

kightlaw

June 24, 2023

Cookies Hemp

Sent via email: Sales@thca.cookies.co

Re: Legal Status of THCa in Smokable Hemp and Other Hemp Products

This letter is written at your request for Cookies Hemp (Cookies) regarding the legal status of harvested hemp and hemp products containing tetrahydrocannabinolic acid (THCa) in concentrations that exceed 0.3% by dry weight but with delta-9 tetrahydrocannabinol (delta-9 THC) concentrations that do not exceed 0.3% by dry weight. The specific question addressed is: **“Are harvested hemp flowers, buds, crystals, and other cannabis parts and products that contain THCa concentrations in excess of 0.3% by dry weight controlled substances under federal law when their delta-9 THC concentrations do not exceed 0.3% by dry weight?”** As discussed in this letter, the answer to this question is **“No”**. With respect to harvested cannabis material and products made from hemp, the sole factor that distinguishes between lawful hemp and unlawful marijuana is the concentration of delta-9 THC.

The analysis and conclusions contained in this letter are based on the Agricultural Act of 2014 (2014 Farm Act)¹, the Agricultural Improvement Act of 2018 (Farm Bill)², the federal Controlled Substances Act (CSA)³, the Drug Enforcement Administration’s (DEA) Interim Final Rule (IFR)⁴, the DEA’s letter to the Alabama Board of Pharmacy (Letter)⁵, a DEA letter regarding cannabis seeds and other cannabis materials⁶, a letter from the DEA to an undisclosed recipient regarding the control status of several compounds⁷, and an opinion by the Ninth Circuit Court

¹ <https://www.govinfo.gov/content/pkg/BILLS-113hr2642enr/pdf/BILLS-113hr2642enr.pdf>

² <https://www.congress.gov/115/bills/hr2/BILLS-115hr2enr.pdf>

³ 21 U.S. Code § 801 *et seq.*

⁴ https://www.deadiversion.usdoj.gov/fed_regs/rules/2020/fr0821.htm

⁵ <https://docs.google.com/viewerng/viewer?url=https://cannabusiness.law/wp-content/uploads/DEA-letter-re-D8-to-Alabama.pdf&hl>

⁶ <https://s3.documentcloud.org/documents/21580238/21-7692-shane-pennington-cannabis-seeds-tissue-genetic-material-11-18-21-signed-1.pdf>

⁷ <file:///Users/rodkight/Downloads/DEA-THCA-and-HHC-letter.pdf>

of Appeals⁸. This letter does not address any requirements under the federal Food, Drug & Cosmetic Act and associated regulations by the Food and Drug Administration (FDA).

This letter is solely for Cookies. All third parties are specifically advised that this letter is not intended to be legal advice for any party other than Cookies and should not be construed or relied upon as such. It is accurate as of the date above.

**PART 1- DISCUSSION OF THE ISSUE:
THE CONCENTRATION OF DELTA-9, NOT THCA, IS THE SOLE FACTOR
IN DETERMINING A CANNABIS PRODUCT'S CONTROLLED STATUS**

There are dozens of forms of the tetrahydrocannabinol (THC) molecule. Some of these forms are called isomers. An isomer is one of two or more compounds that contain the same number of atoms of the same elements but differ in structural arrangement and properties.⁹ There are at least thirty THC isomers¹⁰, of which delta-9 THC is the most well-known. Additionally, delta-8 THC (D8-THC) and delta-10 THC (D10-THC) have recently gained more attention in the media and marketplace. As discussed below, the only THC isomer that is used to determine whether harvested hemp and hemp products are lawful under federal law is delta-9 THC. The quantity and concentration of other THC isomers, and other cannabinoids and forms of THC, including THCa, are totally irrelevant with respect to the legal status of harvested hemp and hemp products.¹¹

PART 2- HEMP IS NOT A CONTROLLED SUBSTANCE

Hemp initially became exempt from the CSA, and thus removed from the list of controlled substances, by virtue of the 2014 Farm Act when produced pursuant to a state's industrial

⁸ *AK Futures LLC v. Boyd St. Distro, LLC*, 35 F.4th 682 (9th Cir. 2022)

⁹ <https://www.merriam-webster.com/dictionary/isomer>

¹⁰ See, eg, this website: <https://cannabislifenetwork.com/amount-of-isomers-in-thc/>. See also, this website: <https://cannabusiness.law/thc-analogs-a-family-divided/>

¹¹ Note that, while the concentration of THCa is not relevant in determining the legal status of harvested hemp or hemp products, it is relevant in determining the legal status of hemp that has not been harvested. This is because USDA regulations require hemp to be tested for delta-9 THC using a "post-decarboxylation method" before it can be harvested. Because THCa converts to delta-9 THC when decarboxylated the THCa concentration of a pre-harvest hemp sample matters. However, and as discussed in this letter, this only applies to hemp that has not been harvested. It does not apply to harvested hemp and products made from it. Further reading on this issue, including testing standards, can be found at the following websites: <https://cannabusiness.law/total-thc-and-harvested-hemp/>, <https://cannabusiness.law/thca-and-the-dea-rod-breaks-down-the-latest-news/>

hemp pilot program. The current Farm Bill, enacted at the end of 2018, removed both “hemp” and “THC in hemp” from the CSA.¹² Hemp is lawful throughout the United States (US).

The Farm Bill defines “hemp” expansively. The definition includes the hemp plant and *“any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis.”*¹³ (*emphasis added*)

The sole distinction between lawful cannabis (hemp) and unlawful cannabis (marijuana) is the concentrations of delta-9 THC in the harvested material. Harvested cannabis with delta-9 THC concentrations that do not exceed 0.3% is legal hemp. On the other hand, harvested cannabis with delta-9 THC concentrations that exceed 0.3% is illegal marijuana. The concentrations of the other cannabinoids in harvested cannabis, including THCa, are irrelevant with respect to its legal status.¹⁴ If the delta-9 THC concentration in harvested hemp or a hemp product does not exceed 0.3% by dry weight, then it is not a controlled substance under federal law.

IT IS LAWFUL TO TRANSPORT HEMP AND HEMP-DERIVED PRODUCTS IN INTERSTATE COMMERCE

The interstate transfer of hemp is authorized by 7 USC § 1621 subsection 10114(b), which states in relevant part: *“No State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with subtitle G of the Agricultural Marketing Act of 1946 (AMA) (as added by section 10113) through the State or the territory of the Indian Tribe, as applicable.”*¹⁵ Although state laws vary with respect to hemp and hemp products, it is absolutely clear that states and Indian tribes may not prohibit the transport of them through their borders.

HEMP AND HEMP PRODUCTS ARE LAWFUL ACCORDING TO THE DEA

I. The Interim Final Rule

The DEA has expressly stated that hemp and hemp products are not controlled substances. On August 21, 2020, the DEA published its Interim Final Rule (IFR) in the federal register¹⁶. In its IFR, the DEA stated:

¹² 21 U.S.C. § 802(16)(B): *“The term “marihuana” does not include— (i) hemp, as defined in section 1639o of title 7.”*

¹³ 7 U.S.C. § 1639o(1)

¹⁴ <https://cannabusiness.law/thca-and-the-dea-rod-breaks-down-the-latest-news/>

¹⁵ <https://uscode.house.gov/statviewer.htm?volume=132&page=4914#>

¹⁶ *“Implementation of the Agriculture Improvement Act of 2018”*, Federal Register Volume 85, Number 163 (Friday, August 21, 2020).

“In order to meet the definition of “hemp”, and thus qualify for the exemption from [S]chedule I, the derivative must not exceed the 0.3% delta-9 THC limit. The definition of “marihuana” continues to state that “all parts of the plant Cannabis sativa L.” and “every compound manufacture, salt, derivative, mixture, or preparation of such plant,” are [S]chedule I controlled substances unless they meet the definition of “hemp” (by falling below the 0.3% delta-9 THC limit on a dry weight basis). . .” (Emphasis added).¹⁷

The DEA’s IFR continues by stating that the listing for “tetrahydrocannabinols” (ie, “THC”) under 21 U.S.C. 812(c) “does not include tetrahydrocannabinols in hemp.”

The DEA’s IFR confirms that hemp products, which by definition must contain no more than 0.3% delta-9 THC on a dry weight basis, are not controlled substances in the US.

II. DEA Public Statements

In addition to the IFR, the DEA has indicated in four public statements that cannabinoids and other cannabis materials are not controlled substances when their delta-9 THC concentrations do not exceed 0.3% on a dry weight basis.

1. DEA’s First Public Statement- Town Hall Meeting

The DEA’s first public statement is in the form of a video webinar called a “Town Hall with USDA and DEA” conducted by the Florida Department of Agriculture and Consumer Services (FLDACS) on June 24, 2021. In the Town Hall webinar, the DEA representative stated the following:

“[W]hat I want to say, and I’ll be very, very deliberate and clear. At this time, I repeat again, at this time, per the Farm Bill, the only thing that is a controlled substance is delta-9 THC greater than 0.3% on a dry-weight basis.” (emphasis added)¹⁸

2. DEA’s Second Public Statement- Letter to the Alabama Board of Pharmacy

The DEA publicly addressed the legal status of the various forms of THC in hemp again in the form of a response letter to the Alabama Board of Pharmacy (ABOP) dated September 15, 2021. In this letter, Terrence L. Boos, Ph.D., Chief of the DEA’s Drug and Chemical Evaluation Section of the Diversion Control Division, responds to the ABOP’s request for the controlled status of delta-8 THC. After differentiating between the legal status of marijuana and hemp, both of which are botanically “cannabis sativa l”, the DEA states:

¹⁷ <https://www.govinfo.gov/content/pkg/FR-2020-08-21/html/2020-17356.htm>

¹⁸ The pertinent portions of the webinar can be viewed at this website: <https://cannabusiness.law/is-d8-from-hemp-a-controlled-substance-dea-says-no/>

“[C]annabinoids extracted from the cannabis plant that have a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis meet the definition of “hemp” and thus are not controlled under the CSA.”

Additionally, the DEA states the following in a footnote:

“The Agricultural Improvement Act of 2018 (AIA), Pub. L. 115-334, § 12619, amended the CSA to remove “tetrahydrocannabinols in hemp” from control. See 21 U.S.C. § 812, Schedule I(c)(17). As noted, however, “hemp” is defined to “mean the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and 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.” 7 U.S.C. 1639o. Thus, only tetrahydrocannabinol in or derived from the cannabis plant—not synthetic tetrahydrocannabinol—is subject to being excluded from control as a “tetrahydrocannabinol[] in hemp.” (emphasis added)¹⁹

3. DEA’s Third Public Statement- Response Letter Regarding Seeds and Cannabis Materials

In response to an inquiry regarding the DEA’s interpretation of its implementing regulations regarding cannabis the DEA stated in a letter dated January 6, 2022: “[M]aterial that is derived or extracted from the cannabis plant such as tissue culture and any other genetic material that has a delta-9-tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis meets the definition of “hemp” and thus is not controlled under the CSA.” (emphasis added)²⁰

4. DEA’s Fourth Public Statement- Response Letter Regarding the Control Status of Several Compounds

On June 9, 2023, the DEA issued a letter to a currently undisclosed recipient in response to a request for the control status of several compounds, including delta-9 THCA.²¹ In that letter, the DEA states: “[C]annabinoids that are extracted from the cannabis plant and that have a delta-9 THC concentration of not more than 0.3% on a dry weight basis meet the definition of ‘hemp.’” The DEA also addresses the control status of delta-9 THCA, stating:

“In regards to delta-9-THCA, Congress has directed that, when determining whether a substance constitutes hemp, delta-9 THC concentration is to be tested “using post-decarboxylation or other similarly reliable methods.” 7 USC § 1639p(a)(2)(A)(ii); 7 USC §

¹⁹ Ibid.

²⁰ <https://s3.documentcloud.org/documents/21580238/21-7692-shane-pennington-cannabis-seeds-tissue-genetic-material-11-18-21-signed-1.pdf>

²¹ <file:///Users/rodkight/Downloads/DEA-THCA-and-HHC-letter.pdf>

1639q(a)(2)(B). The “decarboxylation” process converts delta-9 THCA to delta-9 THC. Thus, for the purposes of enforcing the hemp definition, the delta-9 THC level must account for any delta-9-THCA in a substance.... Accordingly, cannabis derived delta-9 THCA does not meet the definition of hemp under the CSA because upon conversion for identification purposes as required by Congress, it is equivalent to delta-9 THC.”²²

In this portion of the letter, the DEA is clearly referring to hemp that has not been harvested. This is because, while federal law requires the use of a post-decarboxylation test prior to harvesting hemp, neither a post-decarboxylation test, nor any test, applies to post-production hemp for the purposes of determining its control status. The two statutes cited by the DEA in its letter are the only two places in the Agriculture Improvement Act of 2018, commonly known as the “2018 Farm Bill”, that the term “post decarboxylation” appears. They both apply solely to hemp production.

In the first statutory provision, 7 USC § 1639p(a)(2)(A)(ii), Congress sets forth the criteria that states and Indian tribes must comply with in order to “*have primary regulatory authority over the production of hemp*” within their jurisdictions. The second statutory provision, 7 USC § 1639q(a)(2)(B), is similar in that it sets forth the criteria that the USDA shall use to “*monitor and regulate [hemp] production*” in states that do not have an approved hemp plan and thus do not have primary authority over hemp production within their jurisdictions.

The key word in the above provisions is “production”. In the context of hemp, “production” is a legal term of art. Under 7 CFR § 990.1, to “produce” means: “*To grow hemp plants for market, or for cultivation for market, in the United States.*” Additionally, 7 CFR § 718.2 defines a “producer” as “*an owner, operator, landlord, tenant, or sharecropper, who shares in the risk of producing a crop and who is entitled to share in the crop available for marketing from the farm, or would have shared had the crop been produced. A producer includes a grower of hybrid seed.*” To produce hemp means to grow it.

Since the post-decarboxylation test clearly applies to producers, the DEA is correct with respect to hemp that has not been harvested when it states that “*for the purposes of enforcing the hemp definition, the delta-9 THC level must account for any delta-9-THCA.*” However, once the pre-harvested hemp has accounted for delta-9 THCA and passed the required post-decarboxylation test, it may be harvested and no further tests are required. Further, as discussed above, the DEA has confirmed that, “*the only thing that is a controlled substance is delta-9 THC greater than 0.3% on a dry-weight basis.*”^{23 24}

The DEA’s public statements all clearly indicate that harvested hemp and hemp products containing less than 0.3% delta-9 THC on a dry weight basis are lawful.

²² Ibid.

²³ See footnote 18, above.

²⁴ The following website discusses this issue: <https://cannabusiness.law/thca-and-the-dea-rod-breaks-down-the-latest-news/>

NINTH CIRCUIT COURT OF APPEALS CONFIRMS THAT HEMP PRODUCTS ARE NOT CONTROLLED SUBSTANCES

The federal Court of Appeals for the Ninth Circuit issued an opinion regarding hemp products, specifically products containing delta-8 THC, in the context of a trademark dispute. In its opinion, the Ninth Circuit noted that “the only statutory metric for distinguishing controlled marijuana from legal hemp is the delta-9 THC concentration level.” (emphasis added)²⁵

Cookies’ products with no more than 0.3% delta-9 THC on a dry-weight basis are not controlled substances under US federal law. They conform to the Farm Bill, the CSA, and the IFR. They also comply with the legal metric set forth by the Ninth Circuit Court of Appeals.

CONCLUSION

Harvested cannabis material, including products made from it, containing delta-9 THC concentrations that do not exceed 0.3% by dry weight are lawful hemp under federal law, regardless of the concentrations of THCa or any other cannabinoid.

Sincerely,



Rod Kight,
Attorney

²⁵ *AK Futures LLC v. Boyd St. Distro, LLC*, 35 F.4th 682 (9th Cir. 2022)