



COMMONWEALTH OF KENTUCKY  
OFFICE OF THE ATTORNEY GENERAL

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September 25, 2013

Rodney Brewer, Commissioner  
Kentucky State Police  
919 Versailles Road  
Frankfort, KY 40601

Re: Licensing of industrial hemp

Dear Commissioner Brewer:

Introduction

In consideration of the ongoing debate within the Commonwealth regarding the licensing and production of industrial hemp, various stakeholders, including law enforcement officials throughout the state, members of the General Assembly and members of the public, have voiced concerns with the Office of the Attorney General about the planned actions of the Kentucky Industrial Hemp Commission. Consequently, and because KRS 15.025(4) provides that the Attorney General may issue a legal advisory "when, in the discretion of the Attorney General, the question presented is of such public interest that an Attorney General's opinion on the subject is deemed desirable," this advisory letter seeks to clarify the state of the law with respect to industrial hemp in the Commonwealth of Kentucky. The purpose of this advisory letter is not to comment on the policy of growing hemp in Kentucky; it is to provide an overview of current state and federal law related to growing industrial hemp in Kentucky.

Despite the passage of Senate Bill 50 (2013) and the issuance of a recent memorandum from the U.S. Department of Justice<sup>1</sup> prioritizing federal enforcement

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<sup>1</sup> *Memorandum for All United States Attorneys* from James M. Cole, Deputy Attorney General, U.S. Department of Justice, Office of the Deputy Attorney General, Re: Guidance Regarding Marijuana Enforcement, dated August 29, 2013 (the "2013 DOJ Memo").



interests in states that have taken steps to legalize *marijuana*, the cultivation and growth of industrial hemp remains illegal in Kentucky. Any individual or entity that invests in anticipation of growing industrial hemp in the near future, and any individual or entity that intentionally grows hemp within the Commonwealth, will expose themselves to potential criminal liability and the possible seizure of property by federal or state law enforcement agencies.

### Analysis

In order to obtain a license to grow industrial hemp under KRS 260.854, a person must either obtain a waiver from an appropriate federal agency in compliance with KRS 260.854(1)(a), or federal law must provide a procedure for growing industrial hemp under KRS 260.854(1)(b). If neither of those conditions is met, it remains illegal to grow industrial hemp under both Kentucky and federal law.

The distinction between hemp and marijuana is highly technical. A recent Congressional report highlights the distinction as follows:

Marijuana and hemp come from the same species of plant, *Cannabis sativa*, but from different varieties or cultivars . . . Hemp, also called "industrial hemp," refers to cannabis varieties that are primarily grown as an agricultural crop . . . and is characterized by plants that are low in THC (delta-9 tetrahydrocannabinol, marijuana's primary psychoactive chemical). THC levels for hemp are generally less than 1%....Marijuana refers to the flowering tops and leaves of psychoactive cannabis varieties, which are grown for their high content of THC.<sup>2</sup>

Industrial hemp growth has a long history in Kentucky; at one point Kentucky was the nation's largest producer of hemp.<sup>3</sup> Some recent research suggests that hemp *may* be an economically viable product in the Commonwealth if the federal restrictions are lifted.<sup>4</sup>

KRS 260.850(6) defines industrial hemp as follows:

(a) "Industrial hemp" means all parts and varieties of the plant *cannabis sativa*, cultivated or possessed by a licensed grower, whether growing or

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<sup>2</sup> RENEE JOHNSON, HEMP AS AN AGRICULTURAL COMMODITY, CONG. RESEARCH REP. 7-5700 at 1 (July 24, 2013), available at <http://www.fas.org/sgp/crs/misc/RL32725.pdf>.

<sup>3</sup> INDUSTRIAL HEMP – LEGAL ISSUES, UNIVERSITY OF KENTUCKY – COLLEGE OF AGRICULTURE (Sept. 2012), available at <http://www.uky.edu/Ag/NewCrops/introsheets/hemp.pdf>.

<sup>4</sup> INDUSTRIAL HEMP PRODUCTION, UNIVERSITY OF KENTUCKY – COLLEGE OF AGRICULTURE (Jan. 2013), available at <http://www.uky.edu/Ag/NewCrops/introsheets/hempproduction.pdf>.

not, that contain a tetrahydrocannabinol concentration of no more than that adopted by federal law in the Controlled Substances Act, 21 U.S.C. secs. 801 et seq.

- (b) "Industrial hemp" as defined and applied in KRS 260.850 to 260.869 is excluded from the definition of marijuana in KRS 218A.010.

KRS 260.850(6) defines industrial hemp as any cannabis plant that contains a tetrahydrocannabinol concentration of no more than that adopted by federal law in the Controlled Substances Act. The Controlled Substances Act currently does not set a level for tetrahydrocannabinol concentration, but lists as a Schedule 1 substance "any material, compound, mixture, or preparation, which contains any . . . tetrahydrocannabinols." 21 U.S.C. § 812(c), Sch.I(c)(17). Federal law currently does not set a level for tetrahydrocannabinol concentration as required by KRS 260.850(6), but lists all substances containing tetrahydrocannabinols as controlled substances. Further, 21 U.S.C. § 802(16) defines 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." Hemp that does not fall within the exceptions listed in 21 U.S.C. § 802(16) has been held to be marijuana under the Controlled Substances Act. *New Hampshire Hemp Council, Inc. v. Marshall*, 203 F.3d 1 (1st Cir. 2000); *U.S. v. White Plume*, 447 F.3d 1067 (8th Cir. 2008). As such, any person desiring to grow hemp must obtain a certificate of registration from the Drug Enforcement Administration pursuant to 21 U.S.C. § 822(a)(1) and 21 C.F.R. § 1301. The U.S. Attorney General may waive this requirement if it is deemed in the public interest under 21 U.S.C. § 822(d). State statutes and regulations involving industrial hemp that conflict with the federal Controlled Substances Act are preempted. 21 U.S.C. § 903; *Monson v. Drug Enforcement Admin.*, 589 F.3d 952, 961-62 (8th Cir. 2009). Federal law still treats hemp as marijuana, and preempts any state law in conflict with it.

Kentucky law regulating the growth of industrial hemp is consistent with the federal framework. KRS 260.854(2) provides that "any person seeking to grow industrial hemp . . . shall apply to the commission for the appropriate license on a form provided by the commission." KRS 260.854(1) provides two ways in which the Industrial Hemp Commission may grant a license: an industrial hemp research program grower license, and an industrial hemp grower license. KRS 260.854(1)(a) details the procedure for obtaining a research program grower license:

An industrial hemp research program grower license, to allow a person to grow industrial hemp in this state in a controlled fashion solely and

exclusively as part of the industrial hemp research program overseen by the commission. This form of licensure shall only be allowed subject to a grant of necessary permissions, waivers, or other form of valid legal status by the United States Drug Enforcement Agency or other appropriate federal agency pursuant to applicable federal laws relating to industrial hemp.

In order to obtain a research program grower license, a federal waiver or other permission is required, and the person must do so exclusively as part of a research program overseen by the commission. KRS 260.854(1)(b) provides for a general industrial hemp grower license:

An industrial hemp grower license, to allow a person to grow industrial hemp in this state for any purpose. This form of licensure shall only be allowed subject to the authorization of legal industrial hemp growth and production in the United States under applicable federal laws relating to industrial hemp.

KRS 260.854(1)(b) provides for a general industrial hemp grower license to be available to any person who meets the Industrial Hemp Commission's application requirements. However, it expressly specifies that general industrial hemp grower licenses are only allowed after the authorization of legal industrial hemp growth by applicable federal law. Several federal bills titled "The Industrial Hemp Farming Act" have been proposed to allow hemp farming, but they have all died in committee.<sup>5</sup> At present, industrial hemp growing is still illegal under federal law.

The 2013 DOJ Memo outlines the current prosecutorial guidelines regarding marijuana enforcement.<sup>6</sup> The memorandum lists the following enforcement priorities that are particularly important to the federal government:

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<sup>5</sup> See H.R. 3037, 109th Cong. (2005); H.R. 1009, 110th Cong. (2007); H.R. 1866, 111th Cong. (2009); H.R. 1831, 112th Cong. (2011); S 3501, 112th Cong. (2012).

<sup>6</sup> An argument was recently proffered that a regulation promulgated by the federal Drug Enforcement Administration in 2003, "Exemption of certain cannabis plant material, and products made therefrom, that contain tetrahydrocannabinols" (the "2003 DEA Regulation"), when read together with the 2013 DOJ Memo, "clarify that the federal government does not and will not view Kentucky's Industrial Hemp as an illegal product." See 21 CFR Part 1308.35. However, the 2003 DEA Regulation *does not* exempt the cannabis plant from the CSA. The Supplementary Information materials describing the purpose and intent of the 2003 DEA Regulation (available at [http://www.deadiversion.usdoj.gov/fed\\_regs/rules/2003/fr0321.htm](http://www.deadiversion.usdoj.gov/fed_regs/rules/2003/fr0321.htm)) make clear that the regulation, by exempting certain THC-containing *industrial products* from enforcement under the CSA, provided such products are made from those portions of the cannabis plant that are excluded from the definition of marijuana and are not used for human consumption, was intended to allow for the trade and importation of legitimate industrial products. *Id.* The Supplementary Information lists, by way of example, what products the 2003 DEA Regulation renders exempt from

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

*Id.* at 1-2. The memorandum continues that “outside of these enforcement priorities, the federal government has traditionally relied on state and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws.” *Id.* at 2. The memorandum further notes that:

The Department’s guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests.

*Id.* It concludes by advising that “this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department’s authority to enforce federal law.” *Id.* at 4. The 2013 DOJ Memo reiterates throughout that its purpose is to provide general guidelines for U.S.

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enforcement: paper, rope, clothing made from cannabis stalks, processed cannabis plant materials used for industrial purposes, such as fiber retted from cannabis stalks for use in manufacturing textiles or rope, animal feed mixtures and personal care products. *Id.* The regulation does not exempt the hemp plant in its raw form, and indeed the Supplementary Information expressly states that all other portions of the cannabis plant that contain any amount of THC are schedule I controlled substances. *Id.* No person may cultivate the cannabis plant for any purpose except when expressly registered with the DEA to do so. This has always been the case since the enactment of the CSA. 21 U.S.C. 822(b), 823(a); 21 CFR Part 1301; see *New Hampshire Hemp Council, Inc. v. Marshall*, 203 F.3d 1 (1<sup>st</sup> Cir. 2000).

Attorneys to follow in their allocation of investigative and prosecutorial discretion, and is not a substantive change in the federal law regarding marijuana.

Conclusion

Since the 2013 DOJ Memo does not change the federal law regarding the growth of marijuana or hemp, growing either remains a violation of federal law. KRS 260.850(6)(a) incorporates any federal definition of what is a permissible amount of tetrahydrocannabinols, and currently the federal definition does not set a permissible percentage of tetrahydrocannabinols. KRS 260.854(1)(b) only allows for the growth of industrial hemp after it has been legalized by a change in federal law, and there has been no change in federal law allowing the growth of industrial hemp. While Kentucky law is set to mirror any changes in federal law regarding the growth of industrial hemp, as of yet no changes have been made to federal law to legalize the growth of industrial hemp. Therefore, it remains illegal to grow industrial hemp without express authorization from the federal government under both federal and Kentucky law. Any farmer that grows industrial hemp for business purposes is thus still subject to any applicable criminal provisions and the financial risks of investing and producing a product that it is illegal for the general public to possess or grow.

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Sean J. Riley  
Chief Deputy Attorney General

cc: Governor Steven L. Beshear  
Commissioner James R. Comer, Kentucky Department of Agriculture  
Brian Furnish, Chairman, Kentucky Industrial Hemp Commission  
Mark Haney, President, Kentucky Farm Bureau  
Jerry Wagner, Executive Director, Kentucky Sheriff's Association  
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Michael Brackett, President, Kentucky Narcotics Officers Association  
Robert Neace, President, Kentucky County Attorneys Association, Inc.  
Matthew Leveridge, President, Kentucky Commonwealth Attorneys Association