



ALAN WILSON  
ATTORNEY GENERAL

October 4, 2021

Chief Mark A. Keel  
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PO Box 21398  
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Dear Chief Keel:

We received your request for an opinion clarifying the application of South Carolina's Hemp Farming Act as it relates to THC and THC variants. This opinion sets out our Office's understanding of your question and our response.

**Issue (as quoted from your letter):**

In South Carolina, Tetrahydrocannabinol (THC) is a controlled substance listed in Schedule I. . . . As such, it is clear to SLED that the possession, possession with intent to distribute, or distribution of THC is explicitly prohibited by South Carolina law and all existing penalties apply. *See* S.C. Code Ann. § 44-53-370(b)(2). However, South Carolina's Hemp Farming Act, S.C. Code Ann. § 44-56-10 *et seq.*, may authorize certain licensed individuals to cultivate, process, and handle hemp or hemp products in South Carolina. That said, SLED is informed and believes that any authorization provided by the Hemp Farming Act is clearly limited to hemp or hemp products that contain the "federally defined THC level for hemp", which is "a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis" determined by using post-decarboxylation or similarly reliable methods. *See* S.C. Code Ann. § 46-55-10(6), (8), (9).

In that regard, SLED is informed and believes that any and all THC that is not "a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis" is specifically prohibited by the clear and unambiguous language of S.C. Code Ann. § 44-53-190(D)(18). To that end, SLED is informed and believes that this unambiguous language would clearly criminalize the possession, possession with intent to distribute, or distribution of any and all amounts of delta-8 THC, or any other variant of THC, found in South Carolina.

Simply put, delta-8 THC and delta-9 THC are different compounds with different chemical and structural properties and SLED's forensic testing can absolutely differentiate delta-8 THC and delta-9 THC through analytical testing. Accordingly, SLED is informed and believes that the Hemp Farming Act does not apply to delta-8 THC, or any other THC variant, in any way whatsoever because delta-8 THC does not meet the "federally defined THC level for hemp". It also bears noting that Tetrahydrocannabinols are also Schedule I substances prohibited by federal law.

However, SLED would appreciate your opinion on SLED's analysis in this matter.

**Law/Analysis:**

Section 44-53-190 of the South Carolina Code sets out our State's list of Schedule I controlled substances. Subsection 44-53-190(D) lists, in relevant part:

Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, their salts, isomers, and salts of isomers, unless specifically excepted, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

...

(11) Marijuana

...

(18) Tetrahydrocannabinol (THC)

S.C. Code Ann. § 44-53-190(D)(11) & (18) (2018).

The laws of some other jurisdictions have distinguished between THC contained in cannabis and pure THC, whether extracted or synthetically created. *See, e.g., Aycock v. State*, 246 S.E.2d 489 (Ga. Ct. App. 1978). However, South Carolina law does not, in that section 44-53-190 lists each of them as Schedule I controlled substances "unless specifically excepted." § 44-53-190.

Section 44-53-190 also does not distinguish between various isomers of THC, except to provide that “[a]ny . . . isomers” are included. *Id.* Delta-8 THC is one such isomer, as explained by Georgia Court of Appeals in *Aycock v. State*, 246 S.E.2d 489 (Ga. Ct. App. 1978):

THC is the psychopharmacologically active component of the cannabis plant. Most THC exists in the form of an isomer known as delta-9-THC, but somewhat less than ten percent of naturally occurring THC is of the delta-8 isomer. Both delta-8-THC and delta-9-THC produce a psychological effect. They are found in all cannabis plants, and they are not known to exist elsewhere in nature. Concentrations of THC can be produced in two ways, either by chemically extracting it from the cannabis plant or by synthesizing it in the laboratory.

As noted above, South Carolina law designates all isomers of THC as Schedule I controlled substances “unless specifically excepted.” S.C. Code Ann. § 44-53-190 (2018). The Hemp Farming Act of 2019 is one such exception, as discussed thoroughly in prior opinions of this Office. S.C. Code Ann. § 46-55-10 *et seq.*; *see also Op. S.C. Att’y Gen.*, 2019 WL 3243864 (July 10, 2019). Section 46-55-10 contains several key definitions for purposes of the Hemp Farming Act which we quote here:

(6) “Federally defined THC level for hemp” means a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis, or the THC concentration for hemp defined in 7 U.S.C. SECTION 5940, whichever is greater.

...

(8) “Hemp” or “industrial hemp” means the plant *Cannabis sativa* L. and any part of that plant, including the nonsterilized seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with the federally defined THC level for hemp. Hemp shall be considered an agricultural commodity.

...

(9) “Hemp products” means all products with the federally defined THC level for hemp derived from, or made by, processing hemp plants or hemp plant parts, that are prepared in a form available for commercial sale, including, but not limited to, cosmetics, personal care products, food intended for animal or human consumption, cloth, cordage, fiber, fuel, paint, paper, particleboard, plastics, and

any product containing one or more hemp-derived cannabinoids, such as cannabidiol. Unprocessed or raw plant material, including nonsterilized hemp seeds, is not considered a hemp product.

...

(11) “Marijuana” has the same meaning as in Section 44-53-110 and does not include tetrahydrocannabinol in hemp or hemp products as defined herein.

S.C. Code Ann. § 46-55-10 (Supp. 2020) (emphasis added). We have highlighted throughout this quotation that the lawfulness of hemp and hemp products all hinge on the “federally defined THC level for hemp,” which means “a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis.” §46-55-10(6); *see also* 7 U.S.C. § 5940(a)(2) (“The term ‘industrial hemp’ means 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 Hemp Farming Act does not expressly address delta-8 THC, or any isomer besides delta-9. It does, however, specify application of the Act: “The provisions contained in this chapter do not apply to the possession, handling, transport, or sale of hemp products and extracts, including those containing hemp-derived cannabinoids, including CBD. Nothing in this chapter authorizes any person to violate any federal or state law or regulation.” S.C. Code Ann. § 46-55-30 (Supp. 2020) (emphasis added).

To date, it appears that there are no reported appellate cases in South Carolina construing the Hemp Farming Act. However, our Office has opined previously on the scope and application of the Act. *See, e.g., Op. S.C. Att’y Gen.*, 2019 WL 3243864 (July 10, 2019). This opinion should be read in the context of, and consistent with, those prior opinions.

We turn now to the July 10, 2019 opinion addressed to you where we reasoned that “anything exceeding the 0.3% concentration of THC, as defined [by the Hemp Farming Act], transforms industrial hemp into a controlled substance (marijuana) under federal and state law.” *Op. S.C. Att’y Gen.*, 2019 WL 3243864 (July 10, 2019) (emphasis added). The opinion went on to conclude that “possession or sale of material containing more than delta-9 THC concentration of more than 0.3 percent using post-decarboxylation or similarly reliable methods would likely be deemed to constitute marijuana.” *Id.* Therefore, we concluded, “if material contains more than delta-9 THC concentration of not more than 0.3 percent, based upon the relevant circumstances, possession or retail sale would be ‘punishable by all currently existing South Carolina state and

federal laws prohibiting possession, distribution, possession with intent to distribute and trafficking marijuana.” *Id.* (emphasis added). While that opinion did not expressly consider the question of isomers, this language reflects our view that the General Assembly intended the Hemp Farming Act to create an exception that is narrow. *See id.*

That opinion also emphasized that “[a]ny determination as to whether there has been a violation . . . would have to be determined on a case-by-case basis,” and that “we must defer to law enforcement in this regard.” *Id.* Accordingly, it is beyond the scope of any opinion of this Office to say whether a particular criminal statute is violated in a particular instance. We also observed that “the Hemp Farming Act of 2019 was not drafted with the greatest of clarity and needs legislative or judicial clarification.” *Id.*

Our Office has received and carefully reviewed memoranda prepared by a representative of the hemp industry which posit that delta-8 and other isomers of THC are legal. The essential argument may be summarized as follows: the Hemp Farming Act legalized “all derivatives, extracts, cannabinoids, [and] isomers” with “a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis.” S.C. Code Ann. § 46-55-10. Because delta-9 was the only THC isomer expressly regulated in the Act THC, any other isomer extracted or derived from hemp is lawful – provided the delta-9 concentration remains below 0.3. Therefore, they reason, delta-8 and any isomers of THC other than delta-9 became legal under South Carolina law as a result of the Hemp Farming Act. Moreover, under this construction of the law, any concentration of isomer of THC other than delta-9 also became legal, regardless of psychoactive potential.

In support of their proposed construction, the industry points out that the General Assembly could have defined hemp as having “a THC concentration of not more than 0.3 percent,” without reference to specific isomers. Instead, the General Assembly defined hemp by reference to one specific isomer, delta-9. The industry posits that this choice was deliberate, and was intended to legalize other isomers. They also point out that to the extent that the statutes are in conflict, the Hemp Farming Act was passed later in time and is more specific than section 44-53-190, which categorizes all isomers of THC as Schedule I substances.

We believe that a court ultimately would reject these arguments for the reasons explained hereafter. However, these are arguments that a serious stakeholder can make in good faith, as a result of some of the gaps in the Hemp Farming Act. They highlight the persisting need for legislative clarification, which prior opinions of this Office have identified. *Op. S.C. Att’y Gen.*, 2019 WL 3243864 (July 10, 2019).

Notwithstanding that need for clarification, however, we believe that the application of the law here is relatively straightforward. The basic purpose of the Hemp Farming Act is to create a legal framework for the licensed, regulated production of industrial hemp as defined, and it must be construed consistent with that purpose. Section 44-53-190(D) still categorizes all isomers of THC as Schedule I controlled substances “unless specifically excepted.” S.C. Code Ann. § 44-53-190(D) (2018). The Hemp Farming Act creates such a specific exception in certain circumstances for hemp containing up to a specific level of one specific isomer – that is, delta-9 THC. S.C. Code Ann. § 46-55-10 *et seq.* (Supp. 2020). It does not create an express exception for delta-8 THC, or any other THC isomer. *See id.* Lawful hemp as contemplated by the Hemp Farming Act may contain trace amounts of THC isomers, such as delta-8. *See Aycock v. State*, 246 S.E.2d 489 (Ga. Ct. App. 1978). However, this legislative scheme cannot fairly be read to legalize delta-8 THC or any other isomer of THC in itself. And although the Hemp Farming Act was passed later in time and is more specific than section 44-53-190, we believe these statutes do not conflict in the way that the industry posits. Instead, the Hemp Farming Act simply creates a specific exception to accomplish a particular purpose, as contemplated in section 44-53-190(D).

#### **Conclusion:**

In conclusion, we believe a court would hold that the Hemp Farming Act does not provide an exception for, and does not legalize, delta-8 THC or any other isomer of THC in itself. Section 44-53-190(D)(18) (2018) categorizes all isomers of THC as Schedule I controlled substances “unless specifically excepted.” The only exceptions found in the Hemp Farming Act involve “a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis.” S.C. Code Ann. § 46-55-10 (Supp. 2020); *see also* 7 U.S.C. § 5940. Our Office has observed in the past that “the Hemp Farming Act of 2019 was not drafted with the greatest of clarity and needs legislative or judicial clarification.” However, we believe that any good-faith reading of the plain language of the Act in conjunction with section 44-53-190 supports our conclusion here. *See Op. S.C. Att’y Gen.*, 2019 WL 3243864 (July 10, 2019). This reading also is consistent with the prior opinion of this Office which reflects our view that the General Assembly intended the Hemp Farming Act to create an exception that is narrow. *Op. S.C. Att’y Gen.*, 2019 WL 3243864 (July 10, 2019)

Lawful hemp as contemplated by the Hemp Farming Act may contain trace amounts of THC isomers, such as delta-8. *See Aycock v. State*, 246 S.E.2d 489 (Ga. Ct. App. 1978). This opinion should not be read so as to speak to those trace amounts. We express no opinion on what any upper limit of THC isomer concentrations in lawful hemp might be, beyond the statutorily-

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expressed limit placed on delta-9 THC. *See* S.C. Code Ann. § 46-55-10 (Supp. 2020). We understand that your question is focused on delta-8 and other THC isomers in themselves, not these trace amounts. This opinion should be read in the context of, and consistent with, the other prior opinions of this Office which address the Hemp Farming Act.

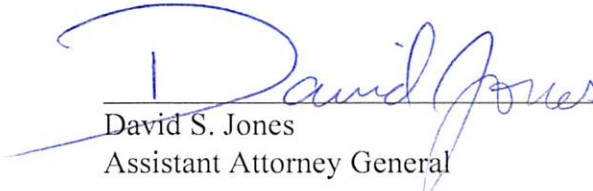
The industry has advanced several arguments in favor of construing the Hemp Farming Act as legalizing delta-8 and other isomers of THC. These are arguments that a serious stakeholder can make in good faith, as a result of some of the gaps in the Hemp Farming Act. They highlight the persisting need for legislative clarification, which prior opinions of this Office have identified. *Op. S.C. Att’y Gen.*, 2019 WL 3243864 (July 10, 2019).

However, we believe that the application of the law here is relatively straightforward. The basic purpose of the Hemp Farming Act is to create a legal framework for the licensed, regulated production of industrial hemp as defined, and it must be construed consistent with that purpose. The plain text of the Hemp Farming Act and section 44-53-190(D) each operate in tandem to create a narrow exception for lawful hemp as defined, while preserving the existing prohibition on other isomers of THC.

In summary, our Office agrees with SLED’s essential analysis that the Hemp Farming Act did not legalize THC except as defined in lawful hemp. If the General Assembly intended to undertake legalization of THC on the scale that the industry posits, they would have done so expressly and unambiguously. Instead, the legislative scheme of the Hemp Farming Act was much narrower: to create a legal framework for the licensed, regulated production of industrial hemp as defined. It cannot fairly be read to accomplish sweeping THC legalization or a similar sea change from previous policy.

We reiterate that any determination as to whether there has been a violation of the Hemp Farming Act or other criminal laws is a factual question which this Office cannot answer in an opinion. *Op. S.C. Att’y Gen.*, 2019 WL 3243864 (July 10, 2019). We defer to law enforcement and the local prosecutor's office to make such determinations on a case-by-case basis. *Id.*

Sincerely,

  
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REVIEWED AND APPROVED BY:



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