washington State Department of Agriculture
Commodity Inspection Division

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Table of Contents

1. Introduction and Background 4

Study Findings

2. Value to Washington State Industrial Hemp and Marijuana Industries 2

3. Identified risks to WSDA’s Industrial Hemp Research Pilot 4

4. Identified risks to WSLCB’s Marijuana Program 5

5. Regulatory framework and legislative needs 7

6. Summary 7



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1. Introduction and Background

In response to Engrossed Substitute Senate Bill 5131, the Washington State Department of Agriculture (WSDA) in collaboration with the Washington State Liquor and Cannabis Board (WSLCB) analyzed the feasibility and practicality of allowing industrial hemp produced under WSDA's Industrial Hemp Research Pilot to be sold or transferred to licensed marijuana processors, licensed by WSLCB, for processing into products for human consumption.

To define and evaluate the feasibility and practicality of allowing industrial hemp to be sold or transferred to licensed marijuana processors, WSDA and WSLCB needed to address four primary areas of concern:

1. Value to Washington State Industrial Hemp and Marijuana Industries
2. Risks identified to WSLCB's Marijuana Program
3. Risks identified to WSDA's Industrial Hemp Research Pilot
4. Regulatory framework requirements and associated legislative needs

After examining these factors, it does seem that transferring industrial hemp to marijuana processors for human consumption is feasible, but there are substantial regulatory and financial challenges. Addressing these challenges would require significant statutory changes as outlined in this report along with commensurate rule making authority for our agencies.

Industrial Hemp is a variety of *Cannabis sativa* which is the same plant species as marijuana. The Agricultural Act of 2014 ("Farm Bill") of the United States has defined industrial hemp as "*Cannabis sativa* L. and any part of such plant whether growing or not, with delta-9-tetrahydrocannabinol (THC) concentration of not more than 0.3 percent on a dry weight basis" and provides states the ability to allow research institutions and the state department of agriculture to grow industrial hemp for research purposes (Section 7606(b)(2)).

The 2016 Washington State Legislature approved Washington's industrial hemp bill (ESSB 6206) in accordance with the 2014 federal Farm Bill. Industrial hemp is now defined in Washington by RCW 15.120.010 as "all parts and varieties of the genera *Cannabis* that contain a THC concentration of 0.3 percent or less by dry weight." Industrial hemp does not include plants of the genera *Cannabis* that meet the definition of "marijuana," which is defined in RCW 69.50.101 as "all parts of the plant *Cannabis*, whether growing or not, with a THC concentration greater than 0.3 percent on a dry weight basis." Additionally, RCW 15.120.020 states "Processing any part of industrial hemp, except seed, as food, extract, oil, cake, concentrate, resin or other preparation for topical use, oral consumption, or inhalation by humans is prohibited."

Although industrial hemp is genetically and chemically different than marijuana and is not cultivated for the psychoactive drug THC, the U.S. Drug Enforcement Administration (DEA) recognizes Cannabis as a controlled substance, Schedule 1 drug, and does not distinguish between industrial hemp and marijuana. WSDA's Industrial Hemp Research Pilot is subject to a grant of necessary permissions, waivers, or other form of valid legal status by the DEA or other appropriate federal agency pursuant to applicable federal laws related to industrial hemp (ESSB 6206 Section 5 (4)).

WSDA has applied for and received a DEA license to act as an importer of viable industrial hemp seeds from international sellers. Without this federally-issued license, WSDA's Industrial Hemp Research Pilot could not function in its current form.

2. Value to Washington State Industrial Hemp and Marijuana Industries

WSDA and WSLCB identified two areas that would directly benefit from allowing industrial hemp to be sold or transferred to licensed marijuana processors for processing into products to be sold at retail for human consumption.

2.1 Support Washington State's Industrial Hemp Industry

Currently there are 7 licensees participating in WSDA's Industrial Hemp Research Pilot, with a total of 180 acres of industrial hemp grown in the 2017 growing season. Research the department has received so far from the licensees shows the inability for the licensees to sell the industrial hemp for a profit as well as inability in some cases to acquire processing equipment.

WSDA receives consistent inquiries from marijuana producers and processors interested in growing and processing industrial hemp for non-psychoactive cannabinoids like CBD. Providing the regulatory framework for industrial hemp to be sold or transferred to licensed marijuana processors will encourage the expansion of industrial hemp as an agricultural commodity in Washington. Industrial Hemp Research Pilot licensees would benefit by having an additional marketing avenue for their crop.

There are currently no CBD products being produced from industrial hemp grown in Washington State as the law does not allow for it. Allowing the regulated sale of hemp plants to licensed marijuana processors would create opportunities for the State to capture and analyze data related to the CBD marketplace. While it is unclear how a large influx of industrial hemp would perform in the current system, there is a potential that this would increase the availability of quality, tested, and regulated CBD products for medical patients.

2.2 Improved Oversight of Certain Cannabinoids

Currently three state agencies regulate marijuana and industrial hemp in Washington State. WSLCB regulates the intoxicating form of Cannabis (marijuana), the Department of Health regulates medical marijuana, and WSDA regulates agricultural cannabis (industrial hemp) as an agricultural commodity. Legally allowing CBD to be processed from industrial hemp grown within Washington State could offer the following benefits:

- Improved oversight - Allowing regulated CBD extraction from industrial hemp would ensure adequate testing and screening requirements are in place. Currently, some unregulated CBD products are available to consumers. Some CBD products currently available on the general market (not the regulated marijuana market) have a pattern of testing high in heavy metals, pesticides, and THC. These products are not currently regulated by any Washington state agency. Additionally, some CBD products have been found to contain no CBD but had high concentrations of melatonin instead. WSDA has already established requirements for pesticide testing when processing industrial hemp for human consumption. These regulatory mechanisms provide assurances that when industrial hemp products from the pilot program move into the regulated marijuana system, they are in fact industrial hemp, and are less likely to have levels of pesticides outside what is allowed under the pilot program. The WSLCB has encountered and seen issues with unregulated CBD products not derived from marijuana, such as products that are sold at smoke shops, gas stations, etc. The WSLCB has some jurisdiction over CBDs not derived from marijuana as it pertains to non-marijuana vapor products because state law prohibits CBD products being sold as or for vapor products. But WSLCB does not have regulatory authority over other CBD products appearing in the state not generated within the regulated marijuana market.
- Controlled access - Regulation combined with traceability of CBD products could help curb youth access and reduce consumer fraud.
- Combat marijuana illicit market - There is also a potential to reduce risk of diversion of illicit marijuana by regulating CBD.
- However, allowing industrial hemp to be transferred to marijuana processors for processing into products for human consumption (CBD products) does not abate the issue of unregulated CBD products coming in from other states or countries that are appearing in gas stations, smoke shops, online ordering, etc., which do not currently fall under any state agency's jurisdiction.

3. Risks Identified to WSDA's Industrial Hemp Research Pilot

Allowing industrial hemp to be sold or transferred to licensed marijuana processors for processing into products to be sold at retail for human consumption poses two primary risks to WSDA - either losing its DEA permit to import hemp seed or being required to implement tracking measures for hemp production beyond its financial ability to do so.

According to the DEA, CBDs derived from any source (marijuana, industrial hemp, or otherwise) are a Schedule 1 listed substance and are not differentiated from products that contain THC. Allowing the production of CBD products derived from industrial hemp will increase the risk that WSDA could lose its DEA import permit for certified industrial hemp seeds. Information received from other states indicates inconsistent enforcement concerning industrial hemp DEA import permits. DEA has revoked at least one state import license, but in other cases has taken no enforcement actions related to CBD extraction. Since WSDA's pilot program is currently fully compliant with Section 7606 of the Agricultural Act of 2014, producers are eligible for National Institute of Food and Agriculture funding and bank loans to produce industrial hemp. Allowing the transfer of industrial hemp out of the pilot program to licensed marijuana processors might be considered out of compliance, putting this avenue of financing for Washington industrial hemp producers at risk.

Industrial hemp production for CBD is often very similar to marijuana production. Industrial hemp is visually indistinguishable from marijuana. Other state departments of agriculture that allow industrial hemp production for CBD have had some plants grown in their industrial hemp program that were actually marijuana. WSDA is concerned that the same would occur here with the risk of diversion into WSLCB licensed marijuana processors or into the illicit drug market.

In the processing and extraction of CBD from industrial hemp it is possible to concentrate the amount of THC in the final product. Raw industrial hemp that is below the 0.3% THC threshold could potentially produce a CBD product with THC concentrations above 0.3% THC, after the cannabinoids have been extracted and concentrated. This possibility would also put WSDA's DEA permit at risk and would not be compliant with Section 7606 of the Agricultural Act of 2014. It would also inadvertently create a regulatory issue for the WSLCB. However, since licensed marijuana processors are already able to receive and process marijuana, defined as having more than 0.3% THC, under state law, this risk may be partially mitigated.

The WSLCB requires the use of a traceability program that tracks all marijuana from the marijuana plants produced to the final product sold to the consumer. Industrial hemp grown in a true agricultural setting is produced in very large fields. The amount of hemp flower that could be produced and potentially transferred to licensed marijuana processors could be very large.

WSDA does not currently have funding to support Industrial Hemp Research Pilot activities. Due to budgetary constraints, the hemp program is currently operating in a limited capacity. WSDA is not currently processing new applications for the 2018 growing season. WSDA would require additional funding just to continue operating the program.

4. Risks Identified to WSLCB's Marijuana Program

Allowing industrial hemp to be sold or transferred to licensed marijuana processors for processing into products to be sold at retail for human consumption creates a number of concerns for WSLCB including potential tax evasion, the challenge of tracking industrial hemp, the impact an influx of hemp might have on the market, ensuring appropriate testing of CBD products, cross contamination issues and staffing, to name a few.

Industrial hemp appears visually similar to marijuana, especially after it is processed into oils or other products. For this reason, a risk of diverting marijuana products outside the WSLCB regulated system would be present without a requirement to trace industrial hemp and industrial hemp products from receipt to sale, similar to how marijuana is traced in the WSLCB's traceability system. Marijuana licensees could accidentally or intentionally swap out industrial hemp products for marijuana products. This, again, poses risk of diversion of marijuana outside the regulated system and potential marijuana excise tax implications. Tracing industrial hemp received by licensed marijuana processors similar to how marijuana is traced in the state traceability system is possible. Additionally, concentrated CBD looks very similar to concentrated THC. CBD testing requirements would need to be established.

Currently there is no tax on industrial hemp. It would need to be determined if marijuana taxes would apply to industrial hemp once it is sold or transferred to marijuana licensees. If there is no taxation on industrial hemp, WSLCB would need processes in place to ensure licensees are not marketing and selling marijuana products as industrial hemp-derived products to avoid the excise tax.

At this time, licensed marijuana processors may only sell marijuana and marijuana products to licensed marijuana retailers. Licensed marijuana retailers are limited by statute and rule to only selling marijuana, marijuana-infused products, marijuana concentrates, and paraphernalia. Statute and rules would need to be amended to allow for the receipt, processing, and sale of industrial hemp by licensed marijuana processors and retailers.

Other states that allow CBD production report that testing finds that CBD products contain varying levels of CBD ranging from no CBD to very high levels of CBD. Additionally, they also report finding high levels of heavy metals, pesticide and high percentages of THC. Unlike marijuana, which is highly regulated and tested, CBD products are not. This fact leads to a varying level of consumer fraud and potential human health and safety concerns.

Allowing industrial hemp to be transferred to licensed marijuana processors for CBD production without stringent testing requirements in place is a concern for both the WSLCB and WSDA in regards to human health and safety and also the regulatory framework that would need to be established in both agencies. Resources would need to be made available to address this concern.

WSLCB understands that there are very large grows established in the Industrial Hemp Research Pilot program. In some instances, fields are well over 50 acres. This means a large volume of industrial hemp product could potentially be brought into the regulated marijuana system. Based on sales data of products currently within the regulated system, high CBD products do not represent a large segment of the market. It is unclear how a large influx of industrial hemp into the regulated system would perform in the current market.

Other states that allow CBD to be made from industrial hemp report that there is an oversupply of raw industrial hemp in the pipeline, which has greatly reduced the price of both raw industrial hemp and CBD products. Kentucky, for example, reports that their processors have a two-year supply of raw product in inventory, not counting the 2017 harvest.

Cross-contamination concerns have also been raised by producers/processors. Depending on how the harvested industrial hemp is brought onto a licensed premises, and whether that processor is also a producer, there may be risks associated with pollen from industrial hemp coming into contact with marijuana grown on the premises, which can have drastic consequences for a marijuana crop. The existing requirement for a four-mile buffer between licensed industrial hemp producers and licensed marijuana producers helps alleviate current concerns, but does not mitigate other risks that would be present should industrial hemp be allowed to be transferred to licensed marijuana producer/processors. These risks may include pollen contamination from harvested hemp brought onto the premises of a licensed processor who also engages in licensed marijuana production on the same premises.

Staffing concerns for enforcement also exist for the WSLCB as additional resources would need to be allocated to ensure the proper enforcement of industrial hemp products processed by marijuana processors. While the WSLCB prefers that industrial hemp products be entered into the state traceability system when transferred to a licensed marijuana processor as detailed above should industrial hemp products be allowed to be transferred to licensed marijuana processors, this would require modifications to the existing traceability system. Modification to the current traceability system would have contract implications between the WSLCB and its traceability system vendor and resource impacts that are not currently in WSLCB's budget.

5. Regulatory Framework and Associated Legislative needs

1. If the Washington State Legislature wishes to allow industrial hemp to be sold to licensed marijuana processors, WSDA and WSLCB together consider the following regulatory framework to be the lowest risk way of accomplishing that goal: To ensure full regulatory functionality for marijuana and for industrial hemp for production into CBD products, the WSLCB would need rulemaking authority over the receipt, processing, testing, and sale of industrial hemp from the pilot program by marijuana licensees for the processing and retail sale of products for human consumption. RCW 69.50.342 and 69.50.345 would need to be amended to allow WSLCB authority to conduct necessary rulemaking and enforcement.
2. RCW 15.120.020 would need to be amended to include language that allows the sale of industrial hemp to marijuana processors as defined under RCW 69.50.325. Current language in RCW 15.120.020 regarding plant extracts being prohibited for human consumption under WSDA's industrial hemp pilot would need to be maintained.
3. A determination will need to be made regarding whether industrial hemp products, once transferred to marijuana processors are subject to the excise tax.
4. WSDA and WSLCB would need to continue to work collaboratively during WSLCB's rulemaking to ensure an accurate traceability system is in place for industrial hemp received by marijuana processors.
5. Testing guidelines would need to be established to ensure the CBD products contain the labeled percentage of CBD and are free from THC (below 0.3% THC) and harmful contaminants such as pesticides, heavy metals and other adulterations. This requirement should also be extended to CBD products that are not processed under the jurisdiction of the WSLCB and are currently available unregulated on the open market.
6. Additional funding may be necessary for both agencies to ensure increased enforcement needs are met and to accommodate changes to the state traceability system.

6. Summary

The WSLCB and WSDA conclude that it is feasible to establish a regulatory framework to transfer industrial hemp from WSDA's Industrial Hemp Research Pilot to marijuana processors licensed by the WSLCB for the purposes of processing products for human consumption. This could potentially increase the number of producers in WSDA's pilot, but this also presents substantial regulatory and financial challenges and concerns to the agency including:

- Risk of losing DEA permit
According to the DEA, CBDs derived from any source are a Schedule 1 listed substance and are not differentiated from products that contain THC. Allowing the production of CBD products derived from industrial hemp will increase the risk that WSDA could lose its DEA import permit for certified industrial hemp seeds.
- Financial risk to hemp producers
Allowing the transfer of industrial hemp out of the pilot program to licensed marijuana processors might be considered out of compliance with Section 7606 of the Agricultural Act of 2014. Being out of compliance could impact Washington industrial hemp producer's eligibility for National Institute of Food and Agriculture funding and bank loans.
- Funding
WSDA does not currently have funding to support Industrial Hemp Research Pilot activities. Due to budgetary constraints, the hemp program is currently operating in a limited capacity. WSDA is not currently processing new applications for the 2018 growing season. WSDA would require additional funding just to continue operating the program.

Likewise, the WSLCB has significant regulatory, enforcement, and resource concerns with industrial hemp being processed in the same facility with marijuana and overall impacts to the regulated system including:

- Visually similar to marijuana
Industrial Hemp appears visually similar to marijuana, especially after it is processed into oils or other products. For this reason, there is a risk of diverting marijuana products outside the WSLCB regulated system. Marijuana licensees could accidentally or intentionally swap out industrial hemp products for marijuana products. This again poses risk of diversion outside the regulated system and potential marijuana excise tax implications.
- Human safety and consumer fraud
Unlike marijuana, which is highly regulated and tested, CBD products are not. This fact leads to a varying level of consumer fraud and potential human health and safety concerns. Allowing industrial hemp to be transferred to licensed marijuana processors for CBD production without stringent testing requirements in place creates risks to human health and safety. A regulatory framework would need to be established in both agencies.
- Cross contamination
Depending on how the harvested industrial hemp is brought onto a licensed premises, and whether that processor is also a producer, there may be risks associated with pollen from industrial hemp coming into contact with marijuana grown on the premises. This could have drastic consequences for a marijuana crop.

- WSLCB resources

Additional resources would need to be allocated to ensure the proper enforcement of industrial hemp products processed by marijuana processors. Additionally modifications to the current traceability system would be required. Both the necessary system modifications and the additional resources needed are not currently in WSLCB's budget.

Significant statutory changes as outlined in this report would be necessary along with commensurate rule making authority in order to establish a regulatory framework to transfer industrial hemp from WSDA's Industrial Hemp Research Pilot to marijuana processors licensed by the WSLCB for the purposes of processing products for human consumption.