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May 11, 2017

By Hand Delivery

Dr. Tom Melton, Chair, North Carolina Industrial Hemp Commission
North Carolina Department of Agriculture & Consumer Services
2 West Edenton Street
Raleigh, NC 27601

Re: Advisory Letter – Application of Agricultural Act of 2014 to Licensing by the Industrial Hemp Commission (the "Commission")
§ 7606 of Agricultural Act, Codified As 7 U.S.C. § 5940;
N.C. Gen. Stat. §§ 106-568.51 to 568.57

Dear Dr. Melton:

This informal advisory letter responds to the Industrial Hemp Commission's recent inquiries concerning interpretation of section 7606 of the Agricultural Act of 2014. Section 7606 authorizes state departments of agriculture and institutions of higher education, if authorized by their state's law, to grow or cultivate industrial hemp for purposes of research. Under Article 50E of Chapter 106 of the North Carolina General Statutes, the Commission has the power and duty to "establish an industrial hemp research program" and "issue licenses allowing a person, firm or corporation to cultivate industrial hemp for research purposes to the extent allowed by federal law." N.C. Gen. Stat. § 106-568.53(1),(2). The North Carolina Department of Agriculture and Consumer Services (hereinafter, the "State Department of Agriculture") provides administrative support to the Commission, and the research program is to be managed by State of North Carolina land grant universities. *Id.*

You have indicated that the U.S. Drug Enforcement Administration (the "DEA") delayed issuing permits to the State Department of Agriculture allowing international imports of industrial hemp seeds for the Commission's research pilot program. We understand that the DEA has now issued those permits. However, an additional issue discussed in your April 7, 2017 letter remains open.

I. Question and Short Answer

Although the DEA now permits international importation of industrial hemp seeds, questions remain about whether federal law allows interstate importation of these seeds. In your April 7, 2017 letter, you wrote that the Commission has several license applications presently under review which indicate the intended planting seed will originate in a U.S. state other than North Carolina.[1] We understand that the Commission has tabled consideration of those applications until the Commission has greater clarity about whether licensees may lawfully obtain seed from another state.

This letter addresses the following question:

> *Is the Commission prohibited from issuing a license to an applicant who indicates that it intends to bring to North Carolina seed from a qualifying industrial hemp program in another state which lawfully acquired or cultivated that seed?*

For the reasons discussed below, we conclude that under the best reading of the Agricultural Act of 2014, the Commission may issue licenses to persons who indicate that they will obtain seed[2] from another state's industrial hemp program qualified under the Agricultural Act.

We cannot control, however, how the DEA or other federal agencies interpret federal law. This advisory letter does not address the question of any legal duties or risks faced by growers licensed by the Commission. Licensees of the Commission should seek legal advice from their own counsel.

II. Statutes and Background

North Carolina law indicates that the Commission shall "issue licenses allowing a person, firm, or corporation to cultivate industrial hemp for research purpose to the extent allowed by federal law...." N.C. Gen. Stat. § 106-568.53(2). The key federal law enabling cultivation of industrial hemp is Section 7606 of the Agricultural Act. Section 7606, as amended, reads:

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[1] This letter does not address the question of whether the Commission (rather than its licensees) may transport seed across state lines.

[2] For purposes of this letter, the word "seed" also refers to any propagules or harvested plant material used to grow and cultivate new plants. As discussed on the next page, the federal definition of "industrial hemp" includes not only the plant itself, but "any part of such plant, whether growing or not." Agricultural Act of 2014 § 7606(b)(2), codified at 7 U.S.C. § 5940(b)(2).

Legitimacy of industrial hemp research.

(a) In general. **Notwithstanding the Controlled Substances Act** (21 U.S.C. 801 et seq.), chapter 81 of title 41, United States Code [41 USCS §§ 8101 et seq.], **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) 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.

Agricultural Act of 2014 § 7606, as amended, codified at 7 U.S.C. § 5940 (emphasis added).

In recent federal appropriations acts, Congress and the President barred federal funds from being used to stop the transportation outside the State of industrial hemp grown under the Agricultural Act. The Appropriations Act's division concerning agriculture, rural development, and food and drug administration reads:

None of the funds made available by this Act or any other Act may be used—

(1) in contravention of section 7606 of the Agricultural Act of 2014 (7 U.S.C. 5940); or

> (2) **to prohibit the transportation**, processing, sale, or use of industrial hemp that is grown or cultivated in accordance with section 7606 of the Agricultural Act of 2014, within or **outside the State in which the industrial hemp is grown or cultivated**.

Consolidated Appropriations Act, 2017, § 773 of Division A (May 5, 2017) (emphasis added). The Appropriations Act's division concerning commerce, justice, and science reads:

> None of the funds made available by this Act may be used in contravention of section 7606 ('Legitimacy of Industrial Hemp Research') of the Agricultural Act of 2014 (Public Law 113-79) by the Department of Justice or the Drug Enforcement Administration.

Id., § 538 of Division B. These provisions were also present in previous appropriations acts. *See, e.g.*, Consolidated Appropriations Act, 2016, Pub. L. 114-113, § 763 of Title VII of Division A and § 543 of Division B, 129 Stat. 2242, 2285 and 2333 (2015).

Nonetheless, the U.S. Department of Agriculture, in consultation with the DEA and the U.S. Food and Drug Administration, issued a nonbinding "Statement of Principles" which stated, "Industrial hemp plants and seeds may not be transported across State lines." 81 Fed. Reg. 53395, 53395 (Aug. 12, 2016). This conclusion was not supported with any analysis, citations, or explanation. *See id.* The federal agencies' "Statement of Principles" was published in the Federal Register, but was not adopted as a rule. The federal agencies wrote, "This Statement of Principles does not establish any binding legal requirements." 81 Fed. Reg. at 53396.

III. Discussion

A. The "Notwithstanding" Clause in the Agricultural Act Overrides the Controlled Substances Act for Qualified Industrial Hemp Cultivation Programs.

Under federal caselaw, the "notwithstanding" clause in the Agricultural Act is best read as an override of any conflicting provisions of the Controlled Substances Act or any other federal law. The U.S. Supreme Court has remarked,

> As we have noted previously in construing statutes, the use of such a "notwithstanding" clause clearly signals the drafter's intention that the provisions of the "notwithstanding" section override conflicting provisions of any other section. Likewise, the Courts of Appeals generally have "interpreted similar 'notwithstanding' language to supersede all other laws, stating that 'a clearer statement is difficult to imagine.'"

Cisneros v. Alpine Ridge Group, 508 U.S. 10, 12-13, 113 S.Ct. 1898, 1903, 123 L.Ed.2d 572, 580 (1993) (internal citations omitted), *quoting Liberty Maritime Corp. v. U.S.*, 928 F.2d 413, 416 (D.C. Cir. 1991). In the *Cisneros* case, a "notwithstanding" clause in a contract prevented adjustment of rents, even though "other provisions of the contracts might seem to require" the opposite result. 508 U.S. at 18-19, 113 S.Ct. at 1903, 123 L.Ed.2d at 581.

A "notwithstanding" clause in a federal law generally overrides not only specifically listed laws, but also other provisions that would restrict the action permitted by the

"notwithstanding" clause. For example, the Mandatory Victims Restitutions Act, which applies "[n]otwithstanding any other federal law," 18 U.S.C. § 3613(a), has been held to override the anti-alienation provisions of ERISA. *See, e.g., U.S. v. Novak*, 476 F.3d 1041, 1046-48 (9th Cir. 2007) (*en banc*); *U.S. v. James,* 312 F.Supp.2d 802, 805-806 (E.D. Va. 2004).[3] *See also Liberty Maritime Corp.*, 928 F.2d at 416-17 (holding that a "notwithstanding" clause not only overrode "laws relating generally to the sale of property by the United States," but also "provisions in the Merchant Marine Act relating specifically to the sale of vessels").

B. In Appropriations Acts, Congress Has Demonstrated that It Intended the Agricultural Act to Allow Transport Across State Lines for Qualified Industrial Hemp Cultivation Programs.

Congressional intent to have a broad reading of the "notwithstanding" clause is supported by contemporaneous and current appropriations acts. Congress specifically prohibited agencies from expending funds "to prohibit the transportation … of industrial hemp" grown or cultivated under the Agricultural Act. Consolidated Appropriations Act, 2017, § 773 of Division A (May 5, 2017). Further, this provision specifically cites transportation "within or outside the State in which the industrial hemp is grown or cultivated." *Id.* Another provision bars the Drug Enforcement Administration from using funds "in contravention" of section 7606 of the Agricultural Act. *Id.*, § 543 of Division B. This provision appeared in the first omnibus appropriations act passed by Congress after Section 7606 of the Agricultural Act became law. *See* Consolidated Appropriations Act, 2015, Pub. L. 113-235, § 539 of Division B, 128 Stat. 2130, 2217 (2014). Ultimately, both appropriations act provisions are evidence that, when drafting section 7606 of the Agricultural Act, Congress intended to allow industrial hemp grown for research purposes to be transported outside the State of origin.

C. Seeds Are Covered by the Agricultural Act.

Federal agencies could argue that the "notwithstanding" clause is not broad enough to allow obtaining seeds. Section 7606 does not use the word "seed." However, Section 7606 defines "industrial hemp" to include "the plant *Cannabis sativa L.* and any part of that plant," § 7606(b)(2), which must include seeds. Further, obtaining seeds is a necessary part of "the growing or cultivating of industrial hemp," § 7606(a)(2), which is the core activity authorized by section 7606.

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[3] Occasionally, the courts have interpreted a "notwithstanding" clause to have more limited effect "based on the whole of the statutory context in which it appears." *See Novak*, 476 F.3d at 1046. Here, the whole of the statutory context strengthens, rather than weakens, the argument that the "notwithstanding" clause overrides the Controlled Substances Act. No other provisions of the Agricultural Act suggest a limitation upon § 7606. Further, as discussed in § B of this letter, recent and current appropriations acts indicate that Congress intended to remove restrictions on the transportation of industrial hemp across state lines for purposes of a qualifying industrial hemp program.

D. Applicability of Agricultural Act § 7606 to North Carolina's Industrial Hemp Cultivation Program.

This advisory letter assumes that North Carolina's industrial hemp pilot program meets all the requirements necessary for section 7606 of the Agricultural Act to apply. North Carolina's program was specifically designed to comply with section 7606 of the Agricultural Act. *See* 02 N.C. Admin. Code 62.0109 (2017) (adopting the Act by reference, along with all subsequent amendments).[4] The North Carolina program authorizes growth or cultivation solely "for research purposes," N.C. Gen. Stat. § 106-568.53(2), which parallels the requirement in Agricultural Act § 7606(a)(1) that the growth or cultivation be "for purposes of research conducted under an agricultural pilot program or other agricultural or academic research." This opinion is premised on North Carolina's program being conducted for research purposes.

Federal agencies could argue that § 7606 of the Agricultural Act authorizes only industrial hemp cultivation carried out *directly* by the State, rather than cultivation by State *licensees* under State supervision and management. This interpretation of the Act, however, would make one provision of § 7606 meaningless, and the courts generally "reject constructions that render a term redundant." *Psinet, Inc. v. Chapman*, 362 F.3d 227, 232 (4th Cir. 2004). Section 7606(b)(1)(B)(ii), defining a qualifying agricultural pilot program, assumes that individual farmers will carry out cultivation under the Act at a variety of sites. The provision reads:

> The term "agricultural pilot program" means a pilot program to study the growth, cultivation, or marketing of industrial hemp …
>
> (B) in a manner that …
>
> (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.

Agricultural Act of 2014 § 7606(b)(1)(B)(ii), codified at 7 U.S.C. § 5940(1)(B)(ii). There would be no purpose to this site registration provision if the state department of agriculture, which is the agency empowered to grow or cultivate industrial hemp, also had to lease or hold physical title to each site where industrial hemp is being grown. The more reasonable reading of this provision is that state departments of agriculture will license individual farmers to grow industrial hemp at a variety of sites, and each site will be registered with the department of agriculture. This is consistent with North Carolina law. *See* N.C. Gen. Stat. § 106-568.53(2), 02 N.C. Admin. Code 62.0107(a)(4), and 02 N.C. Admin. Code 62.0108, which implement the site registration requirement in Agricultural Act § 7606(b)(1)(b)(ii) for licensees.

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[4] Section 106-568.53(8) notes that the Commission "shall adopt .. the federal regulations in effect regarding industrial hemp and any subsequent amendments to those regulations." There are, however, currently no federal regulations in effect. The "Statement of Principles" published in the Federal Register by several federal agencies notes that it is not a rule and "does not establish any binding legal requirements." 81 Fed. Reg. at 53396.

E. Definition of Industrial Hemp

Finally, it should be noted that under North Carolina law and federal law, industrial hemp has a specific, defined meaning, and it is not marijuana. "Industrial hemp" must have a "delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." Agricultural Act § 7606(b)(3), codified as 7 U.S.C. § 5940(b)(3); *accord* N.C. Gen. Stat. § 106-568.51(7). State and federal law do not authorize farmers to grow *cannabis sativa* plants or obtain *cannabis sativa* seeds which would produce a tetrahydrocannabinol concentration above this limit. State and federal law also do not authorize farmers to grow *cannabis sativa* plants or obtain *cannabis sativa* seeds, even if those plants or seeds would qualify as industrial hemp, outside the research program established under State law.

IV. Nature of Advisory Letters

We hope that this adequately responds to your inquiry. Like all advisory letters, this letter is not an official opinion of the Attorney General's Office, and it has not been reviewed and approved in accordance with the procedures for issuing Attorney General opinions. If you should have any further questions regarding this matter, please feel free to contact me.

Sincerely,

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cc: All Members of the Industrial Hemp Commission
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