



**BRIEF EXPLANATION OF THE FEDERAL FARM BILL AND RELATED
TEXAS LEGISLATION IN THE CONTEXT OF MARIHUANA PROSECUTION
August 2019**

Scope of Document:

This document focuses on the impact of the federal farm bill and similar state legislation on forensic analysis of seized drugs in the crime laboratory as well as observations from the Office of Court Administration regarding case filing data. Considerations regarding probable cause, the use of circumstantial evidence, and similar legal issues in marihuana cases are beyond the scope of this document.

Background:

On December 20, 2018, the Agriculture Improvement Act of 2018 legalized the industrial production of hemp nationwide while simultaneously removing hemp from the Controlled Substances Act. Under the new law, hemp was reclassified as an agricultural product and the United States Department of Agriculture (USDA) was charged with publishing regulations to govern the industry. The legislation delegates to states and Indian tribes through their departments of agriculture the broad authority to regulate and limit the production and sale of hemp products within their borders. However, states and tribes cannot limit the transportation or shipment of hemp and hemp products through their respective jurisdictions. Should a state or tribe opt not to do this, the regulations of the United States Department of Agriculture apply.

Since the passage of the federal bill, many state legislatures have adopted their own laws authorizing the Departments of Agriculture at the state level to write rules governing the local industry and submit plans to the USDA describing their proposed regulatory systems.¹

The contemplated safeguards governing the industrial/agricultural hemp industry are extensive, but many states (including Texas) are still in the process of drafting administrative rules.

Hemp vs. Marihuana:

Under the Texas Hemp Bill ([HB-1325](#)), marihuana and tetrahydrocannabinol, or THC (excluding the limited THC in hemp), remain illegal substances. THC is the chemical component that induces the “high” effect. What changed under Texas law, similar to the federal legislation, is that “hemp” is now *excluded from* the definition of “controlled substance” and “marihuana.”²

Hemp and marihuana both come from the cannabis plant. Different parts of the plant have different THC concentrations and various factors may impact whether a particular plant sample exceeds the statutory THC

¹ See <http://www.ncsl.org/research/agriculture-and-rural-development/state-industrial-hemp-statutes.aspx> for an overview of state statutes.

² Hemp is defined as “the plant *Cannabis sativa* L. and any part of that plant, including the seeds of the plant and all derivatives, extracts, cannabinoids, isomers, acids, salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.”

limit of 0.3%.³ For example, if a hemp farmer waits too long to harvest, the THC in the crop may exceed the legal threshold of 0.3%. HB-1325 provides many safeguards to ensure the plant material from Texas farms is compliant with the THC cutoff established in the law. Administrative rulemaking by the Texas Department of Agriculture will provide additional detail and guidance.

HB-1325 and Marihuana Prosecution:

Law enforcement agencies routinely submit suspected illegal substances to accredited crime laboratories for analysis. The laboratories test the substance and issue a report to assist law enforcement and prosecutors with decision-making in a case. Before HB-1325 was enacted, laboratories reported a positive result if cannabinoids were present. When no cannabinoids were detected, the laboratory reported no controlled substance. The laboratories were not required to *quantitate* the THC, i.e., to *identify the amount* of THC, in the evidentiary sample. In order for crime laboratories to specifically quantitate the THC, which definitively distinguishes hemp and marihuana from an analytical chemistry perspective, they need additional equipment and staffing. This is because quantitation is more complex and time-consuming in forensic casework than simply identifying the presence or absence of THC.

Some Texas prosecutors have announced plans to no longer prosecute low-level marihuana cases and to dismiss pending cases that were filed after the enactment of the new law. In response, Texas Governor Greg Abbott, Lieutenant Governor Dan Patrick, House Speaker Dennis Bonnen and Attorney General Ken Paxton issued a letter to district attorneys statewide emphasizing that marihuana was not decriminalized with the passage of HB-1325.⁴ New case filings of low-level marihuana cases decreased by over 20% in June 2019 compared to June 2018.⁵

Solutions in Progress:

Because the federal farm bill was signed into law before the Texas Hemp Bill, the U.S. Drug Enforcement Administration (DEA) was the first agency to address the challenge of reporting analytical information to law enforcement that would assist them in distinguishing hemp from marihuana in seized drug samples.

The DEA developed a qualitative method using a three-pronged analytical scheme for plant material.⁶ This method results in two possible reporting statements: (1) positive for marihuana (THC above 1%); or (2) inconclusive for marihuana/hemp (when one or more of the tests is negative). For inconclusive results, the submitting agency is then afforded the opportunity to request additional testing, which would include the use of a full quantitative method. Depending on the laboratory, that additional testing may need to be outsourced or it may be performed internally.

A key advantage of the DEA's analytical approach is that it provides submitting agencies with a reliable tool to assist with decision-making in the vast majority of suspected marihuana cases. It is also much faster and less expensive than a full quantitation. Based on the experience of federal agencies, including the DEA and the United States Army crime laboratory, evidentiary samples of suspected marihuana in real-life casework almost always contain THC levels significantly higher than 1%, thus making the DEA's method highly informative for stakeholders in the criminal justice system. Texas laboratories are currently in the process of validating the DEA's method with enhancements as needed. This statewide effort is being

³ With the exception of West Virginia, all states that have enacted legislation regulating hemp have used the 0.3% limit. West Virginia's legislation uses a THC content of less than 1%.

⁴ https://gov.texas.gov/uploads/files/press/Letter_to_DAs.pdf

⁵ The law's effective date was June 10, 2019.

⁶ Additional work is currently underway to validate an analytical scheme for edibles and oils.

implemented in collaboration with the Institute for Forensic Research, Training and Innovation at Sam Houston State University. Texas laboratories expect to be issuing reports using the validated method in approximately six months.

Accreditation Considerations:

Under [Article 38.35](#) of the Texas Code of Criminal Procedure, in order for seized drug analysis (including quantitation) to be admitted in a criminal trial, it must be performed in a laboratory accredited by the Texas Forensic Science Commission.⁷ The Commission recognizes national accrediting bodies that accredit to ISO standards (17025 or 17020), including forensic supplemental standards that address the intersection of laboratory analysis with the criminal justice system.⁸

Many private laboratories that currently perform quantitation for the agricultural/industrial hemp industry are accredited to ISO-17025. However, they are not typically accredited to the supplemental forensic standards. These laboratories may choose to add the forensic supplement to their scope of accreditation and would then be eligible to analyze cases for law enforcement agencies or defendants.

Questions regarding accreditation for forensic casework should be directed to Leigh Savage at leigh.savage@fsc.texas.gov. Media inquiries should be directed to megan.lavoie@txcourts.gov.

⁷ The Texas Forensic Science Commission is administratively attached to the Texas Office of Court Administration.

⁸ Examples of forensic supplemental requirements include: chain of custody; handling and disposition of evidence; reporting contents, legal disclosure issues, proficiency testing, administrative and technical review.