



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Jason S. Miyares
Attorney General

202 North Ninth Street
Richmond, Virginia 23219
804-786-2071
Fax 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

MEMORANDUM

TO: Linda Jackson, Director
Department of Criminal Justice Services

FROM: Phillip O. Figura
Assistant Attorney General

DATE: August 23, 2022

SUBJECT: Regulations Relating to the Approval of Field Tests for Detection of Drugs – 6VAC40-50

In response to a request from the Department of Forensic Science, I reviewed the proposed regulations, 6VAC40-50, to ensure statutory authority for the regulations relating to the approval of field tests for detection of marijuana. The regulations are being updated to reflect a variety of statutory changes relating to marijuana.

In recent years, Virginia legalized industrial hemp production¹ while maintaining or modifying certain criminal marijuana provisions.² As a result, there is a need for law enforcement to differentiate between legal industrial hemp and illegal marijuana. Marijuana and industrial hemp are different strains of the Cannabis sativa plant. The only way to differentiate between them is to determine the level of tetrahydrocannabinol (THC) present in the material. Only material with less than 0.3% THC is considered legal industrial hemp.³ At present, Duquenois-Levine test is the only field test currently marijuana approved by Department. However, that test is unable to ascertain the levels of THC in the material, only its presence.

Virginia Code § 19.2-188.1(B) permits law enforcement officers the ability to testify about the results of marijuana field tests “approved as accurate and reliable by the Department of Forensic Science pursuant to regulations adopted in accordance with the Administrative Procedures Act (§ 2.2-4000 et seq.), regarding whether or not any plant material, the identity of which is at issue, is marijuana” Virginia Code § 9.1-1110 grants the Forensic Science Board the power and duty to adopt the regulations required pursuant to § 19.2-188.1 and “for any provisions of the Code as they relate to the responsibilities of the Department.” Given the inability

¹ See § 3.2-4113.

² In 2021, the Virginia General Assembly adopted legislation that established the Virginia Cannabis Control Authority and authorized it to oversee Virginia's prospective adult-use marijuana retail market; however, the 2022 General Assembly did not reenact the regulatory scheme for the regulation of an adult-use marijuana retail market. As such, there is not currently a legal, adult-use marijuana retail market or an adult-use marijuana licensure program in Virginia.

³ See Domestic Hemp Program, 7 CFR § 990.1

of the Duquenois-Levine test to determine THC levels, there is no approved field test which would comply Virginia Code § 19.2-188.1(B). As a result, only the quantitative analysis performed by the Department is an accurate and reliable test evidencing THC concentrations in criminal marijuana cases.

The proposed regulations provide for the public's participation in the regulatory process before the Forensic Science Board. The regulations set forth in 6VAC40-50 have been promulgated pursuant to Virginia Code § 2.2-4007.02 which mandates that each agency develop, adopt, and use Public Participation Guidelines for soliciting the input of interested parties in the formation and development of its regulations. The Forensic Science Board is the promulgating entity, having been granted the regulatory power under Virginia Code §§ 19.2-188.1(B) and 9.1-1110. These proposed regulations were subject to public comment between December 2, 2021 and February 2, 2022. However, no public comments were received.

Accordingly, upon review of the aforesaid regulations, I find the proposed regulations in 6VAC40-50 to be constitutional, consistent with the authority granted by Virginia Code § 2.2-4007.02, in conformity with existing statutory provisions, and in accordance with the Administrative Process Act.⁴

Please note that this memorandum is intended to provide legal interpretations and legal advice, not policy advice. To the extent that this communication may advise you that certain action is lawful, the decision whether to take such action remains a policy decision with the discretion of your agency and this communication should not be construed as a comment for or against the merits of such action.

⁴ See Virginia Code § 2.2-4000 et seq.