ALAN WILSON
ATTORNEY GENERAL

September 30, 2019

Mark A. Keel, Chief
South Carolina Law Enforcement Division
PO Box 21398
Columbia, SC 29221-1398

Dear Chief Keel:

We received your request seeking a follow-up opinion on the appropriate procedure to pursue enforcement of the Hemp Farming Act with respect to hemp grown in violation of the Act where the grower has consented to seizure of such hemp. This opinion sets out our Office's understanding of your question and our response.

Issue (as quoted from your letter):

> I write today to respectfully request an opinion on several aspects of The Hemp Farming Act (Act 14 of 2019, formerly H.3449) and its application in South Carolina. As an initial matter, SLED is informed and believes that only individuals and businesses operating in accordance with this Act can legally "cultivate, handle, or process hemp" in South Carolina, and that any and all such cultivation can only be on land specifically approved and authorized by the Department of Agriculture. As such, any attempt to grow outside the approved auspices of the Hemp Farming Act is illegal. In that regard, in addition to the criminal penalties discussed in the July 10, 2019 Opinion, S.C. Code Ann. § 46-55-40 also states that:
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> > If the commissioner determines that a licensee has violated state law with a culpable mental state greater than negligence, then the commissioner shall immediately report the hemp producer to the Attorney General and the Chief of the South Carolina Law Enforcement Division, and subsection (A)(2) shall not apply to the violation.
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> S.C. Code Ann. § 46-55-10(B). To that end, on August 5, 2019, the Department of Agriculture notified SLED and the Attorney General of a willful violation of the Hemp Farming Act. However, there is no further guidance in the statute on this issue and no regulations have been promulgated. In that regard, SLED requested an opinion regarding the appropriate procedures to take in this instance and your office provided such. At that time, SLED had not received a copy of the

Participation Agreement from the individual involved and was not aware of the consent to forfeiture and destruction contained therein. In addition, following the issuance of the August opinion, SLED attempted to secure an order of destruction from a circuit court as discussed in the August opinion; however, the court would not entertain such. While no specific reasoning was provided by the court, there is simply no statutory or regulatory authorization for a court to entertain such request.

Subsequently, SLED was provided a copy of the Participation Agreement in question which clearly and unequivocally states that the "**Permitted Grower acknowledges and consents to the forfeiture and destruction, without compensation, of hemp material: i. Found to have a measured delta-9 THC content more than 0.3 percent on a dry weight basis;...and iii. Growing in an area that is not licensed by SCDA.**" . . . .

In addition, SLED would also note that the Participation Agreement also contains an Indemnification and Release section that states:

> Permitted Grower agrees to indemnify, hold harmless, and release forever the State of South Carolina, its departments, agencies, officers, employees, and agents of any kind from all liability claims arising out of Pilot Grower's negligent or illegal actions or actions otherwise in violation of the terms of the Program involving the domestic or international acquisition, cultivation, or processing of hemp and Permitted Grower's participation in the Program.

Accordingly, SLED would respectfully request a formal opinion supplementing and clarifying the effect of the Participation Agreement regarding the due process discussed in the August opinion.

Law/Analysis:

It is the opinion of this Office that if there has been a valid consent as you describe then no judicial authorization is required for seizure upon notice from the Department of Agriculture that it has found hemp grown unlawfully in willful violation of applicable law. We emphasize that this conclusion is offered in the abstract, and that the scenario you present involves highly fact-specific questions which this Office cannot determine.

> Section 46-55-20(B)(2) provides:
>
> (2) A person applying for a license to cultivate, handle, or process hemp shall provide the department with prior written consent:
>
> (a) allowing representatives of the department, the State Law Enforcement Division, and local law enforcement agencies to enter onto all premises where hemp is cultivated, handled, processed, or stored for the purpose of conducting physical inspections, obtaining samples of hemp or hemp products, or otherwise ensuring compliance with the requirements of state law and any administrative regulations promulgated by the department; and
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> (b) to the testing procedure set forth in the state plan, using post-decarboxylation or other similarly reliable methods, delta-9 THC concentration levels of hemp produced in the State.

S.C. Code Ann. § 46-55-20(B)(2) (Supp. 2018) (emphasis added). It is a well-established principle of law that legal barriers to the seizure of property may be waived by consent. As explained by the South Carolina Supreme Court:

> The constitutional immunity from unreasonable searches and seizures may be waived by valid consent. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent. *United States v. Durades*, 929 F.2d 1160 (7th Cir.1991). The existence of consent is determined from the totality of the circumstances. *United States v. Zapata*, 997 F.2d 751 (10th Cir.1993).

Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999).

Turning to the facts as described in your letter, it appears that a licensed grower necessarily consents to the forfeiture and destruction, without compensation, of hemp material grown in an unlicensed area or found to have a THC content above the legal limit. We emphasize that we cannot make any findings of fact in an opinion of this Office, and we can only opine on the law based on the facts presented to us.

Based on these additional facts, we supplement our previous advice to you such that where a grower has consented to the seizure and destruction of unlawfully-grown hemp, SLED or another appropriate law enforcement authority with jurisdiction may proceed with the

destruction upon notification from the Department of Agriculture that it has found cannabis sativa grown in willful violation of applicable law. *See* S.C. Code Ann. § 46-55-20(B)(2) (Supp. 2018); *see also Palacio v. State*, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999). Of course the scenario you present involves highly fact-specific questions which this Office cannot determine. We reiterate that we defer to law enforcement's determination of these factual questions in the first instance, and that they ultimately must be determined by a court.

Conclusion:

In conclusion, it is the opinion of this Office that if there has been a valid consent as you describe then no judicial authorization is required for seizure upon notice from the Department of Agriculture that it has found hemp grown unlawfully in willful violation of applicable law. We emphasize that this conclusion is offered in the abstract, and that the scenario you present involves highly fact-specific questions which this Office cannot determine. This formal opinion is intended to supplement and clarify our August 8 opinion in light of the new information presented to us. *See Op. S.C. Att'y Gen.*, 2019 WL 3855186 (August 8, 2019).

Our opinion here has been expedited, and it should be read in the context of our prior opinions dated July 10 and August 8, 2019. *Id.; see also Op. S.C. Att'y Gen.*, 2019 WL 3243864 (July 10, 2019). In the factual scenario you present to us, law enforcement is prepared to proceed on information that hemp is being grown in violation of the law and is therefore contraband *per se*. Consistent with our prior opinions and the longstanding policy of this Office, we defer to law enforcement's determination of that factual question. Our opinion here is focused solely on the procedure SLED should follow in pursuing an enforcement action. Additionally, this opinion is not an attempt to comment on any pending litigation or criminal proceeding.

Our Office acknowledged more than once that "the Hemp Farming Act of 2019 was not drafted with the greatest of clarity and needs legislative or judicial clarification." *Op. S.C. Att'y Gen.*, 2019 WL 3243864 (July 10, 2019). We reiterate that this is another example of the need for legislative or judicial direction regarding the implementation of South Carolina's industrial hemp program.

Moreover, we emphasize again the importance of the General Assembly revisiting the Act to address the numerous issues recognized in this, as well as our July 10 and August 8 opinion. In addition, as the agency designated by the General Assembly to regulate hemp, the Department of Agriculture, working closely with SLED, may wish to promulgate regulations to address the omissions identified in these opinions. Without such regulations, law enforcement agents find themselves in an extraordinarily difficult situation. They are required to enforce a statute which creates a general framework but lacks many of the specific protocols which

normally guide all stakeholders in a regulatory enforcement process. Indeed, your letter notes that one court already has declined to entertain a request to authorize an enforcement action, apparently as a result of the absence of established protocols. Promulgating regulations at the administrative level may provide some much-needed certainty until such a time as the General Assembly clarifies the Hemp Farming Act.

Because our opinion is advisory only, we strongly reiterate that either the courts or the legislature must resolve the difficult issues in the statute outlined in our July 10 and August 8 opinions.

Sincerely,

Robert D. Cook
Solicitor General

David S. Jones
Assistant Attorney General