

**Maryland General Assembly
Department of Legislative Services**

**Emergency/Proposed Regulations
Department of Agriculture
(DLS Control No. 16-180)**

Overview and Legal and Fiscal Impact

The regulation prohibits the use of pesticides in the cultivation of cannabis, subject to specified exceptions.

The regulation presents no legal issues of concern. However, additional comments have been included in the Technical Corrections and Special Notes section of the Legal Analysis below for the consideration of the Joint Committee on Administrative, Executive, and Legislative Review.

State general fund fine revenues and/or incarceration expenditures, and local incarceration expenditures, may increase due to penalties imposed as a result of the regulation, but any increase is not expected to be material. Small businesses may be meaningfully affected.

Regulation of COMAR Affected

Department of Agriculture:

Pesticide Use Control: Use and Sale of Pesticides, Certification of Pesticide Applicators and Pest Control Consultants, and Licensing of Pesticide Businesses: COMAR 15.05.01.02

Legal Analysis

Background

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) prohibits the sale or distribution in the United States of a pesticide that is not registered or exempted from registration by the U.S. Environmental Protection Agency (EPA). Before registering a pesticide, however, EPA must determine that the pesticide will not generally cause unreasonable adverse effects on human health or the environment. Accordingly, EPA assesses a range of potential health and environmental effects associated with the proposed use of the pesticide during the evaluation of an application. At this time, EPA has not registered any pesticide for use on cannabis, as cannabis is a substance prohibited under federal law. The Maryland Department of Agriculture has determined that the application of a pesticide to cannabis may pose a health risk for human consumption.

Summary of Regulation

Generally, the regulation prohibits a person from using any pesticide in the cultivation of cannabis, as defined as any part of the plant *Cannabis sativa*. However, for purposes of controlling microorganisms or soil borne organisms, the regulation authorizes the use of a pesticide that is registered with EPA and labeled and used for specified sanitation, disinfection, and soil fumigation purposes. Additionally, the regulation authorizes a person to submit a written application to the Secretary of Agriculture to approve the use of a pesticide in the cultivation of cannabis. Such application must include a certified risk assessment for the pesticide, performed by an independent accredited laboratory approved by the secretary, that concludes that the use of the pesticide in the cultivation of cannabis will not lead to unreasonable adverse effects on human health or the environment (after considering specified uses). The regulation requires the secretary to consult with the Secretary of Health and Mental Hygiene in determining whether the pesticide poses an unreasonable risk to human health. Additionally, a distributor may not register a pesticide that is labeled for use in the cultivation of cannabis that does not conform to the regulation's requirements.

Legal Issues

The regulation presents no legal issues of concern. However, additional comments have been included in the Technical Corrections and Special Notes section below for the consideration of the committee.

Statutory Authority and Legislative Intent

The department cites §§ 5-106 and 5-204 of the Agriculture Article as statutory authority for the regulation. More specifically, § 5-106(c) sets forth labeling requirements for pesticides that are distributed, sold, or transported in the State. Section 5-204 provides the secretary with broad authority in adopting regulations regarding the storage, sale, distribution, exchange, use, and disposal of pesticides.

Although not cited by the department, § 5-105 of the Agriculture Article also needs to be cited as authority for the regulation. Section 5-105(a) requires a person who distributes pesticides in the State to register the pesticide with the secretary. Section 5-105(f) provides the secretary with broad authority in requesting toxicological, environmental, or health effects data to effectuate the purpose of the Maryland Pesticide Registration and Labeling Law.

With the addition of § 5-105 of the Agriculture Article, this authority is correct and complete. The regulation complies with the legislative intent of the law.

Emergency Status

The department requests emergency status beginning September 2, 2016, and expiring January 30, 2017. This emergency period is within the normal time frames approved by the committee. The department indicates the emergency status is necessary because the secretary has determined that the application of a pesticide to cannabis may pose a health risk for human

consumption as EPA has not registered a pesticide for use on cannabis and no risk assessment on the impact to human health has been performed. Additionally, while cannabis is not currently being cultivated in the State, the Natalie M. LaPrade Maryland Medical Cannabis Commission awarded stage one license pre-approvals to 15 growers and 15 processors on August 15, 2016.

Technical Corrections and Special Notes

Regulation .02D(3) provides a process for the secretary to approve the use of a pesticide in the cultivation of cannabis. The language under Regulation .02D(3)(a)(i)-(iv) is based on language included in a May 19, 2015, letter from EPA to Colorado providing guidance for pursuing a Special Local Need (SLN) registration of a pesticide under FIFRA for use on cannabis. In this letter, “EPA strongly encourages a State to pursue SLN authorization only where a federally registered pesticide is approved for use(s) similar to the manner in which the SLN pesticide would be used.” The letter indicates that a federally registered pesticide might be regarded as having similar use patterns if the federally registered pesticide is approved for specified uses. The uses specified under Regulation .02D(3)(a)(i)-(iv) are largely the same as the uses specified under the May 19, 2015 letter. However, according to staff at the department, the regulation is not intended to facilitate a SLN, but rather to set up a process that might allow the secretary to approve either a federally registered pesticide or a minimum risk pesticide (minimum risk pesticides are not subject to federal registration requirements but are subject to registration requirements under Maryland law) for use in the cultivation of cannabis.

As stated previously, EPA has not registered any pesticide for use on cannabis, as cannabis is a substance prohibited under federal law. Any approval of a federally registered pesticide by the secretary for use on cannabis in the State may conflict with federal law. However, several other states that have legalized cannabis allow for federally registered pesticides to be used in the cultivation of cannabis. With respect to minimum risk pesticides, the approval of a minimum risk pesticide for use on cannabis does not raise any conflict concerns, as minimum risk pesticides are exempt under FIFRA from EPA registration requirements.

In response to suggestions from the Department of Legislative Services, staff for the department agrees to make the following changes:

- clarifying the Notice of Emergency Action by including a summary of the application process for approval of a pesticide for use in the cultivation of cannabis, as described in the proposed regulation’s Statement of Purpose;
- including a statement in the Notice of Emergency Action and Statement of Purpose that a pesticide may be registered if it meets the requirements of the regulation;
- adding § 5-105 of the Agriculture Article as statutory authority for the regulation;
- clarifying that a distributor, rather than a person, is prohibited from registering a pesticide under Regulation .02D(2) (this change is reflected in the Summary of Regulation section above);

- clarifying the uses that must be considered in conducting the certified risk assessment under Regulation .02D(3)(a); and
- making several technical corrections to the regulation.

Fiscal Analysis

State general fund fine revenues and/or incarceration expenditures, and local incarceration expenditures, may increase due to penalties imposed as a result of the regulation, but any increase is not expected to be material. Small businesses may be meaningfully affected.

Agency Estimate of Projected Fiscal Impact

The department's economic impact estimate accompanying the regulation indicates that (1) unknown staff costs will be incurred by the department, and the Department of Health and Mental Hygiene, to review applications for approval of a pesticide for use on cannabis under the process established in the regulation and (2) enforcement of the regulation may increase costs related to staff time.

The Department of Legislative Services generally disagrees with the economic impact estimate to the extent it is indicating that additional expenditures will be incurred. The Maryland Department of Agriculture and the Department of Health and Mental Hygiene have indicated, independent of the economic impact estimate, that the review of any applications for approval of a pesticide for use on cannabis is expected to be handled by existing staff, without an increase in expenditures. With regard to costs of enforcing the regulation, the Maryland Department of Agriculture has also indicated, independent of the economic impact estimate, that any additional enforcement activities resulting from the regulation can be handled with the department's existing resources.

It is also unclear to what extent applications for approval of a pesticide for use in the cultivation of cannabis will be submitted under the process in the regulation. An application must include a certified risk assessment for the pesticide, performed by an independent accredited laboratory approved by the Secretary of Agriculture, that concludes that the use of the pesticide in the cultivation of cannabis will not lead to unreasonable adverse effects on human health or the environment (after considering certain uses). Based on communication with the Maryland Department of Agriculture and departments of agriculture in three other states dealing with the issue of use of pesticides in cultivation of cannabis (Colorado, Oregon, and Washington), it appears possible that few, if any, applications may be submitted for approval of pesticides to be used on cannabis. The cost of the risk assessment that must be included with the application is expected to be substantial, and it is unclear whether the risk assessment must assess health effects specific to cannabis use. A risk assessment specific to cannabis use may be difficult to accomplish because of the range of products and usage that can result from cannabis production. In addition, the producer of a pesticide, as opposed to a medical cannabis grower, may need to submit the application, and it is unclear whether pesticide producers will do so.

While not mentioned in the economic impact estimate, additional penalties could be imposed on cannabis producers as a result of the regulation's prohibition on pesticide use on cannabis (absent approval under the process established in the regulation). Under federal and State law and regulations, many pesticides already cannot be used on cannabis, generally because the pesticides are subject to restrictions on how they are used (reflected in pesticides' approved labeling) and use on cannabis is inconsistent with those restrictions. This regulation's prohibition, therefore, is only affecting a portion of available pesticides, those not already prohibited from use on cannabis under federal and State law and regulations. In addition, the number of cannabis growers affected by the prohibition is limited by the number of growers that will be licensed by the Maryland Medical Cannabis Commission (initially 15 licensees). To the extent additional penalties are imposed as a result of the regulation, fine (general fund) revenues and/or incarceration (general fund) expenditures increase, but any increase is not expected to be material. Local government incarceration expenditures could also increase, for persons sentenced to a local detention facility.

The penalties applicable to a violation of the pesticide use control regulations which this regulation is being added to include (1) a civil penalty of up to \$2,500 for a first violation and up to \$5,000 for each subsequent violation (subject to a \$25,000 limit on penalties resulting from the same set of facts and circumstances) and (2) criminal (misdemeanor) penalties of up to a \$500 fine and/or up to three months imprisonment for a first violation and up to a \$1,000 fine and/or up to one year of imprisonment for each subsequent violation.

Impact on Budget

No material impact on the State operating or capital budget is expected.

Agency Estimate of Projected Small Business Impact

The department advises that the regulation has minimal or no economic impact on small businesses in the State. The department indicates that (1) it is unclear whether cannabis growers licensed by the Maryland Medical Cannabis Commission will be small businesses and (2) by following sound integrated pest management practices (focusing on management practices other than pesticide use), growers should be able to produce their crop without pesticides except as provided in the regulation. (The use of integrated pest management practices is currently required of licensed growers under the Maryland Medical Cannabis Commission's regulations.)

The Department of Legislative Services disagrees with the Maryland Department of Agriculture's assessment. To the extent licensed medical cannabis growers will be small businesses, prohibiting use of pesticides on cannabis (absent approval of a pesticide by the secretary) appears to at least have the potential to meaningfully impact small businesses, whether through increased costs for alternative pest management methods or lost production. As discussed above, it appears possible that few, if any, applications will be submitted for approval of pesticides under the process established in the regulation and, therefore, growers may have very limited, if any, ability to use pesticides on cannabis. Based on communication with the departments of agriculture in Colorado, Oregon, and Washington, as well as communication with the Maryland Cannabis Industry Association, it is not clear that medical cannabis growers, despite use

of integrated pest management practices, will be able to forego the use of pesticides on cannabis and not risk lost production as a result.

For reference, the definition of a small business for purposes of this analysis is a business entity, including its affiliates, that (1) is independently owned and operated; (2) is not dominant in its field; and (3) employs 50 or fewer full-time employees.

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