ALAN WILSON
ATTORNEY GENERAL

9301/9851

December 23, 2014

Hugh E. Weathers
South Carolina Commissioner of Agriculture
Wade Hampton Office Building
P.O. Box 11280
Columbia, SC 29211

Dear Commissioner Weathers:

We are in receipt of your November 12, 2014 letter requesting an opinion regarding Senate Bill 839 ("S.839") dealing with "Industrial Hemp Cultivation." Specifically, you state, "[i]t is my hope your office can provide an official opinion as to how this newly-adopted law is to be carried out; while at the same time ensuring those interested that pre-standing federal policy does not present conflict to what our state law determines permissible." Continuing, you ask questions related to the State Department of Agriculture's ("the Department") authority concerning licensure and permitting related to the cultivation of industrial hemp. In particular, you ask whether the Department may present "a private individual/organization with an official letter of authorization" to grow industrial hemp and whether "we as an agency of South Carolina have authority to issue a private citizen or their authorized entity a permit to cultivate industrial hemp. Our response follows.

I. Introduction

A. Act 216 of the 2013-2014 Legislative Session

As noted in your letter, S. 839 was signed into law on June 2, 2014 as Act 216 of the 2013-2014 Legislative Session. Act 216 consists of three sections, two of which relate to industrial hemp. In Section One, Act 216 makes legislative findings regarding industrial hemp, see 2014, S.C. Acts No. 216 § 1 (1-5) (making various legislative findings regarding the use, genetics, purposes and agricultural potential of industrial hemp), in Section Two, Act 216 amends Title 46 of the Code by adding Chapter 55 entitled "Industrial Hemp Cultivation," 2014, S.C. Acts No. 216 § 2, and in Section Three, Act 216 explains it becomes effective "upon approval by the Governor." 2014, S.C. Acts No. § 3. Your questions relate to Section Two of Act 216.

1. Section Two of Act 216

Section Two of Act 216 adds four new statutes which make up the newly-formed Chapter 55 of Title 46 of the South Carolina Code. See 2014, S.C. Acts No. 216 § 2 (adding Chapter 55 as well as S.C. Code Ann. § 46-55-10 to 40). Essentially, these statutes, when read together, provide for industrial hemp cultivation within the State of South Carolina and provide additional penalties to individuals seeking to cultivate marijuana in areas where industrial hemp is legally cultivated and processed.

In particular, Section 46-55-10 defines the phrases "industrial hemp products," "industrial hemp" and "Tetrahydrocannabinol" ("THC") for purposes of Chapter 55. Specifically, Section 46-55-10 defines "industrial hemp products" as "all products made from industrial hemp;" defines "industrial hemp" as "all parts and varieties of the plant cannabis sativa" with THC concentrations "no more" than those adopted by the federal Controlled Substances Act ("CSA"); and defines THC as the psychoactive substance contained in the plant or extracts of cannabis or its' synthetic equivalent. Section 46-55-20 largely legalizes the cultivation of industrial hemp within the State of South Carolina, explaining, "[i]t is lawful for an individual to cultivate, produce, or otherwise grow industrial hemp in this State to be used for any lawful purpose, including . . . the manufacture of industrial hemp products, and scientific, agricultural, or other research related to other lawful applications for industrial hemp." Meanwhile, Section 46-55-30 legally distinguishes industrial hemp from marijuana, providing that "[i]ndustrial hemp is excluded from the definition of marijuana in Section 44-53-110." Finally, Section 46-55-40 provides criminal penalties for individuals cultivating marijuana in areas where industrial hemp is legally cultivated and processed, stating that those who do so are, in addition to other potential criminal penalties, guilty of a misdemeanor punishable by imprisonment for "not more than three years," fines of "not more than three thousand dollars," or both.

B. The Federal Controlled Substances Act and Industrial Hemp

The CSA establishes a comprehensive federal system aimed at regulating the manufacture and distribution of controlled substances as well as prohibiting the manufacture, distribution and dispensing of any controlled substances "except as authorized by" the CSA. Monson v. Drug Enforcement Agency, 589 F.3d 952, 956 (8th Cir. 2009) (citing 21 U.S.C. § 841(a)(1)). As noted in Monson, "[t]he CSA defines 'manufacture' to include 'production,' and it in turn defines 'production' to include the 'planting, cultivation, growing, or harvesting of a controlled substance.'" Id. (internal citations omitted).

Under the CSA, controlled substances fall within five separate schedules based upon the characteristics of the particular substance at issue. 21 U.S.C. § 811; 21 U.S.C. § 812. Marijuana is listed as a Schedule I substance because, like other Schedule I substances, it "has a high potential for abuse," has "no currently accepted medical use in treatment in the United States,"

and has "a lack of accepted safety for use . . . under medical supervision." Monson, 589 F.3d at 956 (citing 21 U.S.C. § 812(b)(1)(A)-(C). The CSA defines marijuana as "all parts of the plant Cannabis sativa L. and anything made therefrom except, in general, mature stalks, fiber produced from those stalks, sterilized seeds, and oil from the seeds." Id. (citing § 802(16)).[1] Thus, the CSA, unlike Act 216, does not distinguish industrial hemp from marijuana on the basis of THC content and accordingly, in order to cultivate, manufacture, produce, plant, grow or harvest Cannabis sativa, an individual must be registered with the DEA. Id. at 956-57 (citing §§ 822, 823).

C. The Federal Agricultural Act of 2014

On February 7, 2014, the President signed the Agricultural Act of 2014, also known as the 2014 U.S. Farm Bill. Op. Cal. Att'y Gen., 2014 WL 257329 (June 6, 2014) (citing § 7606). This provision, entitled "Legitimacy of Industrial Hemp Research," is codified at Section 7606 of the U.S. Code ("Section 7606") and has been summarized as having "changed federal law to a limited extent, to authorize certain entities to grow or cultivate industrial hemp for agricultural or academic research purposes in states that permit such activity." Op. Cal. Att'y Gen., 2014 WL 257329 (June 6, 2014) (citing § 7606). In its entirety Section 7606 states as follows:

> (a) IN GENERAL.—Notwithstanding the Controlled Substances Act (21 U.S.C. 801 et seq.), the Safe and Drug-Free Schools and Communities Act (20 U.S.C. 7101 et seq.), chapter 81 of title 41, United States Code, or any other Federal law, an institution of higher education (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001)) 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.
>
> (b) DEFINITIONS.—In this section:

[1] See 21 U.S.C. § 802(16) (defining marijuana as "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."); 21 U.S.C. § 802(c)(10) (classifying marijuana as a Schedule I controlled substance); 21 U.S.C. § 802(c)(17) (stating any substance containing "any quantity" of tetrahydrocannabinols is a Schedule I controlled substance).

(1) AGRICULTURAL PILOT PROGRAM.—The term ''agricultural pilot program'' means a pilot program to study the growth, cultivation, or marketing of industrial hemp—

(A) in States that permit the growth or cultivation of industrial hemp under the laws of the State; and

(B) in a manner that—

(i) ensures that only institutions of higher education and State departments of agriculture are used to grow or cultivate industrial hemp;

(ii) requires that sites used for growing or cultivating industrial hemp in a State be certified by, and registered with, the State department of agriculture; and

(iii) authorizes State departments of agriculture to promulgate regulations to carry out the pilot program in the States in accordance with the purposes of this section.

(2) INDUSTRIAL HEMP.—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.

(3) STATE DEPARTMENT OF AGRICULTURE.—The term ''State department of agriculture'' means the agency, commission, or department of a State government responsible for agriculture within the State.

II. Law/Analysis

With this in mind, we now return to your questions regarding industrial hemp, particularly whether Act 216, which defines "Industrial hemp" as "all parts and varieties of the plant cannabis sativa" conflicts with pre-existing federal policy regulating Cannabis sativa as a Schedule I controlled substance under the CSA, and, if it does not, the extent federal law permits the cultivation of industrial hemp. While our previous opinions explain questions regarding the

interpretation or application of federal law are beyond the scope of an opinion of this Office[2] we note that to date, the only cases addressing this issue reflect state regulation of industrial hemp conflicts with the CSA's regulation of marijuana.[3] Moreover, while it is true that passage of the 2014 Farm Bill appears to have altered the authority of States to regulate industrial hemp, we believe a court interpreting the validity of Act 216 would likely find state regulation of industrial hemp is largely preempted by federal law under the CSA, with the exception of the narrow circumstances permitted under Section 7606. Thus, it seems clear the Department is unauthorized to provide private citizens with permits or licenses allowing the cultivation of industrial hemp since doing so would be inconsistent with Section 7606 of the 2014 Farm Bill. See Op. Cal. Att'y Gen., 2014 WL 257329 (June 6, 2014) ("Federal section 7606 limits those who may grow or cultivate industrial hemp to two kinds of entities: institutions of higher education, and state departments of agriculture.").

A. Conflict with Federal Law

"The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." Gonzales v. Raich, 545 U.S. 1, 29 (2005). Conflict occurs when it is impossible to comply with both the state and federal regulations, or when the state law imposes an obstacle to the achievement of Congress' discernable objectives. Gade v. National Solid Wastes Mgmt. Ass'n., 505 U.S. 88, 98 (1992). The CSA is "a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution and possession of five classes of 'controlled substances.'" Gonzales, 545 U.S. at 24. However, the CSA leaves room for state regulation of controlled substances with the limitation that where there is a positive conflict between the CSA and state law, the two "cannot stand . . . together." 21 U.S.C. § 903. Accordingly, we must look to whether Act 216 conflicts with federal law.

1. State Regulation of Industrial Hemp Prior to the Passage of the 2014 Farm Bill

Prior to the passage of the 2014 Farm Bill, a 2013 law review article explained that "[d]espite the growing interest and action taken by the states," courts had repeatedly found state legislation of industrial hemp preempted under federal law. Keller, Nicole M., The Legalization

---

[2] See Op. S.C. Att'y Gen., 2013 WL 3362068 (June 25, 2013) (questions regarding the interpretation or application of federal regulations or policy are beyond the scope of an Attorney General's opinion); Op. S.C. Att'y Gen., 2011 WL 2648714 (June 16, 2011) ("The examination of federal law and the policies of a federal agency are beyond the scope of an opinion of this Office."); Op. S.C. Att'y Gen., 2009 WL 2406409 (July 24, 2009) ("Interpretation of the federal regulations . . . are beyond the scope of an opinion of this Office.").

[3] See Monson, 589 F.3d at 962 (concluding industrial hemp, as defined by a North Dakota law, is marijuana for purposes of the CSA meaning North Dakota law conflicts with pre-existing federal regulation of cannabis sativa); New Hampshire Hemp Council, Inc. v. Marshall, 203 F.3d 1, 8 (1st Cir. 2000) (explaining a New Hampshire bill attempting to distinguish "industrial hemp" from marijuana on the basis of purpose and THC content was in conflict with the CSA's definition of marijuana which the Court found regulated all Cannabis sativa plants).

of Industrial Hemp and What it Could Mean for Indiana's Biofuel Industry, 23 Ind. Int'l & Comp. L. Rev. 555, 568 (2013). For instance, in New Hampshire Hemp Council v. Marshall, 203 F.3d 1 (1st Cir. 2000) the First Circuit Court of Appeals determined that a New Hampshire industrial hemp bill distinguishing marijuana from industrial hemp on the basis of THC content conflicted with the CSA's definition of marijuana which the Court concluded, regulated the cultivation of all Cannabis sativa plants. 203 F.3d at 8. This was also the conclusion of the Eighth Circuit Court of Appeals in U.S. v. White Plume, 447 F.3d 1067 (8th Cir. 2006) where the Court found an ordinance defining "industrial hemp" on the basis of THC content was contrary to the CSA's definition of marijuana which included all species of Cannabis sativa. 447 F.3d at 1073. In particular, the White Plume Court found, "because the CSA does not distinguish between marijuana and hemp in its regulation, and because farming hemp requires growing the entire marijuana plant which at some point contains psychoactive levels of THC, the CSA regulates the farming of hemp." Id. Three years later, in Monson v. Drug Enforcement Agency, the Eighth Circuit Court of Appeals reaffirmed its' position finding a North Dakota statutory scheme distinguishing industrial hemp from marijuana conflicted with the CSA's definition of marijuana, because as noted in both New Hampshire Hemp Council and White Plume, the CSA definition of marijuana includes *all* Cannabis sativa plants "regardless of THC concentration." Monson, 589 F.3d at 961. Thus, it appears that prior to the passage of the 2014 Farm Bill, Courts had routinely found statutes permitting the cultivation of industrial hemp conflicted with federal regulation of marijuana under the CSA, because industrial hemp, like marijuana, came from the plant Cannabis sativa, which is defined as a Schedule I controlled substance under the CSA.

2. State Regulation of Industrial Hemp Following the Enactment of the Farm Bill

Understanding state statutes permitting the cultivation of industrial hemp have been widely understood as conflicting with federal law, we must now address whether the recent passage of the 2014 Farm Bill, Section 7606 in particular, represents a change in the law regarding federal regulation of industrial hemp, and if it does, to what extent it impacts state statutes such as Act 216. While questions regarding the interpretation or application of federal statutory law are beyond the scope of an Attorney General's opinion, because the only authority to interpret Section 7606 has found it permits institutions of higher education and state agricultural departments to cultivate "industrial hemp for research purposes," it appears that when the requirements described in Section 7606 are met, federal law permits state regulation of industrial hemp. Op. Cal. Att'y Gen., 2014 WL 2573229 (June 6, 2014) (concluding federal law authorizes state regulation of industrial hemp only to the extent it permits institutions of higher education and state departments of agriculture to conduct agricultural pilot and research programs consistent with the terms of Section 7606).

a. Key Provisions of Section 7606 of the Farm Bill

As laid out in Section I(C) above, Section 7606(a) explains that, "notwithstanding the [CSA], . . . or any other Federal law, an institution of higher education . . . or a State department of agriculture may grow or cultivate industrial hemp" if two conditions are filled: (1) the 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 hemp is allowed under the State laws governing the academic institution or agricultural department. H.R. 2642, 113th Cong. § 7606(a)(1-2) (2013-14) (internal citations omitted). Section 7606(b) defines "agricultural pilot program" as a program "to study the growth, cultivation, or marketing of industrial hemp" in a State permitting the cultivation of industrial hemp; and in a manner that: (i) strictly limits cultivators to institutions of higher education or state agricultural departments; (ii) requires cultivation sites to be certified and registered with the department of agriculture; and (iii) authorizes State departments of agriculture to promulgate regulations to carry out a pilot program consistent with the section. H.R. 2642, § 7606(b). The statute further defines "industrial hemp" as "Canabis sativa L. and any part of such plant, whether growing or not, with a delta-9 [THC] concentration of not more than 0.3 percent on a dry weight basis." H.R. 2642, § 7606(b)(2). Finally, Section 7606's use of the phrase "state department of agriculture," "means the agency, commission, or department of a State government responsible for agriculture within the State." H.R. 2642, § 7606(b)(3).

b. Interpretation of Section 7606 of the Farm Bill

In interpreting Section 7606, the California Attorney General's Office analyzed the statute and construed it as authorizing institutions of higher education as well as State departments of agriculture "to grow and cultivate industrial hemp for purposes of agricultural or academic research." Op. Cal. Att'y Gen., 2014 WL 2573229 (June 6, 2014). Elaborating, the opinion said, institutions of higher learning and State departments of agriculture "may grow and cultivate industrial hemp for purposes of research conducted under a pilot program to study the growth, cultivation, or marketing of industrial hemp provided that the pilot program is conducted in a manner that [is consistent with the requirements of § 7606(b)(1)(B)(i-iii)]." Op. Cal. Att'y Gen., 2014 WL 2573229 (June 6, 2014). Thus, it is clear that Section 7606, as interpreted, modifies preexisting federal law, particularly the CSA, and permits States, in certain limited circumstances, to "grow or cultivate industrial hemp." H.R. 2642, § 7606(a).

3. Act 216 Conflicts with Section 7606

Applying Section 7606 to Act 216 with the understanding that Act 216 is only enacted to the extent it is consistent with federal law, it seems Act 216 is largely preempted in light of the fact that many of its provisions are in conflict with the narrower provisions of Section 7606. See Raich, 545 U.S. at 29 ("The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail."); 21 U.S.C. § 903 (stating that where there is a positive conflict between the CSA and state law, the two "cannot stand . . .

together."). For instance, while the phrase "industrial hemp" as defined in Section 46-55-10 is largely consistent with the definition of the phrase used in Section 7606(b)(2), Act 216, which pursuant to Section 46-55-20 permits "an individual" to cultivate industrial hemp, is clearly broader than Section 7606's narrow authorization of allowing only institutions of higher education and state departments of agricultural to grow industrial hemp. Moreover, while Act 216 permits industrial hemp to be cultivated "for any lawful purpose" including a list of industrial products, Section 7606 is again more limited in the scope of its authorization explaining institutions of higher education and state agricultural departments may only grow industrial hemp "for purposes of research conducted under a pilot program to study the growth, cultivation, or marketing of industrial hemp." Op. Cal. Att'y Gen., 2014 WL 2573229 (June 6, 2014). Likewise, Act 216, which, via Section 46-55-30 excludes industrial hemp from the definition of marijuana, appears to be at odds with Section 7606. In particular, Section 7606, unlike Act 216, did not have the effect of changing the definition of marijuana for the public at large. See H.R. 2642, § 7606(a) ("[N]otwithstanding the [CSA], . . . or any other Federal law, an institution of higher education . . . or a State department of agriculture may grow or cultivate industrial hemp" if: (1) the 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 hemp is allowed under the State laws governing the academic institution or agricultural department). Instead, Section 7606 merely permits institutions of higher education and state departments of agriculture to, under certain circumstances, cultivate Cannabis sativa meeting the definition of industrial hemp so long as such cultivation is consistent with the safeguards described elsewhere in the statute. E.g. H.R. 2642, § 7606(a)(1-2); § 7606(b)(1)(B)(i-iii). Thus, Act 216 is largely in conflict with Section 7606, and is therefore preempted except as permitted by the terms of Section 7606.

B. The Department's Ability to Authorize Private Citizens, Entities and Organizations to Cultivate Industrial Hemp in Light of Section 7606

In light of the obvious conflicts between Act 216 and Section 7606 we now return to your questions regarding authorization letters and permitting. Specifically, you have asked whether the Department may present private individuals and organizations with an official letter of authorization to cultivate industrial hemp and have further inquired as to whether the Department may issue a private citizen or their authorized entity a permit to do so. Since, as discussed above, Act 216 conflicts with Section 7606 and is therefore only operative to the extent Section 7606 authorizes the cultivation of industrial hemp, we believe a court addressing this question would likely find Section 7606 prohibits the Department from issuing both authorization letters and permits. Indeed, as noted by the California Attorney General's Office, it seems clear Section 7606(a) only authorizes institutions of higher education and state agricultural departments to cultivate industrial hemp, and even then, only for research purposes. Op. Cal. Att'y Gen., 2014 WL 2573229 (June 6, 2014) (concluding federal law authorizes state regulation of industrial hemp only to the extent it permits institutions of higher education and state departments of

agriculture to conduct agricultural pilot and research programs consistent with the terms of Section 7606). Accordingly, we believe a court would likely find the Department is unable to issue official authorization letters and permits to private individuals, private organizations, or their entities.

III. Conclusion

In conclusion, the only cases addressing the issue of whether state regulation and legalization of industrial hemp conflicts with federal regulation of marijuana under the CSA have determined state regulation and legalization is in conflict with the CSA and therefore preempted under federal law. That said, we acknowledge passage of the 2014 Farm Bill, Section 7606 in particular, appears to have altered the authority of States to regulate industrial hemp. In particular, it appears that when the requirements described in Section 7606 are met, federal law permits state regulation of industrial hemp. Op. Cal. Att'y Gen., 2014 WL 2573229 (June 6, 2014) (concluding federal law authorizes state regulation of industrial hemp only to the extent it permits institutions of higher education and state departments of agriculture to conduct agricultural pilot and research programs consistent with the terms of Section 7606). However, we believe a court interpreting the validity of Act 216 would likely find state regulation of industrial hemp is largely preempted by federal law under the CSA, with the exception of the narrow circumstances permitted under Section 7606. Specifically, because Section 7606 does not authorize private individuals, their authorized entities, or organizations to cultivate industrial hemp, we believe a Court would likely find that despite the terms of Act 216, the Department cannot legally authorize private individuals or organizations to do so. The same is true with respect to permits as, "[f]ederal section 7606 limits those who may grow or cultivate industrial hemp to two kinds of entities: institutions of higher education, and state departments of agriculture." Op. Cal. Att'y Gen., 2014 WL 2573229 (June 6, 2014). As a result, unless the entities seeking permits meet Section 7606(a)'s definition of an "institute of higher education," or in the alternative, meet Section 7606(b)(3)'s definition of a "state department of agriculture," federal law continues to prohibit the cultivation of industrial hemp despite the terms of Act 216.

Sincerely,

Brendan McDonald
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook, Solicitor General