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Inside this issue

- Industrial hemp program: What Colorado municipalities need to know
- CDPHE's role in regulating hemp
- Keeping Colorado as a hemp industry leader

Note

- If your municipality is considering or has adopted ordinances or regulations concerning industrial hemp, please let CML know by contacting CML Staff Attorney Laurel Witt at lwitt@cml.org.

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Hemp, September 2019



Hemp regulation: A Colorado municipal perspective

By Laurel Witt, CML staff attorney

The ban is lifted and the race kicks off as farmers and businesses around the United States begin to grow hemp, America's newest cash crop. Like marijuana, hemp is a strain of the *Cannabis sativa* L. plant, but unlike marijuana, hemp contains less than three-tenths of a percent of tetrahydrocannabinol (THC). THC is the psychoactive component of marijuana causing the characteristic "high." Hemp can be used in a wide range of industries, but the most lucrative use comes from the plant's high concentration of cannabinoid (CBD). Many claim CBD oil has positive benefits, helping with a range of ailments from arthritis to migraines. Products containing CBD, from topical lotions to dog treats, are flying off the shelves even as claims remain unsubstantiated by the U.S. Food and Drug Administration (FDA).

The swirl of excitement around the legalization of hemp has every layer of government asking what it can do to regulate the plant, ensuring the safe cultivation, production, and, in the case of CBD, consumption. This article will describe federal and state regulation before turning to what Colorado municipal governments can do to promote the health and safety of their residents.

Evolution of federal regulation

Congress outlawed hemp in the United States in 1970 with the enactment of the Controlled Substances Act (CSA). The CSA classified any use of the *Cannabis sativa* L. plant as extremely dangerous — a schedule 1 substance, which includes the most dangerous narcotics found in the United States, such as cocaine and heroin.

Continued on page 2

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Continued from page 1

The CSA defined marijuana as "all parts of the plant *Cannabis sativa* L., 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." 21 U.S.C.A. § 812(1)(c)(17) (2016).

In the last twenty years, interest in industrial hemp began to resurface with research showing hemp as a sustainable crop for use in clothing, makeup, oils, medicine, etc. In response, Congress permitted hemp cultivation in pilot programs around the United States in the Agricultural Act of 2014, P.L. 113-79 (2014 Farm Bill). The Agricultural Act is adopted by Congress every four to five years to shape national food and agriculture policy. Hemp, however, remained illegal under the CSA, and several federal law enforcement agencies continued to enforce all strains of *Cannabis sativa* L. as a schedule 1 substance. Tension brought lawsuits and a wake of confusion for would-be producers about how federal authorities would respond to hemp cultivation.

Congress responded in the Agriculture Improvement Act of 2018 (2018 Farm Bill) by removing hemp from the CSA definition of marijuana. It moved hemp regulation to the Agriculture Marketing Act of 1946, which treats hemp like all other crops in the United States, and gave oversight authority to the United States Department of Agriculture (USDA). The 2018 Farm Bill passed before CBD became more widely used.

The 2018 Farm Bill also empowers state and tribal governments to create a regulatory framework for hemp within their respective jurisdictions. These plans must be submitted to the USDA Secretary through the state department of agriculture in consultation with the governor and the chief law enforcement officer of the state. State and tribal governments can choose not to regulate hemp, in which case the USDA will regulate and license hemp businesses within the state or tribal jurisdiction. The USDA is currently developing regulations for the oversight process.

Hemp in Colorado

Amendment 64, approved by Colorado voters in 2012, directed the Colorado General Assembly to "enact legislation concerning the cultivation, processing and sale of industrial hemp." The General Assembly gave the Colorado Department of Agriculture (CDA or the Department) authority to regulate the cultivation of hemp in Colorado, including

registration of hemp producers and enforcement authority. The CDA enacted further regulations on hemp while emphasizing it only regulates the cultivation of hemp as a farm product. The Department does require applicants to first check local regulations before applying for a license; however, the process does not require CDA officials to confirm with local governments before granting a license. For hemp in consumable products, the Colorado General Assembly gave oversight to the Colorado Department of Public Health and Environment (CDPHE).

The Palisade Police Department experienced the issue of conflicting regulations firsthand last year with a case that reached the Colorado Supreme Court. The police executed a warrant on a suspected illegal marijuana grow that had the hallmarks of illegal activity including visual sightings of the plants and distinctive odor. The police seized the plants and through scientific testing discovered that the plants contained less than three-tenths of a percent of THC. The homeowner had registered as a hemp grower with the CDA. The Court held probable cause existed in the search warrant, but the limited communication between regulatory arms remains a problem. *People v. Cox*, 429 P.3d 75 (Colo. 2018). CML will advocate for better communication and accountability in this area.

In response to the 2018 Farm Bill, the Colorado General Assembly adopted and Gov. Jared Polis signed two bills in 2019, Senate Bill (SB) 19-220 and SB 19-240. These new state laws require the CDA to submit a state plan to the USDA, which will detail the state's plan to regulate and oversee hemp with input from stakeholders. The CDA is engaging stakeholders through an initiative called CHAMP (Colorado Hemp Advancement and Management Plan), which has a two phase implementation plan. The first stage will be to submit the state plan to the USDA by the end of November 2019 and the second stage will incorporate the state plan into a larger Colorado Blueprint. CML will be actively engaged in the process of developing the Colorado state plan and blueprint, with the primary goals of maintaining municipal authority to regulate businesses and of gaining more coordination and communication with the state on issues such as permitting locations for hemp cultivation.

The General Assembly gave local governments authority to regulate businesses engaged in processing, extraction, and manufacturing hemp in SB 19-240. Local governments can

regulate businesses involved in the sale of industrial or food products containing hemp so long as those regulations do not conflict with state law. C.R.S. § 31-15-501.

Both state and federal regulations continue to evolve. For example, the FDA is conducting ongoing stakeholder meetings to discuss how hemp should be regulated in consumable products on a federal level.¹ CDPHE will likely add on additional requirements after the FDA releases its rules (see article on page 4). Both agencies are concerned with the potential health and safety risks to consumers while also improving regulatory pathways for marketing of products.

Colorado municipal governments are left to figure out how to regulate hemp manufacturing and processing within the authority given by the 2019 legislative session and previously held powers. Before the passage of SB 19-240, municipal governments did not have explicit authority to regulate hemp.² Now, with the demand frenzy for CBD, hemp growhouses are cropping up in industrial and residential areas, unregulated and causing problems with odor and noise. The lack of federal and state oversight has left a vacuum of regulation, leaving municipalities unsure how to best to protect the health, safety, and general welfare of their residents.

Practical steps for municipalities

Under the guise of federal and state regulation, the state of affairs for municipalities is confusing at best. However, municipalities can take steps today to regulate the proliferation of hemp and hemp producers while safeguarding residents. Listed below are examples of concrete steps municipalities can begin now.

Continued on page 3

¹ The FDA has only legally approved four specific drugs with hemp as a component, all of which require a doctor's prescription: Epidiolex, Marinol, Syndros, and Cesamet. If a company markets CBD products as disease-curing or therapeutic and sells the products online, the company will receive a warning letter from the FDA.

² Note, authority to regulate hemp lies with the ability to regulate business licenses. There is not explicit authority in SB 19-240 to regulate individuals growing hemp for their own purposes. However, it is arguable that municipalities, particularly home rule municipalities, can already regulate individuals with the power to protect the general health, safety, and welfare of the municipal citizens. Consult your municipal attorney before regulating individuals growing hemp who are not intending to sell the finished product.

Cultivation

- **Zoning.** The state government controls hemp cultivation regulations. However, a local government may treat hemp like any other unnamed and enumerable industrial crop within its ordinances (e.g., corn, soybeans) and enforce zoning regulations accordingly.
- **Noise and odor regulations.** Municipalities may enforce their noise and odor regulations on hemp cultivation as they would on any other industrial crop.

Likely, any sort of license for hemp at the cultivation stage will be considered preempted by state law if challenged in the courts. Additionally, testing the plants for compliance with the three-tenths of a percent or less of THC requirement is a state level function.

Storage, Extracting, Processing, and Manufacturing

- **Broad Authority.** The legislature, under C.R.S. § 31-15-501, gave broad authority to municipalities in regulating the storing, extracting, processing, and manufacturing of hemp. This means that after the cultivation process, municipalities

have broader authority to regulate the stages of hemp.

- **Licensing.** Municipalities may require businesses with hemp components to get a local license to operate in the industry. These licenses can have additional requirements, similar to other local business licenses.
- **Zoning and building codes.** Municipalities have broad power to enact and enforce zoning and building codes. Municipalities may enforce these codes on businesses engaged in the storing, extracting, processing, and manufacturing of hemp.
- **Noise and odor regulations.** Municipal noise and odor regulations may also be applied equally to businesses engaged in the storing, extracting, processing, and manufacturing of hemp.
- **Temporary food product regulation.** C.R.S. § 31-15-501 restricts municipalities from imposing additional food production regulations that conflict with state law. As these food laws are being developed, municipalities may temporarily step into the regulatory vacuum and enact regulations until and if state law preempts the regulation. After the state enacts its

own regulations, municipalities may then wish to weigh in on additional regulations that do not conflict for processing of food.

Selling

- **Licensing.** Municipalities may require businesses with hemp components to get a local license to operate in the industry. These licenses can have additional requirements, similar to other local business licenses.
- **Selling of food product.** While state law articulates restrictions on the production of food, there is not a restriction on regulating the selling of food containing hemp. A municipality may still require a local license to sell food containing hemp.

As a warning, the status of hemp regulation will continue to evolve. Before acting on any of the preceding regulatory options, we recommend consulting with your municipal attorney. Unlike marijuana, the cultivation of hemp is treated as an agricultural product, which means the federal government will continue to develop regulations in addition to any state laws. CML will continue to update municipalities on developments with hemp regulation.

Industrial hemp program: What Colorado municipalities need to know

By Brian Koontz, Colorado Department of Agriculture industrial hemp program manager

The Colorado Department of Public Health and Environment (CDPHE), pursuant to C.R.S. § 35-61-108, permits registered persons in the State of Colorado to carry out the processing, sale, and distribution of industrial hemp-based products. At the Colorado Department of Agriculture (CDA), the regulatory role of our Industrial Hemp Program is limited to the cultivation (growing) of industrial hemp only. CDA does not regulate processing and/or extraction. Our Inspection and Consumer Services Division provides information on hemp regulation (www.colorado.gov/aginspection) related to farm products and commodity handlers.

Even though the 2018 Farm Bill removed Hemp from the Controlled Substance Act, it did not deregulate it. It does require that states maintain information on lands where hemp is grown. Anyone cultivating hemp in Colorado must have a registration issued by CDA prior to planting. Requirements for registrants include

citizenship verification or a business registration with the Secretary of State, a legal description of property including GPS coordinates and boundary map, a pre-planting report, a planting report, and a harvest report. The harvest report must be submitted to CDA 30 days prior to harvest.

Regarding zoning laws, there are no requirements or restrictions in place at the state level in terms of distance to schools, neighboring properties, residential areas, etc. While any land within the State of Colorado can be registered with the CDA to cultivate industrial hemp, local jurisdictions may have their own ordinances on land use. Prospective hemp cultivators are responsible for verifying local ordinances with anyone who may have jurisdiction over their land area (including, but not limited to, HOA/landowner/city/town/county, etc.) prior to applying to register the land area or planting.

At this time, CDA uses a risk and random selection procedure to select a percentage of registrants to be inspected and sampled. We

can inspect and sample at any time, even without notice. The CDA takes the top two inches of female plants and decarboxylases the lab sample for total %THC concentration (of THC and THCa) as defined in statute. Registrants have the option to voluntarily destroy non-compliant material pending a plan approved by the commissioner.

Gov. Polis has made it a priority for Colorado to remain an innovating force in the promotion of this high-value agricultural commodity. In response, CDA is partnering with leading state, local, and tribal agencies, as well as industry experts in cultivation, testing, research, processing, finance and economics to establish a statewide initiative known as the Colorado Hemp Advancement and Management Plan (CHAMP). In keeping with CDA's core mission to continuously strengthen and advance Colorado agriculture, a key objective of the CHAMP initiative will be to define a well-structured and defined supply chain for hemp in order to establish a strong market for the state's farming communities.



CDPHE's role in regulating hemp

By Jeff Lawrence, Colorado Division of Environmental Health and Sustainability director

The Colorado Department of Public Health and Environment (CDPHE) is coordinating with the Colorado Department of Agriculture (CDA) on the Colorado Hemp Advancement and Management Plan (CHAMP) initiative and the endeavor to create a strong and vibrant hemp industry in Colorado. While CDA is involved with research and development, seed certification, and cultivation, CDPHE is engaged with those businesses that are processing the hemp plant into finished consumable products. In support of CDPHE's role, there have been legislative actions over the last two years that statutorily recognize the allowance of industrial hemp as a food ingredient, including cannabidiol (CBD). With the backing of law, the industry has grown quickly. Currently, there are more than 350 businesses registered with CDPHE as industrial hemp extractors and/or manufacturers. These operations are overseen just like any other food or dietary supplement manufacturer in the state. We require them to meet the Good Manufacturing Practices and, if involved, the production of dietary supplements, the provisions that deal with additional record keeping and testing for purity and potency of the finished product.

While the outlined approach treats hemp operations like any other food manufacturer, the uniqueness of their process and the equipment processors used for extraction does not have a direct correlation to any other food manufacturing process or operation. The uniqueness of these operations generates additional questions that need to be addressed, such as:

- Fire safety within the production environment;
- Product safety, ensuring that while the operations are intentionally concentrating CBD, the process does not concentrate other aspects of the plant, including pesticides, solvents used in the extraction process, and tetrahydrocannabinol (THC);
- Proper management and disposal of waste that is generated in this process.

Key components for any hemp manufacturer to be aware of:

- Assuring all parts of the hemp plant used in food must come from a state that has an established and approved industrial hemp program or a country that inspects or regulates hemp under a food safety program or equivalent criteria to ensure safety for human consumption.
- The industrial hemp must conform to the standard of identity established in C.R.S. § 35-61-101(7) of no more than three-tenths of 1% delta-9 THC.

- The use of other parts of the industrial hemp plant other than seed and its derivatives: seed meal, flour, and oil, must have lab test results indicating the levels of THC within the derivatives are not above the allowable limit of three-tenths of 1% of THC.
- The product must be labeled in conformance with state and federal labeling laws, including:
 - clearly identify hemp as an ingredient;
 - clearly identify CBD and the amount of CBD if added as an isolate;
 - include the statement "FDA has not evaluated this product for safety or efficacy" and;
 - not contain any health or benefit claims.
- The producer must be able to document that the finished product does not contain more than three-tenths of 1% of THC.

CDPHE stands committed in supporting the hemp industry and local governments, being nimble in our approach and assuring the products produced are safe, while providing a framework for how other states and FDA can approach the use of hemp as a food ingredient and dietary supplement. Additional information can be found at www.colorado.gov/pacific/cdphe/industrial-hemp-food.



Keeping Colorado as a hemp industry leader

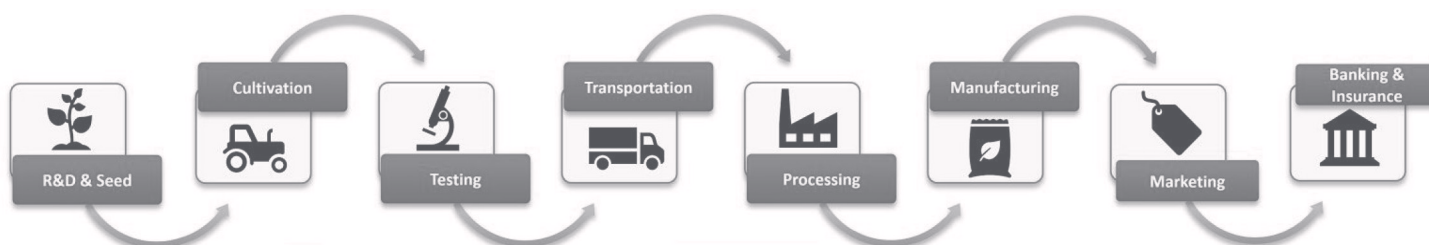
By Hunter Buffington, Hemp Feed Coalition program director

Industrial hemp is projected to become a \$20 billion industry in the next four years. Colorado has been the epicenter of this growth in the United States since 2014, and as a state, we are poised to enjoy the economic benefits of this market explosion. The development of the industry has not been without its challenges, and as the expansion continues across the United States, we plan to keep Colorado at the apex of this growth. To do this requires a concerted effort between producers, processors, regulators, and public policy experts and advocates. Colorado has boldly moved forward creating a partnership between our Department of Agriculture (CDA) and our Department of Public Health and Environment (CDPHE) to regulate hemp. It is this relationship — and not the legalization of marijuana — that has allowed Colorado to lead the hemp movement.

The 2019 passage of a licensing program for hemp processors by CDPHE and the allocation of funds to conduct the Colorado Hemp Agriculture Management Plan (CHAMP) (www.colorado.gov/pacific/agplants/champ-initiative) will solidify Colorado's leadership by creating the regulatory backbone and pathway for the production of hemp products. The CHAMP will inspect eight aspects of the supply chain with stakeholder input and feedback from other state agencies, the Colorado Municipal League, and industry experts that will result in the submission of Colorado's hemp plan to the United States Department of Agriculture. Meetings are open to the public, and municipal participation is key to the success of the state plan. The goal of CHAMP is to provide a roadmap that can be replicated in other states that supports local farmers and producers and ensures the safety of hemp products across the United States.

The most important message that I would like to share with municipal leaders is that the industry was begun by small farmers and entrepreneurs who believed passionately that the return of hemp to American agriculture would provide environmental and economic benefits. These pioneers worked with regulators and policymakers to build the industry, creating the legal pathway together. While there will always be a few bad players, we take pride in the quality of our genetics, hemp harvests, and our position as educators and leaders in this movement. The industry and its producers and manufacturers want to be held to the same standards of other agriculture commodities and products and to be recognized for this. Partnerships with municipal governments will help the industry promote and meet these standards, but the real benefit of collaboration will be for small producers and their local communities and economies.

The CHAMP hemp supply chain





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