BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE MARIJUANA CONTROL BOARD

In the Matter of	)	
	)	
ALASKA CANNABIS EXCHANGE	)	OAH No. 17-0291-MCB
	)	Agency No. AB-17-0060
	)	
In the Matter of	)	
	)	OAH No. 17-0292-MCB
THE HERBAL CACHE	)	Agency No. AB-17-0074
	)	
	)	
In the Matter of	)	
	)	OAH No. 17-0294-MCB
ALASKA FIREWEED	)	Agency No. AB-17-0075
	)	

DECISION

I. Introduction

The central issue in this case is whether cannabidiol, popularly known as CBD, falls within Alaska's statutory definition of marijuana. Believing CBD to fall within that definition, in early 2017, the Alcohol and Marijuana Control Office (AMCO) confiscated, from numerous licensees, CBD products that had not been manufactured according to the State's "seed-to-store" marijuana cultivation requirements. It then issued Notices of Violation to the licensees whose products had been seized. Three licensees now appeal these NOVs, arguing that hemp-derived CBD products are not marijuana as a matter of law, and also arguing that the NOVs should be stricken from their records given the lack of pre-seizure notice of AMCO's contrary view. After delays to accommodate the parties and to await submission of a complete record, this appeal became ripe for decision on December 20, 2017.

This decision, while sympathetic to the licensees' genuinely held view that hemp-derived CBD products should not be considered "marijuana" for purposes of Alaska's regulation of marijuana, concludes that the statutory definition of marijuana currently in place does not support the distinction drawn by the licensees. As currently written, Alaska's statutory scheme does not exempt cannabidiol products from the definition of marijuana. Accordingly, AMCO did not err in seizing the CBD products at issue in this case.

However, because the licensees lacked prior notice that AMCO or the Board was viewing CBD products as marijuana, this decision also concludes that the NOVs should be replaced with advisory notices, such that any future licensing decision involving these licensees does not

consider the January 2017 seizure of CBD to be a prior violation of the Board's regulations. Lastly, as to the NOV issued to Alaska Cannabis Exchange, this decision concludes that the NOV was also fatally deficient for other reasons described herein, but the seizure of CBD products is upheld for the same reasons applicable to the other licensees.

II. Factual Background

A. Overview of key statutes and key terms

The marijuana plant is part of the botanical species *cannabis sativa*, which falls within the broader genus, *Cannabis*. Alaska voters voted to decriminalize marijuana in November 2014. The Alaska statute that decriminalized marijuana broadly defined it in terms of the genus *Cannabis*, and as meaning, with few exceptions, "all parts of the plant" and its derivatives.[1]

Cannabis plants produce numerous chemical compounds known as cannabinoids. Marijuana is perhaps most commonly associated with the psychoactive cannabinoid tetrahydrocannabinol (THC). The current dispute concerns a different, non-psychoactive cannabinoid cannabidiol (CBD). THC and CBD are the two most abundant cannabinoids.[2]

Within the last decade, CBD has received national attention because of its use by patients with seizure disorders and other ailments. Manufacturers and retailers of these products have marketed CBD products as useful in ameliorating pain, anxiety, and other ailments, without causing the "high" associated with THC.

Some plants within the genus *Cannabis* are bred to have low levels of THC. The plant commonly referred to as "industrial hemp" is a *Cannabis sativa* plant crossbred to have low concentrations of THC. Most, if not all, of the CBD products at issue in this case were derived from low THC "hemp" plants.[3] Hemp has traditionally been illegal to grow in the United States,

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1 AS 17.38.900(10).

2 *See generally*, Shelly DeAdder, "The Legal Status of Cannabidiol Oil and the Need for Congressional Action," 9 *Biotechnology & Pharmaceutical Law Review* 68 (2016) at 72-73 ("[B]oth the marijuana plant and the industrial hemp plant come from the same botanical species, *Cannabis sativa*, which is within the broader genus, *Cannabis*. The *Cannabis sativa* plant has trichomes, which are small hairs growing from the epidermis of the plant. These hairs contain two organic compounds, phenols and terpenes. 'As phenols and terpenes migrate upward from the base of a trichome to the bud at its tip, a series of chemical reactions occur that convert these simple basic compounds into a large variety of more complex compounds ....' While more than 400 chemical compounds can be extracted from *Cannabis sativa*, 66 of them are unique to that plant. These 66 chemicals are called cannabinoids. Psychoactive THC, and non-psychoactive CBD, are the most abundant cannabinoids. Although the flowering portion of the plant does not contain trichomes, it nevertheless has a high concentration of cannibinoids, 'probably because of the accumulation of resin secreted by the supporting bracteole (the small leaf-like part below the flower).'") (internal citations omitted).

3 *See* Joy Beckerman Aff., ¶¶ 6, 8(d) (Ms. Beckerman's Affidavit has not been relied on in this Decision other than as expressly stated. Citation to any portion of her affidavit should not be construed as an endorsement of the overall content or tone of her submission, much of which is unhelpful argument rather than fact-based testimony. Moreover, she has not been qualified nor relied upon as an expert.); Ralph Aff.; Licensees' brief, pp. 4-5.

with hemp-based products (including CBD products) thus being made from hemp grown in Europe, Canada, and China.[4] But the legal status of industrial hemp changed slightly in 2014. The 2014 federal Farm Bill permits state departments of agriculture and institutions of higher learning to cultivate industrial hemp – defined as "the plant *Cannabis sativa L*. and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol [THC] concentration of not more than 0.3 percent on a dry weight basis"[5] – for research under specified certain circumstances and where state law permits.[6]

Some states have adopted laws authorizing the cultivation of industrial hemp production for purposes identified in the Farm Bill.[7] Such a bill was introduced in Alaska in 2016, but did not make it out of committee. As currently written, Alaska's statute does not define marijuana with reference to THC levels, and does not mention or distinguish "hemp."[8]

CBD can be found in and extracted from both "industrial hemp" (i.e. low THC cannabis plants) and other, higher THC cannabis plants. Hemp-derived CBD products are widely available in retail stores and from online retailers in Alaska and nationwide.[9]

B. February 2017 AMCO seizure of CBD products

1. February 3, 2017 post office seizure

The events giving rise to this case began in earnest on February 3, 2017, when a leaking mail parcel led U.S. postal inspectors to notify AMCO investigators about a shipment of bottled liquids en route to an Anchorage address from a business in Colorado.[10] AMCO investigators met with U.S. postal inspectors and took possession of 764 bottles labeled with the words "Alaska

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4 *See* R. 889.

5 7 U.S.C. § 5940(b)(2). See also, *De Adder*, at pp. 72-73 ("It is the near absence of THC that distinguishes the industrial hemp plant from the marijuana plant. 'Over the centuries, the hemp plant has been crossbred to have low concentrations of THC, presently about 0.3 percent. By contrast, cannabis plants raised for the production of marijuana have much higher concentrations of THC, ranging from about 2 to as much as 20 percent.').

6 7 U.S.C. § 5940(a) ("[N]otwithstanding the Controlled Substances Act" and other federal laws, an institution of higher education (as defined in section 1001 of Title 20) or a State department of agriculture may grow or cultivate industrial hemp if— (1) the industrial hemp is grown or cultivated for purposes of research conducted under an agricultural pilot program or other agricultural or academic research; and (2) the growing or cultivating of industrial hemp is allowed under the laws of the State in which such institution of higher education or State department of agriculture is located and such research occurs.").

7 *See, e.g.*, CT. ST. 21a-240; FL ST. 1004.4473; KY ST. 260.862; *see generally*, 10/25/17 Aaron Ralph Aff., ¶ 4 and Attachment A.

8 AS 17.38.900(10).

9 *See, e.g.*, 10/25/17 Aaron Ralph Aff., ¶ 10; Ex. 3 to Beckerman Aff.; R. 889.

10 Rukes Aff., pp. 1-2.

Cannabis Exchange" and "CBD," as well as twenty unlabeled bottles they suspected contained CBD.[11]

Although the bottles bore "Alaska Cannabis Exchange" labels, they were not being shipped to the address of Alaska Cannabis Exchange or its owner, but instead to Geneva Cowen. The relationship between Ms. Cowen and Alaska Cannabis Exchange is unclear in the record.[12] However, Alaska Cannabis Exchange does not appear to dispute its ownership of, and responsibility for, the products in question.[13]

According to undisputed testimony presented to the Board in February 2017, the products seized were manufactured in Colorado under that state's agricultural hemp program, and were made from "industrial hemp" – that is, "*Cannabis sativa L*. with a THC concentration of not more than 0.3 percent."[14]

2. February 9, 2017 seizures from retailers

As described below, the February 3 seizure led to issuance of a Notice of Violation against Alaska Cannabis Exchange. It also led to inspections of and seizures of CBD products from numerous licensed retail establishments, including the two other appealing licensees in this case. On February 9, 2017, AMCO inspectors visited licensed retailers, including Alaska Fireweed and The Herbal Cache, inquiring about and seizing all CBD products offered for sale.[15] From Alaska Fireweed, a retail establishment in downtown Anchorage, AMCO staff seized a total of 203 bottles of CBD oil, variously labelled "adult vape oil," "adult hemp oil," and "pet hemp oil," and all bearing Alaska Cannabis Exchange labels.[16]

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11 Rukes Aff., p. 2. Of the 764 labeled bottles, some were also labeled "100% Whole Plant CBD Vape Oil" or "100% whole plant CBD Hemp Oil in MCT." Ex. 2, pp. 4-16.

12 At the February 17, 2017 Board hearing, AMCO's investigator described Ms. Cowen as "the wife of an affiliate of Alaska Cannabis Exchange," and Ms. Cowen identified herself as affiliated with "ACE Holdings." Alaska Cannabis Exchange's Aaron Ralph testified that the products seized were "manufacture[d] and produce[d]" by "ACE Holdings," which he described as "a separate company" with whom Alaska Cannabis Exchange has "a licensing agreement … for branding purposes." The evidentiary record in this case is devoid of details about the nature of this agreement.

13 In an affidavit submitted with the licensees' brief, Mr. Ralph identifies himself as "the manufacturer of the products that were seized from the post office and three marijuana retail stores," including Alaska Fireweed and Dankorage (another retail licensee which settled its appeal during the briefing phase), and refers to the products seized form the post office as being "Alaska Cannabis Exchange's products." 10/25/17 Ralph Affidavit, ¶ 3, 5.

14 ACE Interrogatory response; 2/17/17 Aaron Ralph testimony; 10/25/17 Aaron Ralph affidavit. All the Alaska Cannabis Exchange-labelled CBD products seized were "whole plant" products. 2/17/17 Ralph testimony. The unlabeled bottles were "samples of the vape for R&D purposes," to be sent back to the lab every few months to determine if the contents were separating. 2/17/17 Ralph testimony.

15 Affidavit of Joseph Bankowski; ¶¶ 7-8.

16 Ex. 6, p. 5; Bankowski Aff., ¶ 8; Nowland Aff., ¶ 2; Exhibit 5.

From The Herbal Cache, a retail establishment in Girdwood, AMCO staff inventoried and seized 54 CBD products that included creams, oils, sprays, hair conditioners, and softgel capsules.[17] The products seized from The Herbal Cache were manufactured by three companies: CV Sciences, CBD for Life, and Kush Creams. The labelling on the CV Sciences products describes the product as "hemp-derived CBD oil."[18] The company's promotional materials describe the product as "a total plant CO2 extract from agricultural hemp."[19] Likewise, the promotional materials for the CBD for Life products describe them as "whole plant" products made from industrial hemp.[20] The labeling on the Kush Cream products indicate that the products contain "cannabis-infused emu oil, full cannabis extract, and hemp seed oil."[21]

C. NOVs and hearing notices

On February 10, 2017, the day after seizing CBD products from the retailers, AMCO issued Notices of Violation (NOVs) to a number of licensees. The text of the NOV issued to each retailer was identical, reading as follows:

> On 2/9/17 it was observed by AMCO investigators that your location had marijuana oil (CBD oil) manufactured from a source outside the State of Alaska for sale. This action is in violation of the following:
> 3 AAC 306.305 – Retail Marijuana Store Privileges
> 3 AAC 306.310 – Acts Prohibited at Retail Marijuana Store
> 3 AAC 306.330 – Marijuana Inventory Tracking System
> 3 AAC 306.340 – Testing Required for Marijuana and Marijuana Products
> 3 AAC 306.345 – Packaging and Labeling[22]

The exact same NOV was also issued to Alaska Cannabis Exchange. Like the NOVs issued to the retailers, the Alaska Cannabis Exchange NOV said the seizure occurred on February 9, 2017, and was based on sale of CBD oil at the licensed premises, which it then identified as violating various regulations governing retail marijuana stores.[23]

Of course, as to Alaska Cannabis Exchange, this statement of facts was wholly inaccurate, misstating the date, location, and circumstances of the seizure. It is undisputed that the CBD product was not seized at Alaska Cannabis Exchange; it was seized at the post office. Nor was

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17 Affidavit of Francis Hamilton, ¶¶ 3-7; Ex. 8. These events were understandably surprising to The Herbal Cache, which had had CBD products out in plain view during pre-licensing inspections by AMCO staff the previous week. *See* Licensees' brief, pp. 2-3.

18 Ex. 8, pp. 3-4; Ex. 15, pp. 30-31.

19 Ex. 15, p. 115.

20 Ex. 15, pp. 88(a), (b), 105.

21 Ex. 8, pp. 2, 9, 11. A more legible version of these photos is available in the record in the AMCO staff's July 21, 2017 filings in support of the later-withdrawn motion for summary adjudication.

22 Ex. 6, p. 1 (Alaska Fireweed); Ex. 9, p. 1 (The Herbal Cache).

23 Ex. 3, p. 1.

the product being mailed to the licensed facility.[24] Not only was the seized CBD product not "for sale" at the licensed premises, it never came into possession of Alaska Cannabis Exchange or onto its premises.

These errors were repeated in the Notice of Hearing sent to Alaska Cannabis Exchange. That notice stated:

> You are hereby notified that on February 9, 2017, the following marijuana product was seized from your licensed place of business in accordance with 3 AAC 306.830. Seizure of marijuana or marijuana product: Please see attached written inventory receipt. The marijuana product listed above was found to be in violation of regulations pertaining to licensure as a Marijuana Retail Establishment.[25]

When asked at the Board's evidentiary hearing to identify his "probable cause" for citing the licensee, the AMCO investigator acknowledged that the NOV was inaccurate as to Alaska Cannabis Exchange and "should have been worded differently," but provided no explanation of the actual probable cause as to the relationship between this shipment and the licensee.[26] AMCO never issued a corrected NOV.

III. Procedural History

As a result of the February inspections and seizures, AMCO issued NOVs to numerous retailers found to have been carrying CBD products. Days later, AMCO notified the licensees that a hearing would be held on the NOVs.[27] The Board held a series of evidentiary hearings on February 17, 2017 to hear the challenges to the NOVs.[28]

At the close of the February 17 hearing, the Board convened in executive session for deliberations. When the Board came out of executive session, Acting Director Sara Chambers announced that the Board had "unanimously moved to consider all of the seized items as marijuana product except those labeled as made exclusively from seeds and also not including the term CBD," and that the Board had "decided to retain the product and take no further action on the establishments receiving NOVs."

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[24] The license is located at 1805 & 1807 W. 47th Avenue in Anchorage. Ex. 3, p. 1. The package labels were addressed to Geneva Cowen at 11201 Avion Street in Anchorage. Ex. 3, pp. 4-16.

[25] Ex. 3, p. 2.

[26] Recording of 2/17/17 Board hearing. Mr. Ralph did not deny that a relationship existed between Alaska Cannabis Exchange and the items seized, and indicated they were to be sold "on the Alaska market."

[27] See Ex. 3, p. 2.

[28] R. 836-983.

Licensees were notified of the Board's determination by email, and then by letter.[29] Four licensees then filed administrative appeals to challenge the Board's determination. The appeals were referred to the Office of Administrative Hearings on March 30, 2017. Because of the overarching common legal question regarding the status of CBD, the appeals were consolidated.

All parties initially agreed to delay further proceedings in hopes that a legislative fix would be forthcoming. After legislation regarding industrial hemp failed to move out of committee before the end of the legislative session, the administrative law judge held a status conference and scheduled the cases for an evidentiary hearing to be held in September 2017.[30]

After initially scheduling the matter for an evidentiary hearing, the parties collectively agreed the matters were better submitted for decision on the written record.[31] AMCO filed its brief on September 25, 2017. AMCO's submission included affidavits of three AMCO investigators, as well as exhibits detailing the items seized from each licensee, discovery exchanged by the parties, and an expert report procured by the licensees.[32] The licensees submitted a single consolidated brief on October 26, 2017.[33] The licensees also submitted affidavits from Alaska Cannabis Exchange's Aaron Ralph and from Alaska Fireweed's Susan Nowland, as well as exhibits concerning the content of the Alaska Cannabis Exchange products, the open sale of CBD products by non-licensees, and the Municipality of Anchorage's view of CBD products. AMCO filed its reply on November 2, 2017.

After briefing was complete, the administrative law judge determined that the agency record filed by the agency in this matter was incomplete. Specifically, and although these had been requested during earlier status conferences, AMCO staff had never submitted a copy of the audio recordings from the Board's February 17, 2017 hearing on the NOVs. At the request of OAH, AMCO staff finally provided the recordings on November 16, 2017, and additional documents on December 19, 2017.[34] Additionally, after briefing was complete, the parties

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29 Exhibit C; Exhibit D.

30 June 7, 2017 Scheduling Order.

31 July 21, 2017 Order Vacating Hearing Date and Setting Briefing Schedule.

32 AMCO Hearing Brief and Exhibits 1-18.

33 The Scheduling Order had provided that "[t]he licensees have discretion to determine how best to present their arguments. Options include (1) filing a single, unified brief on behalf of all licensees; (2) each licensee filing its own separate brief; or (3) filing a unified brief on some issues, with individual supplemental briefs filed by licensees as each licensee deems appropriate." July 21, 2017 Order Vacating Hearing Date and Setting Briefing Schedule .

34 Because the written agency record contained no express references to the February 17 hearing, AMCO staff was ordered to further supplement the record with any written materials submitted to the Board for that hearing. On December 1, 2017, AMCO staff provided an index indicating where in the record materials submitted by the three licensees were located. AMCO staff did not, however, provide a complete copy of all written materials submitted to the Board during the February 17 hearing. Numerous licensees participated in that hearing and submitted written

engaged in motion practice about evidentiary issues.[35] Following all of the foregoing, this matter was finally ripe on December 20, 2017. No party requested oral argument on the appeal.

IV. Discussion

A. The Board's regulatory process and the function of administrative appeal

Under the Board's regulations, a marijuana establishment – whether a retail marijuana store, a marijuana cultivation facility, a marijuana product manufacturing facility, or a marijuana testing facility – must be licensed by the Board.[36] Licenses issued by the Board are tied to specific licensed premises as identified in the license application.[37]

Article 3 of the Board's regulations govern retail establishments such as The Herbal Cache and Alaska Fireweed. Article 4 governs cultivation facilities such as Alaska Cannabis Exchange. Article 8 addresses enforcement and civil penalties.

AMCO staff may enter and inspect "the licensed premises of a marijuana establishment," and licensees must allow such inspections.[38] AMCO staff may seize "from a licensed or previously licensed marijuana establishment" products that have not been grown and tracked under the state seed-to-store system.[39]

Following an inspection, AMCO may issue either an inspection report, an advisory report, or a notice of violation.[40] A licensee that receives a notice of violation may respond in writing and request to appear before the Board.[41]

A licensee aggrieved by an action of the Board may request an administrative hearing conducted under Alaska's Administrative Procedure Act.[42] Because such a hearing concerns a sanction on the license, the Director bears the burden of proof.[43]

Following the hearing, unless there is a delegation (which has not occurred here), the matter then returns to the Board for a final decision.

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materials about the status of CBD generally. The Board then convened in executive session to consider the NOVs as a whole. The materials submitted by other licensees are therefore part of the material before the Board when it made its determination, and are thus properly part of the administrative record in this case. Accordingly, AMCO was directed in a supplemental order to produce the full record by December 19, 2017, which it did.

35 Also after briefing was complete, a dispute arose amongst the parties about an exhibit included in the licensees' opposition brief. At a status conference, the parties set a schedule for briefing a motion to strike this exhibit. Pursuant to that schedule, AMCO staff filed a motion to strike, which the licensees opposed. A separate order regarding this evidentiary issue is being issued herewith.

36 3 AAC 306.010.

37 3 AAC 306.015(c).

38 3 AAC 306.800(a)(1), (b).

39 3 AAC 306.830(a).

40 3 AAC 306.805.

41 3 AAC 306.805(d).

42 3 AAC 306.835.

43 *See Alaska Alcoholic Beverage Control Board v. Malcolm, Inc*., 391 P.2d 441, 444 (Alaska 1964).

> The decision at the end of the second round will be a more rigorously tested version of the first decision. If it differs from the first, the difference may not stem from any 'errors' in the initial round. Instead, it is simply a new decision made with a different and more complete body of evidence. The task is to make the best decision possible at the executive branch level.[44]

The final decisionmaker in such cases – here, the Board – may defer to judgments made by agency staff, but is not required to do so.[45]

B. Why this decision concludes that CBD is not excluded from the definition of marijuana under AS 17.38.900(10)

The overarching legal issue in this case is whether CBD is marijuana for purposes of the Alaska laws regulating marijuana licensees. If CBD is marijuana, it is subject to the same stringent seed-to-store regulatory control as other types of marijuana and marijuana products under the statute. If it falls outside the statue, it is not.

1. Alaska's statutory definition of marijuana does not exclude "hemp" products

As currently written, Alaska's statute does not mention hemp, or otherwise distinguish between types of cannabis based on THC levels. Rather, under Alaska law,

> "[M]arijuana" means all parts of the plant of the genus cannabis whether growing or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin, including marijuana concentrate; "marijuana" does not include fiber produced from the stalks, oil, or cake made from the seeds of the plant, sterilized seed of the plant which is incapable of germination, or the weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other products.[46]

This definition is nearly identical to that found in the federal Controlled Substance Act (CSA), enacted in 1970, which defines marijuana as follows:

> The term "marihuana" means 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. Such term does 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

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[44] *In re Palmer,* OAH No. 09-0133-INS (Director of Insurance 2009), at pp. 6-7 (describing this decision-making paradigm in the context of professional licensing cases).

[45] *Id*. at 7, citing *In re Alaska Medical Development – Fairbanks, LLC,* OAH No. 06-0744-DHS, Decision & Order at 5-6 (issued April 18, 2007; adopted by Commissioner of Health & Social Services in relevant part, Decision After Remand, Oct. 9, 2007).

[46] AS 17.38.900(10).

> 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.[47]

Neither the federal CSA nor Alaska's law defines marijuana with reference to its psychoactive properties generally, or its THC content specifically. (Nor does either law expressly identify whether cannabidiol is or is not "marijuana.")

2. Neither the federal Farm Bill nor the 2004 Ninth Circuit Hemp Industries decision are controlling here

The licensees' primary argument is that hemp – that is, low THC marijuana plants – is simply not marijuana, period. Based on that assumption, the licensees then contend that "cannabidiol does not constitute marijuana or marijuana product when it is derived from industrial hemp."[48]

The licensees point to the language of the federal Farm Bill, which defines "industrial hemp" to mean "the plant Cannabis sativa L. and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." The licensees interpret the Farm Bill as broadly "legalizing" industrial hemp, citing it for the proposition that hemp is "legal under federal law." But by its own terms, the Farm Bill's reach is limited to authorizing pilot industrial hemp research programs on a state level, where state law authorizes such programs, which Alaska law currently does not. The Farm Bill does not purport to "legalize" industrial hemp outside of these limited confines, and it does not assist in this analysis, given that Alaska's statutory definition does not distinguish between low THC and high THC marijuana.

The licensees also point to a 2004 Ninth Circuit decision that addressed an attempt by the DEA to classify "items containing oil or sterilized seeds from hemp" on Schedule I of the Controlled Substances Act.[49] But the products at issue in that case undisputedly fell within the exclusionary language of the Controlled Substances Act. Unlike in this case, "[t]he non-psychoactive hemp in [the Hemp Industries] Appellants' products is derived from the 'mature stalks' or is 'oil and cake made from the seeds' of the Cannabis plant, and therefore fits within the plainly stated exception to the CSA definition of marijuana."[50] The decision did not address, and is not persuasive as to, the broader argument advanced by the licensees that all low-THC hemp is excluded from the statutory definition of marijuana.

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47 21 U.S.C. § 802(16).
48 10/25/17 Ralph Aff., ¶ 5.
49 *Hemp Indus. Ass'n. v. Drug Enf't Admin*., 357 F.3d 1012 (9th Cir. 2004).
50 *Hemp Indus. Ass'n. v. Drug Enf't Admin*., 357 F.3d 1012, 1017 (9th Cir. 2004).

3. *Alaska's statutory definition of marijuana only excludes "oil … from seeds," not all oil-based marijuana products*

In addition to a generalized argument that hemp is not marijuana, the licensees separately argue that CBD oil falls within the "exception" language in the statutory definition. Specifically, they argue that the "exception" language excludes from the definition any "oil," no matter the specific source.

Alaska courts interpret statutes "according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters."[51] A review of the licensees' argument about "oil" requires an analysis of the exception language and its context.

As noted, the definition of marijuana, including the exception language, is similar but not identical to the federal Controlled Substances Act. The federal law excludes from the definition of marijuana:

> [T]he 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.[52]

The Alaska law excludes:

> [F]iber produced from the stalks, oil, or cake made from the seeds of the plant, sterilized seed of the plant which is incapable of germination, or the weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other products.[53]

Thus, while the federal law excludes fiber from stalks, and "oil or cake made from the seeds" of the plant, Alaska's statute includes a comma after the word "oil," thus appearing to exclude fiber from stalks, and "oil, or cake made from the seeds of the plant."

The licensees argue that the Alaska exception must mean what its plain language says – that "marijuana" does not include any "oil."[54] AMCO argues that this interpretation relies on a typographically misplaced comma to reach an absurd result. AMCO notes that many marijuana products are produced in oil form and plainly part of what the Board is intended to regulate.[55] Indeed, the Board's regulations define "marijuana concentrate" to mean "resin, oil, wax, or any

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51 *Native Village of Elim v. State*, 990 P.2d 1, 5 (Alaska 1999).
52 21 U.S.C. § 802(16).
53 AS 17.38.900(10).
54 Licensees' brief, pp. 8-9.
55 Reply, pp. 1-3.

other substance produced by extracting or isolating cannabinoids, THC, or other components from a marijuana plant or from materials harvested from a marijuana plant."[56] The Board is frequently called on to approve applications for intoxicating oil-based marijuana products that all parties involved acknowledge are regulated marijuana products.

Given this reality, AMCO reasons the comma between "oil" and "or cake" in Alaska's statute must be a typographical error, because accepting a wholesale exception for all oils would contravene and undermine the statutory purpose.

> Manufacturers produce oils, and oils are the basis for a wide variety of products … if all cannabis sativa derived oils were excepted from the definition of marijuana, [the Board's statutory authority to regulate marijuana products] would be meaningless and a huge segment of the marijuana market would go unregulated.[57]

On the other hand, because seeds contain a negligible amount of THC, an exception for "oil made from seeds" would be consistent with the federal statute and not undermine the statute's purpose.

The position advocated by the licensees – that Alaska's definition excludes all "oil" – is simply too far attenuated from any statutory history or purpose, or from common sense, to be adopted here. To accept the licensees' position on "oil" would render a significant portion of Alaska's retail marijuana market inexplicably and unjustifiably unregulated. In the complete absence of any legislative history supporting such a broad gulf in regulatory coverage of marijuana, the statute is more logically read as containing an errant comma, rather than excluding from its coverage a broad swath of intoxicating marijuana products.

Nor does the existing statute support the licensees' broader position that hemp-based products are impliedly excluded from the definition of marijuana. Whatever the Board may believe about the wisdom of differentiating higher THC products from non-intoxicating marijuana products through a definition of marijuana that draws such distinctions, the total lack of such differentiation in Alaska's existing statute controls this case. Unless and until the legislature amends the statutory definition to recognize a distinction between non-intoxicating "hemp" products and higher THC marijuana products, such a distinction does not exist in Alaska law. Marijuana is marijuana, regardless of its THC content.[58]

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[56] 3 AAC 306.990(b)(11). *See also* 3 AAC 306.555(b)(2), (d)(4) (addressing requirements for manufacture of oil-based marijuana concentrates).

[57] Reply, pp. 2-3.

[58] Of course, it also follows that CBD products that fall within the existing exclusionary portion of the statute are not marijuana. In particular, and as discussed above, both Alaska's statute and the CSA exclude from the definition of marijuana "oil or cake made from the seeds of the plant." AS 17.38.900(10). Thus, if a CBD oil product were made exclusively "from the seeds of the plant," it would not be a marijuana product under the law.

C. Why this decision concludes that seizure of the retail licensees' CBD products was appropriate

Licensed retail marijuana stores are prohibited from selling marijuana products that have not been tracked through the state's seed-to-store tracking process.[59] Under 3 AAC 306.830, AMCO enforcement agents "may seize marijuana or any marijuana product from a licensed or previously licensed marijuana establishment" if the marijuana or marijuana product has not been "properly logged into the marijuana establishment's marijuana inventory tracking system," or if the marijuana or marijuana product" is not packaged and labeled under the state's "seed to store" tracking system.

The licensees admit that "it is undisputed that the hemp-derived CBD products seized did not comply with the marijuana regulations requiring identification, tracking, labeling, packaging, and transportation."[60] They contend that the products are exempt from those requirements because the products are not marijuana, and therefore, "these products are not within the regulatory authority."[61]

Given the conclusions above – that CBD is a marijuana product as that term is currently defined in Alaska's statute – it necessarily follows that CBD products originating outside of the seed-to-store tracking process may not be sold by retailers and may be seized by AMCO.

The retailers make much of the fact that CBD products are openly sold in other retail establishments throughout Alaska. But it is well established that "laxity in the enforcement of [a law] in other cases . . . would not constitute a denial of equal protection" against the law's enforcement in a particular case.[62] "An agency need not – indeed, often cannot – apply a statute simultaneously to all similarly situated parties to avoid violating the equal protection clause so long as it is not intentionally discriminating against any party."[63]

Further, the licensed retailers are not similarly situated to unlicensed retailers, who have not sought out the privileges and benefits of a retail marijuana license. AMCO unquestionably has authority to inspect licensed premises and to enforce the licensing requirements against those licensees. It is a reasonable use of limited enforcement resources to focus those resources on ensuring compliance by licensees. This is not a case where the licensees allege they have been

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There has been no argument or showing here that any of the products at issue are exclusively "made from the seeds of the plant."

59 3 AAC 306.310(a)(3).

60 Licensees' brief, p. 4.

61 *Id*.

62 *Nelson v. State*, 387 P.2d 933, 935 (Alaska 1964).

63 *State, Dept. of Natural Resources v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1220 (Alaska 2010).

treated differently than other similarly situated license holders, nor is there evidence in the record to support such a position. Even assuming that AMCO could enforce the CBD restrictions on non-licensed retailers known to carry CBD products – far from a foregone conclusion based on the plain language of 3 AAC 306.830 – its failure to have done so thus far does not invalidate its decision to enforce the restrictions as to its licensees.

Of course, since the definition of marijuana excludes oil made from seeds, this analysis only applies to whole plant products. Because products made only from seeds are not marijuana, any such products would not be subject to seizure. But the evidence in the record does not establish that any of the products seized fall within this exclusionary provision. AMCO has met its burden of showing that the products seized were more likely than not marijuana under the statute, and the licensees have failed to show that the products fall within the "made from seeds" exemption.[64]

D. Why this decision concludes that the NOVs related to the retail licensees' CBD products should be replaced with a non-punitive advisory notice

The Board's regulations provide the Director with various enforcement mechanisms. Upon inspecting a licensed premises, the inspector must prepare an inspection report under 3 AAC 306.805(a). The Director or her staff may issue a notice of violation, or a non-punitive inspection report.

Marijuana establishment licenses must be renewed annually.[65] As part of the license renewal process, the licensee must report to the Board any Notices of Violation issued in the past two calendar years.[66] The Board may then deny a renewal application based on a finding "that the license has been operated in violation of a condition or restriction the Board previously imposed."[67] The imposition of an NOV is thus a matter of potentially serious consequence for licensees, with the potential to at least contribute to nonrenewal of a license.

The Director did not meet her burden of showing that NOVs are appropriate under the totality of circumstances here. It is undisputed that numerous licensees were carrying CBD products because of a widespread belief that they were exempted from the Board's regulations. It is undisputed that such products are widely available locally and nationally. It is undisputed that, prior to the seizures giving rise to these cases, AMCO staff were aware of CBD products being

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64 Given that legislation was introduced in the last legislative session to amend the definition of marijuana to exclude hemp products, the Board could, but is not required to, direct the AMCO to delay destruction of the products until after the legislative session, with the products to be returned in the event that the legislation passes.

65 3 AAC 306.025.

66 3 AAC 306.035(b)(4(B).

67 3 AAC 306.080(b)(3).

sold by licensees and took no action to halt such practices or make licensees aware of concerns. And it is undisputed that AMCO staff took no steps to communicate with licensees about possible concerns about the status of CBD before seizing CBD products and issuing NOVs. Under the totality of the circumstances, and given the uncertainty and confusion that has surrounded the status of CBD, the Board should not penalize the licensees with NOVs.

E. The separate issues raised by the Alaska Cannabis Exchange NOV

This decision lastly considers the unique circumstances surrounding the NOV issued to Alaska Cannabis Exchange. Although these cases were consolidated for hearing based on the common legal issue posed by the identical Notice of Violation – namely, the legal status of CBD – Alaska Cannabis Exchange's appeal raises unique factual issues that distinguish it from the other licensees and warrant discussion.

Unlike the retailers, the product was not seized at the licensed premises; it was seized by postal inspectors at the post office.[68] At the time, the product was en route to a personal address, not the address of the licensed premises.[69] At the same time, Alaska Cannabis Exchange does not deny owning (and intending to distribute) the product seized, nor has any other putative owner (such as Ms. Cowen) come forward to make a claim on the products.

As described above, the NOV issued to Alaska Cannabis Exchange was identical to the one issued to the retailers. But as to Alaska Cannabis Exchange, the NOV is riddled with errors:

- The NOV says it was observed that the licensee had products for sale.[70] There is no evidence this is true; the only evidence is that it is not true.
- The NOV then cites requirements for retail establishments vis-a-vis the tracking system and testing and packaging.[71] Alaska Cannabis Exchange does not have a retail license and is not governed by 3 AAC 306.300.
- The acts prohibited by a marijuana cultivation facility are delineated in 3 AAC 306.405. The NOV did not cite any provision in this regulation.

At the evidentiary hearing, the AMCO inspector acknowledged that the NOV was inaccurate as to this licensee, saying the NOV was "a form letter" and that it "should have been worded differently." But AMCO made no attempt to correct it, even after being made aware of the patent deficiencies in the notice. AMCO's briefing in this case makes no attempt to address the multiple factual inaccuracies of the NOV or its reliance on inapplicable regulations.

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68 Ralph Aff.; Rukes Aff., pp. 1-2.
69 See Ex. 3, p. 4.
70 Ex. 3, p. 1.
71 *See* Ex. 3, p. 1.

Wholly apart from the underlying legal issues involved in AMCO's decision to seize CBD products from licensees, Alaska Cannabis Exchange's appeal implicates basic principles of due process. Even if the Notices of Violation were upheld as to the other licensees, the NOV to Alaska Cannabis Exchange cannot be upheld because it relies on inapplicable code provisions and patently erroneous factual statements.

A more difficult question is posed by the seizure of the Alaska Cannabis Exchange products at the post office. On the one hand, as described above, the seizure did not occur as described in the NOV. And the products were not clearly en route to Alaska Cannabis Exchange or its facility. On the other hand, Alaska Cannabis Exchange does not disclaim ownership of the products, and at the Board's hearing acknowledged intending to sell them "in the Alaska market."[72] Ordering the return of the products under these circumstances would sanction the introduction into the Alaska market of products that cannot currently be legally sold here. Because the Board has authority to seize marijuana products that have not been produced in compliance with the seed-to-sale regulatory scheme, and because the products in question were clearly destined for prohibited sales "in the Alaska market," this decision concludes that the seizure itself was proper, notwithstanding errors in the related NOV.

V. Conclusion

For the reasons described herein, AMCO's seizure of CBD products from the licensees is upheld, but the NOVs issued to all three licensees are rescinded.

DATED: January 18, 2018.

By: *Signed*
Cheryl Mandala
Administrative Law Judge

[72] 2/17/17 Testimony of Aaron Ralph.

Modified Adoption

The Marijuana Control Board, in accordance with AS 44.64.060(e)(3), hereby revises the disposition of the case to include the following:

> AMCO will return all inventory seized in this matter which is shown to the Director's satisfaction to have a THC content of less than 0.3%, within 72 hours of Senate Bill 6 becoming effective, or as soon thereafter as reasonably practicable. Any product found to have a THC content over that amount, and any product for which the THC content cannot reasonably be determined to the Director's satisfaction, will be destroyed. If Senate Bill 6 does not become effective within 20 days of the close of the 30th Legislature, all seized inventory will be destroyed. This direction as to disposition of inventory has been agreed to by the parties and is made independent of and notwithstanding any other legal or factual finding in this Decision.

Pursuant to AS 44.64.060(e)(3), the Board adopts the proposed decision as so revised.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of distribution of this decision.

DATED this 6th day of April, 2018.

By: *Signed*
Signature
Mark Edward Springer
Name
Chair, Alaska Marijuana Control Board
Title

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]