

## Interview With Rod Kight Regarding the Legality of THCA Hemp Flower

*This interview was conducted by CBD Oracle via email in November 2023 and is provided here for full transparency. Learn more about [CBD Oracle's Editorial Policy](#).*

### About Rod Kight:

A recognized industry leader, Rod is an award winning attorney who represents clients in the cannabis industry throughout the United States and the world. He also drafts legislation for governments and promotes cannabis in lawful international markets. [Read full bio →](#)

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**CBD Oracle:** *Before considering specific state laws, does the "total THC" standard adopted by the USDA apply to finished products, or just hemp plants pre-harvest?*

**Rod Kight:** The total THC standard, referred to in the 2018 Farm Bill and USDA rule as a "post-decarboxylation method", is solely required for hemp plants pre-harvest. Because this point is widely misunderstood I will explain it in detail. The Farm Bill only addresses "post-decarboxylation" twice. In the first statutory provision, 7 USC § 1639p(a)(2)(A)(ii), it 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. That's it.

The key word in both of 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." In other words, to produce hemp means to grow it. This means that the post-decarboxylation method is required in the context of growing hemp. Once the hemp has passed the required pre-harvest testing it may be harvested. Once harvested, the sole statutory metric to distinguish legal hemp from illegal marijuana is the concentration of delta-9 THC, not "total THC". The statute is very clear about this.

**CBD Oracle:** *Is THCA flower (sourced from a compliant hemp plant) exempt from the controlled substances bill if it meets the 0.3% delta-9 THC threshold, even if it has higher quantities of THCA?*

**Rod Kight:** Yes. This meets the plain and unambiguous definition of "hemp" in the Farm Bill.

**CBD Oracle:** *Assuming there are no other relevant restrictions in state law (e.g. a ban on flower or inhalable products), does the existence or absence of a state-level "total THC" standard for finished products or hemp overall determine whether THCA flower is legal in the state?*

**Rod Kight:** Yes. If a state has a "total THC" standard for post-production hemp and/or hemp products, then THCa flower is not lawful in the state. With that being said, there is an open issue that is playing out in courts across the country regarding how far a state can go in re-defining and regulating hemp. For this reason, state-level "total THC" requirements for harvested hemp and hemp products may be preempted by federal law. For example, a federal court in Arkansas recently found that a state may not redefine "hemp". That being said, this is an evolving issue and I would never recommend ignoring state law.

**CBD Oracle:** *It is unlikely that a plant could meet the 0.3% THC + 0.877\*THCA pre-harvest standard and have (using a real-world example) 27% THCA at harvest. If such a product was made by spraying THCA onto compliant hemp flower, would the result still be considered "hemp"?*

**Rod Kight:** I don't know if your example is unlikely or not. The cannabis industry has shown a remarkable ability to innovate and I would not be surprised to find that a 27% THCa hemp bud is possible. Regarding spraying THCa, that hypothetical necessarily assumes a lot, and the details matter. I cannot say in the abstract whether it is lawful or not.

**CBD Oracle:** *What would you say to a client interested in selling THCA flower as hemp, if you were asked to advise them in a legal context? Is there a significant legal risk? (assuming there is no explicit "total THC" standard in relevant state law)*

**Rod Kight:** I spend a lot of my time these days consulting with people on THCa hemp, so this is a pertinent question. I always make it a point to discuss the legal issues in depth, even with experienced players in the industry, to make sure that they fully understand them. The first thing I usually say is that distributing THCa hemp is the riskiest thing you can do in the legal cannabis industry right now. This is primarily due to a widespread lack of understanding about it, including a general lack of understanding about its legal status. Additionally, I inform my clients that law enforcement typically uses a "post-decarboxylation" testing method, such as gas chromatography or a Duquenois-Levine field test, to determine the legal status of cannabis material it detains or seizes. Even though a post-decarboxylation testing method is not appropriate for post-harvest hemp, the fact that this method is widely used means that law enforcement may press charges based on the test results, thus requiring a person to defend

herself in criminal court based on a "false positive" result. Similarly, a regulatory agency that uses a post-decarboxylation method sometimes detains products based on the results. The legal defense to these charges and/or detentions is, of course, that a post-decarboxylation test turns lawful hemp into unlawful marijuana- it literally creates the molecule (D9) that it is looking for and is thus invalid. It is akin to evidence tampering. Unfortunately, there is very little legal precedent on this particular issue and being charged with a crime or having a hemp product detained, even if you are eventually exonerated and get the product back, can be extremely stressful and expensive. For this reason, I spend most of my consulting time with clients discussing best practices and ways to mitigate the risks associated with THCa hemp.

**CBD Oracle:** *Do you expect to see enforcement actions against sellers of THCa products in future?*

**Rod Kight:** Unfortunately, yes. THCa hemp is emerging as the controversial and misunderstood hemp product of the day in a long line of controversial and misunderstood hemp products over the years. For this reason, I anticipate law enforcement action. This is not new to the hemp industry. I remember when CBD was controversial and resulted in law enforcement actions. Nowadays, this seems almost quaint and like it occurred a long time ago; however, law enforcement actions based on CBD distribution occurred within the past decade and resulted in major stress, loss of resources, and even criminal charges. Then the same thing occurred with CBD flower, followed by delta-8 THC, etc. Now the focus is on THCa hemp. With each new category of hemp product, I have renewed hope that law enforcement and uninformed detractors will finally read the plain language of the statute so that we can avoid unnecessary legal actions. Disappointingly, it seems that we have to go through the process of proving hemp's legal status, in all of its forms, with each new product category that emerges.

**CBD Oracle:** *If a company was found to be faking or doctoring a Certificate of Analysis to make their product appear compliant or more potent, what action could be taken against them?*

**Rod Kight:** Fortunately, there are lots of legal actions that can be taken against the people who provide fake and doctored COAs, from private civil actions based on breach of contract, fraud, and deceptive trade practices, to regulatory lawsuits, fines, and penalties by state and federal agencies. Under certain circumstances, a person faking a COA could face criminal charges. This is important because fake COAs are terrible for the industry.

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