STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ESXPO RETAIL, LLC D/B/A CHRONIC GURU,

Petitioner,

vs. Case Nos. 23-4508RU
24-0033RX

DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a final hearing in this cause was held in Tallahassee, Florida, on January 17, 2024, before Brandice D. Dickson, Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUES

Whether Florida Administrative Code Rule 5K-4.034(2)(m) (the Rule) is an invalid exercise of delegated legislative authority under section 120.52(8)(b), (c), or (e), Florida Statutes; whether Respondent's statements that hemp flower products intended for inhalation or ingestion are hemp extract is an unadopted rule; and whether Respondent applied an unadopted rule formula for determining total delta-9 tetrahydrocannabinol concentration.

PRELIMINARY STATEMENT

Petitioner filed its Petition for Determination of Invalidity of Non-Rule Policy with DOAH on November 14, 2023, which was assigned to the undersigned on November 21, 2023. By agreement of the parties, the final hearing was scheduled for December 21, 2023.

On December 11, 2023, Petitioner sought leave to amend its unadopted rule challenge petition to include a separate challenge to an existing rule. That amendment was accepted and the challenge to the existing rule was assigned Case No. 24-0033RX. Pursuant to section 120.56(4)(b), the undersigned concurrently granted Respondent's motion for a continuance of the final hearing in light of the new cause of action being added fewer than ten days from the scheduled final hearing.

Petitioner's two rule challenges (23-4508RU and 24-0033RX) were consolidated on January 5, 2024, pursuant to section 120.56(4)(g) and Florida

Administrative Code Rule 28-106.108. By agreement of the parties, the consolidated cases were set for hearing on January 17, 2024. At the outset of the hearing, Petitioner moved to compel production of documents from Respondent, Florida Department of Agriculture and Consumer Services (FDACS or the Respondent), which motion was heard and resolved on the record. The undersigned ordered the final hearing commence as noticed, and allowed the record be held open until January 22, 2024, subject to Petitioner's review of documents produced by Respondent.

Petitioner presented the testimony of Patrick O'Brien, Matthew Curran, Ph.D., and Christopher Ware. Petitioner's Exhibits 1 through 5, 7, 8, 15 through 17, and 20 through 22 were admitted into evidence. Respondent presented the testimony of Dr. Curran and offered no exhibits.

During a noticed telephone conference on January 22, 2024, Petitioner advised no further testimony was needed and the final hearing record was closed. The parties agreed to submit their proposed final orders within ten days of the transcript of the proceedings being filed. The one-volume Transcript was filed on February 1, 2024. The parties timely filed their Proposed Final Orders (PFOs), which have been reviewed and considered. References to materials not admitted into evidence, or not otherwise admissions of the parties' positions, have not been considered.

References to Florida Statutes are to the 2023 version unless stated otherwise. Citations to the transcript appear as (Tr. ___).

FINDINGS OF FACT

The Parties

1. Petitioner is a licensed retailer of hemp-based products and operates retail hemp establishments at 146 Woodland Boulevard, Deland, Florida and

303A East 1st Street, Sanford, Florida. (Jt. Pre-Hearing Stip., E. ¶¶ 1-2). Both stores have been in operation for approximately one year. (Tr. 36).

2. Retailers, such as Petitioner, must hold a "hemp food establishment permit from FDACS to sell prepackaged food consisting of or containing hemp to the end user." (Amended Petition, ¶ 6). Petitioner sells, among other items, hemp flower, edibles, and gummies.

3. Respondent is the state agency charged with administering Florida's hemp program as codified in section 581.217, Florida Statutes, and for administering Florida's Food Safety Act as codified in section 500.01, *et. seq.*, Florida Statutes.

4. Respondent also performs inspections of hemp food establishment permit-holders. (Pet.'s Exs. 1, 2, and 5).

Inspections and Reports Showing Respondent's Statements

5. During inspections of Petitioner's Deland and Sanford stores, on September 27, 2023 and October 2, 2023, respectively, Respondent cited Petitioner for the following violation, "Hemp intended for human consumption contains a total delta-9 tetrahydrocannabinol concentration of more than 0.3% on a dry weight basis and is considered adulterated pursuant to s. 500.10(1)(a), s. 581.217(3)(e), F.S." (Jt. Pre-Hearing Stip., E. ¶¶ 3-4; Pet.'s Ex. 1, p 2; Pet.'s Ex. 2, p. 2).

6. The Supplemental Reports issued to Petitioner with respect to the inspections stated "primary reason and condition that caused the product or equipment stop sale or stop use and determined dangerous, unwholesome, fraudulent, or insanitary was: FS 500.04; FS 500.10 Adulterated.* Total delta-9 tetrahydrocannabinol concentration – Hemp." (Pet.'s Ex. 1, p. 3; Pet.'s Ex. 2, p. 4).

7. Respondent concurrently issued Stop Sale Orders blanketly prohibiting the sale of "[A]ll THCA to include Flower, Pre rolls and concentrates." (Pet.'s Ex. 1, p. 3). Further into the Supplemental Reports, the prohibited items were identified by their specific product name. (Pet.'s Ex. 1, p. 6; Pet.'s Ex. 2,

pp. 4-29). All told, 79 separate products at the Deland store and 26 separate product types at the Sanford store were found to be in violation.[1]

8. Petitioner challenged Respondent's statements in its citations as unadopted rules because Respondent was regulating "hemp" as if it was "hemp extract," and because Respondent applied a non-rule formula which calculates "total" THC, as opposed to "only the delta-9 THC," concentration to determine whether a hemp-based product may be sold at retail in Florida. During discovery, Respondent stated it relied, in part, on rule 5K-4.034(2)(m), as authority for its Stop Sale Orders. Petitioner challenges that rule in this proceeding as well and Respondent concedes it has standing to do so.

The 2018 Farm Bill

9. In 2018, Congress passed the Agriculture Improvement Act (the 2018 Farm Bill) and redefined "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," *but does not include* "hemp, as defined in section 1639*o* of Title 7." 21 U.S.C. §§ 802(16)(A), (B)(i).

10. The 2018 Farm Bill defined "hemp" as "the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C. § 1639o.

11. Thus, the 2018 Farm Bill classified *Cannabis sativa* L. as being either marijuana *or* hemp, depending only on the level of delta-9 tetrahydrocannabinol concentration (delta-9 THC); if the plant tests 0.3% delta-9 THC concentration or below, it is legal hemp. If it tests higher, it is illegal marijuana, a schedule I controlled substance. 21 U.S.C. §§ 802(6), 812(c).

[1] Petitioner separately challenges these FDACS actions in a section 120.57(1) proceeding at DOAH.

12. Delta–9 THC is the primary psychoactive component of cannabis. (Tr. 132); 7 C.F.R. § 990.1. Under federal regulations, "delta-9 THC" and "THC" are interchangeable. *Id*.

13. The 2018 Farm Bill required states that desired to "have primary regulatory authority over the production of hemp in the State" to submit a hemp plan to the United States Department of Agriculture (USDA) for approval. 7 U.S.C. § 1639p(a)(1).

14. Each such proposed state hemp plan was required to contain:

> (i) a practice to maintain relevant information regarding land on which hemp is produced in the State or territory of the Indian tribe, including a legal description of the land, for a period of not less than 3 calendar years;
>
> (ii) a procedure for testing, using post-decarboxylation or other similarly reliable methods, delta-9 tetrahydrocannabinol concentration levels of hemp produced in the State or territory of the Indian tribe;
>
> (iii) a procedure for the effective disposal of—
> (I) plants, whether growing or not, that are produced in violation of this subchapter; and
> (II) products derived from those plants;
>
> (iv) a procedure to comply with the enforcement procedures under subsection (e);
>
> (v) a procedure for conducting annual inspections of, at a minimum, a random sample of hemp producers to verify that hemp is not produced in violation of this subchapter;
>
> (vi) a procedure for submitting the information described in section 1639q(d)(2) of this title, as applicable, to the Secretary not more than 30 days after the date on which the information is received; and
>
> (vii) a certification that the State or Indian tribe has the resources and personnel to carry out the

> practices and procedures described in clauses (i) through (vi).

7 U.S.C.A. § 1639p

15. In 2019, Florida enacted section 581.217, as its hemp plan. After some revision, the pertinent portions of the plan now state:

> 581.217. State hemp program
> (1) Creation and purpose.--The state hemp program is created within the department to regulate the cultivation of hemp in the state. This section constitutes the state plan for the regulation of the cultivation of hemp for purposes of 7 U.S.C. s. 1639p.
>
> (2) Legislative findings.--The Legislature finds that:
>
> (a) Hemp is an agricultural commodity.
>
> (b) Hemp-derived cannabinoids, including, but not limited to, cannabidiol, are not controlled substances or adulterants if they are in compliance with this section.
>
> (3) Definitions.--As used in this section, the term:
>
> * * *
>
> (d) "Cultivate" means planting, watering, growing, or harvesting hemp.
>
> (e) "Hemp" means the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof, and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers thereof, whether growing or not, that has a total delta-9-tetrahydrocannabinol concentration that does not exceed 0.3 percent on a dry-weight basis, with the exception of hemp extract, which may not exceed 0.3 percent total delta-9-tetrahydrocannabinol on a wet-weight basis.

(f) "Hemp extract" means a substance or compound intended for ingestion, containing more than trace amounts of a cannabinoid, or for inhalation which is derived from or contains hemp and which does not contain controlled substances. The term does not include synthetic cannabidiol or seeds or seed-derived ingredients that are generally recognized as safe by the United States Food and Drug Administration.

* * *

(7) Distribution and retail sale of hemp extract.—

(a) Hemp extract may only be distributed and sold in the state if the product:

1. Has a certificate of analysis prepared by an independent testing laboratory that states:

a. The hemp extract is the product of a batch tested by the independent testing laboratory;

b. The batch contained a total delta-9-tetrahydrocannabinol concentration that did not exceed 0.3 percent pursuant to the testing of a random sample of the batch;

c. The batch does not contain contaminants unsafe for human consumption; and

d. The batch was processed in a facility that holds a current and valid permit issued by a human health or food safety regulatory entity with authority over the facility, and that facility meets the human health or food safety sanitization requirements of the regulatory entity. Such compliance must be documented by a report from the regulatory entity confirming that the facility meets such requirements.

* * *

> (c) Hemp extract distributed or sold in this state is subject to the applicable requirements of chapter 500, chapter 502, or chapter 580.
>
> * * *
>
> (12) Rules.--The department shall adopt rules to administer the state hemp program. The rules must provide for:
>
> (a) A procedure that uses post-decarboxylation or other similarly reliable methods for testing the delta-9-tetrahydrocannabinol concentration of cultivated hemp.
>
> (b) A procedure for the effective disposal of plants, whether growing or not, that are cultivated in violation of this section or department rules, and products derived from those plants.
>
> (c) Packaging and labeling requirements that ensure that hemp extract intended for human ingestion or inhalation is not attractive to children.
>
> (d) Advertising regulations that ensure that hemp extract intended for human ingestion or inhalation is not marketed or advertised in a manner that specifically targets or is attractive to children.

§ 581.217, Fla. Stat.

16. The parties agree that Florida's hemp plan was approved by the USDA. (Jt. Pre-Hearing Stip., F. ¶ 2).

17. Within the hemp plan, the Legislature directed Respondent to enact rules that, among other things, provide for "a procedure that uses post-decarboxylation or similarly reliable methods for testing the delta-9-tetrahydrocannabinol concentration of cultivated hemp." § 581.217(12)(a), Fla. Stat.

18. Decarboxylation is "the removal or elimination of carboxyl group from a molecule or organic compound." 7 C.F.R. § 990.1.

19. In the context of testing methodologies for THC concentration levels in hemp, "post-decarboxylation" means:

> [A] value determined after the process of decarboxylation that determines the potential total delta–9 tetrahydrocannabinol content derived from the sum of the THC and THCA content and reported on a dry weight basis. The post-decarboxylation value of THC can be calculated by using a chromatograph technique using heat, gas chromatography, through which THCA is converted from its acid form to its neutral form, THC. Thus, this test calculates the total potential THC in a given sample. The post-decarboxylation value of THC can also be calculated by using a liquid chromatograph technique, which keeps the THCA intact. This technique requires the use of the following conversion: [Total THC = (0.877 x THCA) + THC] which calculates the potential total THC in a given sample. See the definition for decarboxylation.

7 C.F.R. § 990.1

20. The reference to "potential" delta-9 THC in hemp, stated above, is to tetrahydrocannabinol acid (THCA), the acid precursor to delta-9 THC. (Tr. 69-70; 138).

21. Christopher Ware, Petitioner's expert in the field of cannabis and hemp material testing, testified that THCA is a separate molecule from THC. THCA, like THC, is a cannabinoid, but it is not psychoactive like THC. However, when THCA loses its carboxyl group, through exposure to heat or UV light, it converts into delta-9 THC. (Tr. 120).

22. Manufacturers of hemp-based products often decarboxylate their own products in order to achieve a higher delta-9 concentration so as to maximize the psychoactive effect. (Tr. 132).

23. Matthew Curran, Ph.D., Respondent's expert on the testing and chemistry of hemp, concurred with Mr. Ware that THCA, when it

decarboxylates, "turns into delta-9." (Tr. 144-145). Heat as low as 250°, like that achieved in a toaster oven, will trigger decarboxylation. (Tr. 70).

24. Because THCA may convert to delta-9 THC, a post-decarboxylation testing method will account for all potential, or "available," delta-9 THC in a sample. (Tr. 60, 70). This is also referred to as the "total THC" in a hemp sample. 7 C.F.R. § 990.1 ("Meaning of Terms").

Certificates of Analysis

25. Any hemp extract product sold at retail in Florida requires a certificate of analysis (COA) that states it is the product of a laboratory tested batch that contains a "total delta-9-tetrahydrocannabinol concentration that did not exceed 0.3 percent pursuant to the testing of a random sample of the batch." § 581.217(7)(a)1., Fla. Stat.

26. A COA shows, at a minimum, the cannabinoid profile of the batch. (Tr. 39-40). The inspection reports issued to Petitioner by Respondent from September 27 and October 2, 2023, state that inspectors observed "hemp products with link Certificate of Analysis [sic] that exceed the total delta-9 tetrahydrocannabinol concentration of more than 0.3%." (Joint Pre-Hearing Stip., E. ¶¶ 6-8).

27. Petitioner introduced a COA at hearing for its "White Truffle" hemp flower product that served as an exemplar COA. (Tr. 41; Pet.'s Ex. 3). It is reproduced as follows:

FOOD & ENVIRONMENT SAFETY ANALYTICAL LAB

Sample ID:
Date Issued: 9/13/23

Certificate of Analysis

For R&D Use Only - Not a California Compliance Certificate.

White Truffle

Client:

Total CBD	**ND**
Total THC	**26.91 %**
Total Cannabinoids	**30.66 %**

Sample Name:
White Truffle

Matrix:
Plant

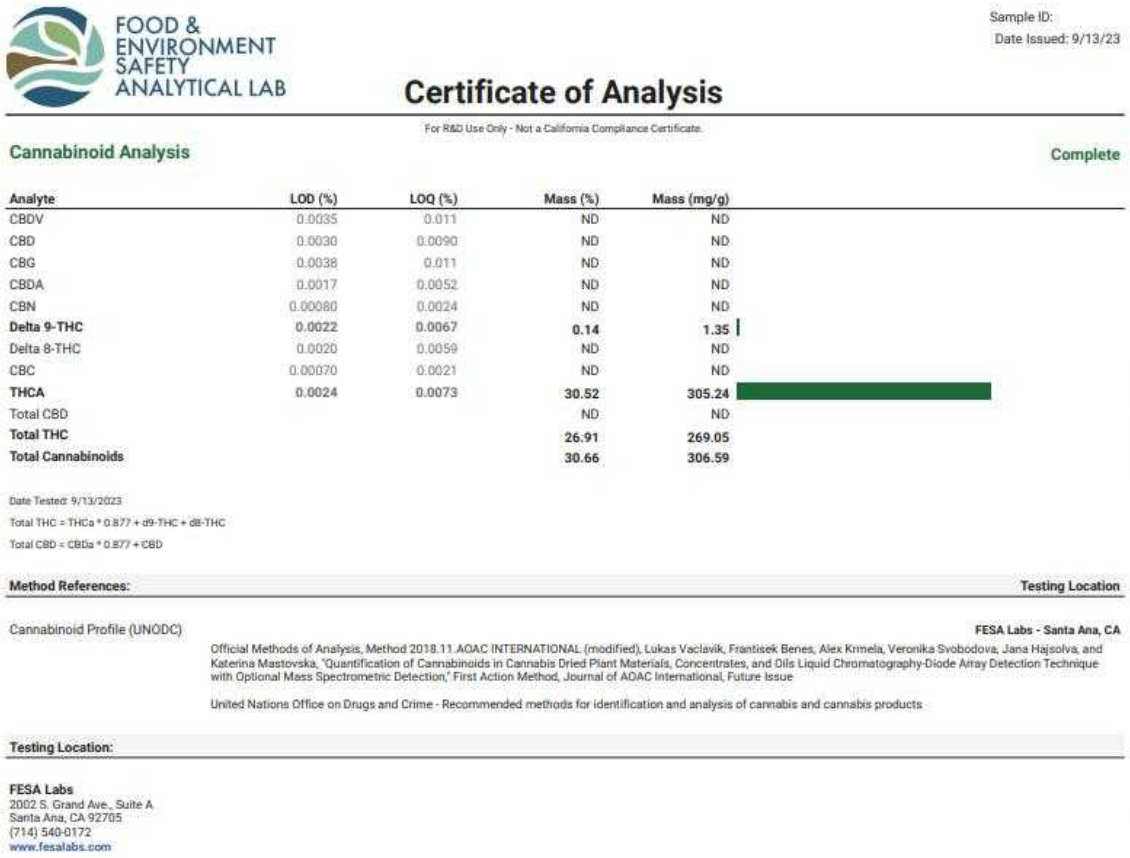
Unit Mass:
1 g per unit

Sample ID:

Date Received:
9/13/2023

Approved By:
Marie True, M.S.
Laboratory Manager

References: limit of detection (LOD), limit of quantitation (LOQ), not detected (ND), not tested (NT)



FOOD & ENVIRONMENT SAFETY ANALYTICAL LAB

Sample ID:
Date Issued: 9/13/23

Certificate of Analysis

For R&D Use Only - Not a California Compliance Certificate.

Cannabinoid Analysis — **Complete**

Analyte	LOD (%)	LOQ (%)	Mass (%)	Mass (mg/g)
CBDV	0.0035	0.011	ND	ND
CBD	0.0030	0.0090	ND	ND
CBG	0.0038	0.011	ND	ND
CBDA	0.0017	0.0052	ND	ND
CBN	0.00080	0.0024	ND	ND
Delta 9-THC	**0.0022**	**0.0067**	**0.14**	**1.35**
Delta 8-THC	0.0020	0.0059	ND	ND
CBC	0.00070	0.0021	ND	ND
THCA	**0.0024**	**0.0073**	**30.52**	**305.24**
Total CBD			ND	ND
Total THC			**26.91**	**269.05**
Total Cannabinoids			**30.66**	**306.59**

Date Tested: 9/13/2023

Total THC = THCa * 0.877 + d9-THC + d8-THC

Total CBD = CBDa * 0.877 + CBD

Method References: — **Testing Location**

Cannabinoid Profile (UNODC) — **FESA Labs - Santa Ana, CA**

Official Methods of Analysis, Method 2018.11 AOAC INTERNATIONAL (modified), Lukas Vaclavik, Frantisek Benes, Alex Krmela, Veronika Svobodova, Jana Hajsolva, and Katerina Mastovska, "Quantification of Cannabinoids in Cannabis Dried Plant Materials, Concentrates, and Oils Liquid Chromatography-Diode Array Detection Technique with Optional Mass Spectrometric Detection," First Action Method, Journal of AOAC International, Future Issue

United Nations Office on Drugs and Crime - Recommended methods for identification and analysis of cannabis and cannabis products

Testing Location:

FESA Labs
2002 S. Grand Ave., Suite A
Santa Ana, CA 92705
(714) 540-0172
www.fesalabs.com

28. Patrick O'Brien is the owner of Chronic Guru. He testified that his customers seek out his products for pain relief and sleep disorders because they are natural remedies. (Tr. 29-33). He was present for Respondent's inspection at the DeLand location. (Tr. 43-45). He was told the flower products at issue were deemed non-compliant by Respondent's inspectors when they reviewed the COAs attached to those products. (Tr. 44-45). He testified that Respondent's previous inspections of his DeLand and Sanford stores included the same flower products with the same offerings and both stores passed inspections as late as June 21, 2023. (Tr. 46; Pet.'s Ex. 5).

29. Mr. O'Brien testified it is his belief that the White Truffle COA shows the sample is legal for sale in Florida because the delta-9 THC concentration is .14%, which is below the 0.3% maximum delta-9 allowed. He testified, "[s]o long as we're below that 0.3% it's our understanding that we're able to provide that product especially on the federal hemp bill definition." (Tr. 40).

30. Dr. Curran was asked at hearing to "ballpark the total delta-9 THC concentration" of White Truffle using the Rule formula at issue, discussed below, based on the COA and arrived at "approximately 26%," which is "100 fold more than the" 0.3% limit. (Tr. 146).

Rule 5K-4.034 Hemp Extract for Human Consumption

31. Florida's hemp plan defines "hemp" as "the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof, and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers thereof, whether growing or not, that has a total delta-9-tetrahydrocannabinol concentration that does not exceed 0.3 percent on a dry-weight basis, with the exception of hemp extract, which may not exceed 0.3 percent *total* delta-9-tetrahydrocannabinol on a wet-weight basis." § 581.217(3)(e), Fla. Stat. (emphasis added).

32. "Total delta-9-tetrahydrocannabinol concentration" is undefined in section 581.217. (Tr. 65).

33. Respondent promulgated the Rule which Petitioner challenges. It defines "[T]otal delta-9 tetrahydrocannabinol concentration" as follows:

> (m) "Total delta-9 tetrahydrocannabinol concentration" means [delta-9 tetrahydrocannabinol] + (0.877 x [tetrahydrocannabinolic acid]).

34. The Rule lists sections 500.09, 500.12, 570.07(23), and 581.217(12), Florida Statutes, as the Respondent's rulemaking authority and sections 500.03, 500.04, 500.09, 500.10, 500.11, 500.12, 500.121, 500.13, 500.172, and 581.217 as the law implemented.

Petitioner's Challenges to the Rule

35. As stated in its PFO, Petitioner's challenge is twofold. Specifically, it asserts:

> The statutory definition of "hemp" refers solely to the total *delta-9 THC*, however, the rule improperly adds THCa[2] to the statutory definition by including

[2] THCa is also referred to as THCA.

> it in the calculation of "total delta-9 THC." This means that either (a) FDACS unlawfully promulgated a rule that goes beyond the plain language of the statute by including definitional qualifiers not present in the statute, or (b) FDACS' expanded definition of "total delta-9 THC" is addressed solely to the specific situation contemplated by the statute, namely **compliance testing for hemp that is in the process of being harvested**.

(Pet.'s PFO, ¶ 59)

36. Turning first to Petitioner's argument that the Rule goes beyond that authorized by the statute, the undersigned finds otherwise and that the definition at issue is authorized by the Legislature's use of the word "total" in "total delta-9 tetrahydrocannabinol" found at section 581.217(3)(e) *coupled with* the requirement of using a post-decarboxylation test for hemp. (Tr. 65-67).

37. The parties agree that the Legislature's use of the word "total" preceding "delta-9" in the definition of "hemp" is meaningful but differ as to its import.

38. Mr. Ware opined at hearing that "total delta-9" referred to the sum of delta-9 THC plus "cis and trans delta-9," which are molecules of delta-9 that have different orientations. (Tr. 126-128). As one who runs a laboratory that tests hemp samples, he would report the cis and trans delta-9 within the delta-9 THC on a COA. (Id.) However, Petitioner did not identify references to either cis or trans delta-9 in the 2018 Farm Bill, the federal code of regulations regarding hemp, the explication of decarboxylation, or in the Florida hemp plan. This suggests cis and trans delta-9 are not the target of the word "total" when testing for the delta-9 of hemp.

39. Mr. Ware further testified that as one who tests hemp and prepares COAs, if given the definition of "hemp" as it appears in section 581.217(e), he would understand he would be testing a floral sample, like those at issue in this proceeding, for THCA, and would report the THCA level found in a COA.

(Tr. 130-131). He would not, however, intuitively include it in a "total delta-9" calculation because the definition of hemp in section 581.217(3)(e) is not "specific to decarboxylated delta-9 THC." (Id.).

40. Mr. Ware and Dr. Curran agree that decarboxylation can occur to any cannabinoid molecule, including all of the acid precursors to same (*e.g.* CBDA converts to CBD[3]). (Tr. 138, 160). However, the only molecule specifically mentioned in the federal regulation describing the required "post-decarboxylation" testing method *as a molecule that should be accounted for in the "total" sum of potential delta-9* in addition to delta-9 itself, is THCA. Further, THCA is the only acid precursor identified as potentially psychoactive.

41. The formula in the Rule, Total delta-9 THC = delta-9 THC + (0.877 x THCA), comports with the formula found in the federal regulation[4] describing "post-decarboxylation," Total THC = (0.877 x THCA) + THC, in that it accounts for the THCA that may convert to delta-9.

42. The undersigned finds that the definition of "total delta-9 tetrahydrocannabinol concentration" in the Rule correctly implements the post-decarboxylation test required by the statute. Accounting for the THCA in a sample comports with, and gives effect to, use of the word "total" preceding "delta-9" in the definition of hemp. Respondent's explanation of why THCA is the target of the Legislature's choice to use "total" preceding "delta-9" in the definition of "hemp" is more logical than Petitioner's assertion that cis and trans delta-9 were behind the meaning of "total."

43. There is no preemption of state hemp plans by the federal farm bill and states can enact laws and regulations more stringent than those in the 2018 Farm Bill as long as they are not in conflict. 7 U.S.C.A. § 1639p(3)(A) and (B). Accounting for the THCA present in a hemp sample through a

[3] The COA for White Truffle shows CBD and CBDA in the cannabinoid profile. (Pet.'s Ex. 3).

[4] Petitioner agrees that the federal regulations defining terms and testing procedures for delta-9 THC concentration are applicable in this proceeding to define post-decarboxylation. (Pet.'s PFO, ¶¶ 46-48).

decarboxylation formula does not run afoul of the 2018 Farm Bill or federal regulations.

44. Next is Petitioner's assertion that Respondent did not have rule-making authority to promulgate the Rule for application to hemp products and the formula in the Rule is applicable only to pre-harvest hemp.

45. A plain reading of Florida's hemp plan reveals the Legislature intended to regulate not only hemp production, but retail sales of hemp-based products as well. *See* § 581.217(7) and (12)(c)-(d).

46. Respondent promulgated Florida Administrative Code Rule 5B-57.014, State Hemp Program, which rule governs *production* of hemp. That rule states, in pertinent part:

> (2) Definitions. The definitions provided in Sections 581.011, 581.217, F.S., and the following shall apply to this rule:
>
> (a) "Acceptable THC level" means that the representative sample has a Total delta-9 tetrahydrocannabinol concentration that does not exceed 0.3% on a dry-weight basis.
>
> …
>
> (i) "Total delta-9 tetrahydrocannabinol concentration" means [delta-9 tetrahydrocannabinol] + (0.877 x [tetrahydrocannabinolic acid]).

Fla. Admin. Code R. 5B-57.014(2)(a) and (i).

47. To be sure, rule 5B-57.014(2)(i) is identical to the Rule being challenged. Petitioner has no quarrel with rule 5B-57.014(2)(i) though, because it is, in its view, rightly limited to production of hemp. When Respondent promulgated the exact same definition and placed it in the "Hemp Extract for Human Consumption" rule, it did so without authority, argues Petitioner.

48. Petitioner agrees that a "total THC" calculation is required by the 2018 Farm Bill, but asserts that "once a crop has passed the 'post-decarboxylation' compliance test and is out of the ground, the statutory

definition of 'hemp,' which only references delta-9 THC, and not total THC or the concentrations of THCa, controls the legal status of hemp and hemp products." (Pet.'s PFO, ¶ 41).

49. One of the problems with Petitioner's argument is the "statutory definition" to which it points is the 2018 Farm Bill definition of "hemp"[5] and not the Florida statutory definition, which requires a "*total* delta-9" calculation, as discussed above. "Total" delta-9 calculations include THCA.

50. Petitioner further asserts that section 581.217(12) "mirrors the requirements of the 2018 Farm Bill as it relates to compliance testing for in-production hemp." (Pet.'s PRO, ¶ 55). A plain reading of section 581.217(12), though, shows that it applies to "cultivated hemp" and does not, as suggested by Petitioner, limit rulemaking to "in-production" hemp. "Cultivate" means planting, watering, growing, or harvesting hemp. § 581.217(3)(d), Fla. Stat. By authorizing rulemaking to "cultivat*ed* hemp," the Legislature authorized rulemaking to administer the state's hemp plan vis-à-vis "planted, watered, grown, or harvest*ed* hemp."

51. Both parties agree that pre-harvest testing of hemp, and compliance with the 0.3% delta-9 THC limit, is required by the 2018 Farm Bill. In unrebutted testimony, Dr. Curran explained that the act of cutting a plant from a field (*e.g*. harvesting) can change the concentration of cannabinoids in that plant because it is no longer taking up water nor is it alive. (Tr. 80, 146). That testimony is credited. Because delta-9 THC is a cannabinoid, and thus subject to change in concentration, post-harvest testing ensures compliance with the 0.3% total delta-9 concentration limit in retail products. (Tr. 81).

52. Nothing in section 581.217 limits post-decarboxylation testing to pre-harvest as is suggested by Petitioner. As such, the undersigned cannot find

[5] "The plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with *a delta-9 tetrahydrocannabinol concentration* of not more than 0.3 percent on a dry weight basis." 7 U.S.C. § 1639*o* (emphasis added).

that Respondent did not have authority to promulgate the Rule and apply it to post-production (*e.g.* harveste*d*) hemp-based products.

Petitioner's Products and Respondent's Statements

53. Petitioner sells hemp flower products, like the White Truffle product above, that are buds of cannabis plants. The buds are not processed beyond cutting them from the rest of the plant and placing them into their packaging. (T. 45). As Mr. O'Brien described them: "our flower is flower. There is nothing added to these plants." Each hemp flower product sold by Petitioner has its own COA that was generated by that flower's farmer. (Tr. 40).

54. Hemp flower products, like Petitioner's, contain cannabinoids and are derived from a hemp plant. (Tr. 59). They can be inhaled or ingested.[6] (Pet.'s Resp. in Opp. to Resp.'s Motion for Summary Final Order, p.11; Tr. 51-52, 60).

55. Respondent issued its Inspection Reports, Supplemental Reports, and Stop Sale Orders aimed at Petitioner's hemp-based products stating they are "hemp intended for human consumption" that "contains a total delta-9 tetrahydrocannabinol concentration of more than 0.3% on a dry weight basis" and are thus considered "adulterated."

56. The agency statements Petitioner contends are unadopted rules are: (1) FDACS' regulation of hemp, that is not "hemp extract," as a food product; and (2) FDACS' regulation of hemp and hemp-based products in the same manner as "hemp extract." (Jt. Pre-Hearing Stip., ¶ B (1)).

---

[6] Petitioner advised the undersigned that "[t]he hemp flower at issue is not marketed or intended to be ingested or otherwise used as food. Rather, the flower products are marketed for inhalation." (Pet.'s Resp. in Opp. to Resp.'s Motion for Summary Final Order, p.11). At hearing, Mr. O'Brien testified that the "individuals that come into our facilities half of them aren't even smoking this product if that's the concern. Half of them are taking it and juicing it… . " (Tr. 51-52). "So you can juice the product as well and you can make tea drinks… ." (Tr. 60). "Some individuals will use alcohol to strip the plant…and it will just leave the cannabinoids themselves, the terpenes or the cannabinoids" to consume as oil under their tongue." (Tr. 60).

57. Respondent asserts that all hemp products that are intended for human consumption (*e.g.* ingestion or inhalation) are, by statutory definition, hemp extract. Respondent asserts when hemp is intended for inhalation or ingestion, then it becomes hemp extract under the definition found at section 581.217(3)(f) and regulated as an adulterated food pursuant to sections 500.03(1)(m)6. and 581.217(2)(b). It further states that "human consumption," "ingestion," and "inhalation" are all duly-adopted definitions within Rule 5K-4.034 and Petitioner's redefinition of "hemp extract" to "include an extraction process" does not an unadopted rule challenge make.

58. Section 500.03 was amended in July 2023, just after Petitioner's last successful inspection by Respondent, to include section 500.03(1)(m)6. and states:

> (m) "Food" includes:
> 1. Articles used for food or drink for human consumption;
> 2. Chewing gum;
> 3. Articles used for components of any such article;
> 4. Articles for which health claims are made, which claims are approved by the Secretary of the United States Department of Health and Human Services and which claims are made in accordance with s. 343(r) of the federal act, and which are not considered drugs solely because their labels or labeling contain health claims; and
> 5. Dietary supplements as defined in 21 U.S.C. s. 321(ff)(1) and (2); and
> 6. Hemp extract as defined in s. 581.217.
>
> The term includes any raw, cooked, or processed edible substance; ice; any beverage; or any ingredient used, intended for use, or sold for human consumption.

59. Section 581.217(3)(f) states, in pertinent part:

> (f) "Hemp extract" means a substance or compound intended for ingestion, containing more than trace amounts of a cannabinoid, or for inhalation which is derived from or contains hemp and which does not contain controlled substances.

60. Rule 5K-4.034 states, in pertinent part:

> (1) Products.
>
> (a) Section 581.217(7)(b), F.S., provides that Hemp Extract distributed or sold in violation of Section 581.217, F.S., shall be considered adulterated or misbranded pursuant to Chapter 500, F.S. As such, products consisting of or containing Hemp Extract intended for Human Consumption are subject to the requirements of Chapter 500, F.S., Section 581.217, F.S., and Rules 5K-4.002, 5K-4.004, 5K-4.020, 5K-4.021, and 5K-4.035, F.A.C., in addition to the requirements of this rule.
>
> * * *
>
> (2) Definitions. The definitions provided in Sections 500.03 and 581.217, F.S., and the following shall apply to this rule:
>
> * * *
>
> (d) "Hemp" is defined in Section 581.217(3)(d), F.S.
>
> (e) "Hemp Extract" is defined in Section 581.217(3)(e), F.S.
>
> * * *
>
> (g) "Human Consumption" includes products intended for human *Ingestion* and/or human *Inhalation* but does not include topical applications.
>
> (h) "Ingestion" means the process of consuming Hemp Extract through the mouth, whether by swallowing into the gastrointestinal system or through tissue absorption.
>
> (i) "*Inhalation*" means the process of consuming Hemp Extract through the mouth or nasal passages into the respiratory system.
>
> * * *

(k) "Processor" or "Extractor" means the establishment that removes the Hemp Extract oil from the Hemp plant.

* * *

(4) Requirements.

* * *

(g) Hemp Extract intended for Human Consumption shall not contain a Total delta-9 tetrahydrocannabinol concentration of more than 0.3%.

* * *

(9) Penalties.

* * *

(b) Hemp Extract intended for Human Consumption distributed or sold in violation of this rule shall be considered adulterated or misbranded pursuant to Chapter 500, F.S., as provided in Section 581.217(7)(b), F.S.

(c) Hemp or Hemp Extract Products must meet the requirements of this rule. Such products not meeting the requirements of this rule or without the documentation required in paragraphs (4)(a)-(b) of this rule may not be sold in this state.

61. Section 581.217(2) states:

(2) Legislative findings.--The Legislature finds that:
(a) Hemp is an agricultural commodity.
(b) Hemp-derived cannabinoids, including, but not limited to, cannabidiol, are not controlled substances or adulterants if they are in compliance with this section.

62. Petitioner contends that its hemp flower products are hemp and not hemp extract, because they have not undergone an extraction process.[7] (Pet.'s PFO, ¶¶ 67-68). Respondent argues that no "extraction process" is required to convert hemp to hemp flower under section 581.217(3)(f); rather, upon the hemp substance being intended for ingestion or inhalation, it becomes hemp extract by operation of law.

Extract of Hemp Versus Hemp Extract

63. Mr. Ware, as someone who oversees laboratory testing of hemp, testified that "hemp extract," as he understands it, is a substance that contains cannabinoids that has "undergone an extraction process that's subjected to … some kind of form of chemical extraction followed by distillation." (Tr. 121). Dr. Curran agreed that there is an extraction process that can be applied to hemp where the cannabinoids are pulled, in liquid form, from the plant. (Tr. 80). Extracts from hemp are used to make gummy hemp products. (Tr. 121). Those extracts are tested for their delta-9 THC level on a wet weight basis. (Tr. 123-124, 130).

64. Petitioner's confusion is understandable as the definition of "hemp" includes derivatives, like "extracts." However, the Legislature has defined "hemp extract" separate and apart from the "extract" of hemp as a derivative. That statutory definition of "hemp extract" versus the "extract" of hemp is one example of what the experts, both in chemistry and hemp testing, testified was a "challenge" between the legal jargon not matching the chemical lexicon. (Tr. 112, 125, 154).

65. The undersigned can discern no "extraction process" that a hemp product must undergo in order to become "hemp extract" under the statutory definition and Petitioner's engrafting onto the statutory definition such a process is not well-taken. That there is an extraction process whereby some

[7] Petitioner also half-heartedly asserted that its flower products cannot be hemp extract because they are not hemp-derived vaping products, they are simply hemp. (Tr. 45, 153-155; Pet.'s PFO, ¶ 76). Because Mr. O'Brien testified the flower products at issue are hemp-derived (Tr. 59), and because "inhalation" is not limited to vaping, the undersigned cannot agree. *See* Fla. Admin. Code R. 5K 4-034(2)(i).

hemp undergoes a distillation is irrelevant to whether the product is meant for ingestion or inhalation, the hallmarks of "hemp extract," as defined in statute.

66. Respondent is the agency charged with administering both Florida's Food Safety Act and Florida's hemp plan. That it has chosen to regulate "hemp" as food, when it is intended for human consumption, like "hemp extract," appears to be within its authority and pursuant to adopted rules and enacted statutes.

CONCLUSIONS OF LAW

67. DOAH has jurisdiction over the subject matter and parties to this action in accordance with section 120.56.

68. Any person who is substantially affected by an existing rule can petition DOAH for a final order determining that the rule is an invalid exercise of delegated legislative authority; and any person affected by an agency statement that is an unadopted rule may seek a final order determining that the statement violates section 120.54(1)(a). § 120.56(1) and (4), Fla. Stat. Petitioner has demonstrated it is substantially affected by Respondent's challenged statement and, by virtue of being a licensed retailer of hemp-based products, the existing rule being challenged. Respondent concedes Petitioner's standing. As such, Petitioner has standing to maintain its challenges.

69. Petitioner bears the burden of proving by a preponderance of the evidence that Respondent has made a statement, or statements, that constitute unadopted rules, and that rule 5K-4.034(2)(m) is an invalid exercise of delegated legislative authority. In a challenge to an existing rule, the Petitioner bears the burden of proving by a preponderance of the evidence that the rule is invalid as to the objections raised. § 120.56(3)(a), Fla. Stat.

70. As stated in section 120.52(8):

> (8) "Invalid exercise of delegated legislative authority" means action that goes beyond the

powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

(a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a) 1.;

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a) 1.;

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

(e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or

(f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language

> granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

71. Here, Petitioner maintains that rule 5K-4.043(2)(m) is an invalid exercise of delegated legislative authority in violation of section 120.52(8)(b), (c), and (e). (Amended Petition, ¶ 36).

Respondent Did Not Exceed Its Grant of Rulemaking Authority

72. "'Rulemaking authority' means statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of the term 'rule' and 'law implemented' means the language of the enabling statute being carried out or interpreted by an agency through rulemaking." *Fla. Prepaid Coll. Bd. v. Intuition Coll. Savings Solutions, LLC*, 330 So. 3d 93, 97 (Fla. 1st DCA 2021).

73. "Section 120.536(1) and the flush-left paragraph in section 120.52(8) require a close examination of the statutes cited by the agency as authority for the rule at issue to determine whether those statutes explicitly grant the agency authority to adopt the rule." *Id.* citing *MB Doral, LLC v. Dep't of Bus. & Prof'l Reg., Div. of Alcoholic Beverages & Tobacco*, 295 So. 3d 850 (Fla. 1st DCA 2020). "[T]he question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough. Either the enabling statute authorizes the rule at issue or it does not." *Id*.

74. Whether an existing rule is an invalid exercise of delegated legislative authority under section 120.52(8)(b) and the flush-left language must be determined on a case-by-case basis. *Sw. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).

75. Section 500.09, cited as rulemaking authority for the Rule, states, in pertinent part:

> (4) The department may adopt rules relating to food safety and consumer protection requirements

> for the manufacturing, processing, packing, holding, or preparing of food; the selling of food at wholesale or retail; or the transporting of food by places of business not regulated under chapter 381 or chapter 509.
>
> (5) The analytical work necessary for the proper enforcement of this law and rules adopted by the department in regard to food shall be done by the department or under the direction of the department and is prima facie evidence in any court in this state.

76. Section 570.07, cited as additional rulemaking authority states, in pertinent part:

> The department shall have and exercise the following functions, powers, and duties:
>
> (23) To adopt rules pursuant to ss. 120.536(1) and 120.54 to implement provisions of law conferring duties upon it.

77. In light of the foregoing legal principles, rule 5K-4.034(2)(m) does not exceed the grant of rulemaking authority. Section 581.217(12) directed Respondent to adopt rules "to administer the state hemp program." Those rules "must provide for" a "procedure that uses post-decarboxylation or other similarly reliable methods for testing the delta-9-tetrahydrocannabinol concentration of cultivated hemp." § 581.217(12)(a), Fla. Stat.

78. Respondent has also been granted authority to adopt rules for food relating to safety and consumer protection. Hemp extract is statutorily defined as food. Ensuring those products comply with the "total delta-9 THC" requirement under a post-decarboxylation standard required Respondent to identify and include THCA, a potentially psychoactive compound, in its formula definition for safety and consumer protection. The Rule allows consumers to know, when purchasing hemp extract for human consumption, the maximum potential psychoactive effect of the product.

79. Petitioner contends that the Rule exceeds Respondent's rulemaking authority because it was not given authority to define "total delta-9-tetrahydrocannabinol concentration." However, an agency is not prohibited from defining a phrase in a rule which is undefined by statute. *Bd. of Podiatric Med. v. Fla. Med. Ass'n,* 779 So. 2d 658 (Fla. 1st DCA 2001); *Fla. Elections Comm'n v. Blair*, 52 So. 3d 9 (Fla. 1st DCA 2010); *Hanger Prosthetics and Orthotics, Inc. v. Dep't of Health*, 948 So. 2d 980 (Fla. 1st DCA 2007).

80. Petitioner further contends Respondent lacked authority to adopt the formula in the Rule, total delta-9 tetrahydrocannabinol concentration = delta-9 THC + (0.877 x THCA), that accounts for THCA. Because the statute directed Respondent to adopt a rule that uses "post-decarboxylation or other similarly reliable methods for testing the delta-9-tetrahyrdocannabinol concentration of cultivated hemp" and because the formula adopted tracks the formula in the federal regulation describing post-decarboxylation testing of hemp, Respondent did not exceed its rulemaking authority.

81. Respondent's definition of the phrase "total delta-9 tetrahydrocannabinol concentration" is consistent with section 581.217 and the grant of rulemaking authority. That authority includes the ability to define terminology related to its statutory mandate to administer the hemp plan and give effect to the Legislature's use of the word "total" preceding "delta-9" in the definition of "hemp." *See Bogard v. Cnty. Mutual Ins. Co.*, 2021 WL 4269991 (D. Oregon)(Sept. 20, 2021)(general discussion of import of "total THC" standard with and without reference to the federal post-decarboxylation regulation); *N. Va. Hemp and Agric., LLC v. Va.*, 2023 WL 7130853(E.D. Va.)(Oct. 30, 2023)(general discussion of "total THC" standard provided by post-decarboxylation regulation incorporated into state law).

The Rule Does Not Enlarge, Modify, or Contravene the Specific Provisions of Law Implemented

82. Petitioner argues that the Rule is not valid when applied to post-harvest hemp products for retail sale as it "enlarges, modifies, or contravenes the specific provisions of the law implemented" in violation of section 120.52(8)(c). "The 'law implemented' is the language of the enabling statute being carried out or interpreted by an agency through rulemaking." § 120.52(9), Fla. Stat; *Blair*, 52 So. 3d at 14.

83. Because Petitioner points to the 2018 Farm Bill as the law implemented, and not section 581.217, its argument is misplaced. (Pet.'s PFO, ¶¶ 41-59). When Petitioner *does* discuss section 581.217, it incorrectly states what the statute provides. Specifically, Petitioner boldly states, "[t]he only statutory provision regarding hemp that takes into consideration a THCa calculation is section 581.217(12)(a), which directs FDACS to issue a rule for compliance testing by hemp producers who are in the process of harvesting their hemp." (Pet.'s PFO, ¶ 60). Of course, as stated earlier, section 581.217(12)(a) instead states:

> (12) Rules.--The department shall adopt rules to administer the state hemp program. The rules must provide for:
> (a) A procedure that uses post-decarboxylation or other similarly reliable methods for testing the delta-9-tetrahydrocannabinol concentration of cultivated hemp.

84. Again, as discussed earlier, while the 2018 Farm Bill is limited to production, Florida's hemp plan does not use the term "produce" and instead uses the word "cultivate." Cultivate is defined as "planting, watering, growing, *or* harvesting." *See* § 581.217(3)(d), Fla. Stat. The Legislature directed FDACS to adopt rules requiring post-decarboxylation testing to "cultivat*ed* hemp," which *can* mean hemp that is either still in the ground or harvested. In short, Petitioner's view that a post-decarboxylation test is limited to pre-harvest hemp is unsupported by the law implemented.

Respondent's interpretation of the statute and rule is within the range of permissible possible and reasonable interpretations and results from a plain reading of the statute. *Society for Clinical and Medical Hair Removal, Inc. v. Dep't of Health*, 183 So. 3d 1138 (Fla. 1st DCA 2015); *G.B. v. Ag. for Pers. with Disab.*, 143 So. 3d 454 (Fla. 1st DCA 2014)(agency's rule and interpretation "must comport with the specific authorizing statute.").

85. Respondent's Rule that applies a post-decarboxylation test to post-harvest hemp products is both logical and permissible. There is nothing in the statute that expressly limits testing to pre-harvest hemp and post-harvest testing ensures compliance with the 0.3% total delta-9 THC standard. (Tr. 81).

The Rule is Not Arbitrary or Capricious

86. A rule "is arbitrary if it is not supported by logic or the necessary facts, and is capricious if it is adopted without thought or reason or is irrational." § 120.52(8)(c), Fla. Stat. Petitioner does not articulate how it believes the Rule is arbitrary or capricious.

87. As discussed above, Respondent adopted the formula in the Rule to comply with the statute's directive to provide a procedure that uses post-decarboxylation for testing cultivated hemp. Using the formula in the federal regulation that describes post-decarboxylation testing is logical and rational.

88. With respect to application of the Rule to post-harvest hemp, Respondent provided a logical and rational explanation. As Dr. Curran testified, the concentration of cannabinoids in hemp can change post-harvest. (Tr. 80, 146). Post-harvest testing is needed to ensure compliance with the 0.3 percent total delta-9 concentration limit of retail products. (Tr. 81). The Rule is neither arbitrary nor capricious.

Respondent's Statements are not Unadopted Rules

89. Section 120.52(20) provides that an "[u]nadopted rule' means an agency statement that meets the definition of the term 'rule,' but that has not been adopted pursuant to the requirements of 120.54."

90. "An agency statement that is the equivalent of a rule must be adopted in the rulemaking process. *See, e.g., Christo v. State Dep't of Banking and Fin.,* 649 So. 2d 318 (Fla. 1st DCA 1995); *Fla. League of Cities v. Admin. Comm'n,* 586 So. 2d 397 (Fla. 1st DCA 1991). This requirement, carried forward in section 120.54(1), Florida Statutes, prevents an administrative agency from relying on general policies that are not tested in the rulemaking process, but it does not apply to every kind of statement an agency may make. Rulemaking is required only for an agency statement that is the equivalent of a rule, which is defined in section 120.52(15), Florida Statutes (1996), as a statement of 'general applicability.'" *Env't Tr. v. State, Dep't of Env't Prot.*, 714 So. 2d 493, 498 (Fla. 1st DCA 1998).

91. An agency's statement that "merely reiterates a law, or declares what is 'readily apparent' from the text of a law," is not an unadopted rule. *Grabba-Leaf, LLC v. Dep't of Bus. & Prof'l Reg., Div. of Alcoholic Beverages & Tobacc*o, 257 So. 3d 1205 (Fla. 1st DCA 2018)*; State Bd. of Admin. v. Huberty*, 46 So. 3d 1144 (Fla. 1st DCA 2010); *Beverly Enterp.-Fla., Inc. v. Dep't of HRS*, 573 So. 2d 19 (Fla. 1st DCA 1990); *St. Francis Hosp., Inc. v. Dep't of HRS*, 553 So. 2d 1351 (Fla. 1st DCA 1989).

92. Here, Respondent's statements are declaring what is readily apparent from the text of section 581.217 and its adopted rules. Petitioner's arguments amount to a disagreement that its products meet the definition of "hemp extract" and/or "food."

93. Any error by Respondent in its application of facts to the law, including whether Petitioner's flower products meet the definition of "hemp extract" or "food," may be remedied by the adjudicatory process detailed in section 120.57.

94. Respondent adopted the formula in rule 5K-4.034(2)(m) that Petitioner claims was unadopted. Specifically, Petitioner alleged in its Amended Petition:

> FDACS' imposition of a requirement that the total percentage of THC in a hemp-based product, and

> not only the delta-9 THC concentration, is the test for whether a product may be sold in Florida constitutes an unadopted rule…

(Amended Petition, ¶ 21).

Costs and Attorney's Fees

95. Respondent's request for costs and attorney's fees in the amount of $1,000.00 is granted. Respondent limited its request to Petitioner's assertion in its Amended Petition that Respondent did not adopt as a rule the formula defining total delta-9 THC concentration.

96. Petitioner, as late as the filing of the Joint Pre-Hearing Statement, stated:

> The Petitioner is challenging the Respondent's imposition of a requirement that the total percentage of THC in a hemp-based product, and not only the delta-9 THC concentration, is the test for whether a product may be sold in Florida as an unadopted rule that is contrary to Florida law…

(Jt. Pre-Hearing Statement, A. "Petitioner's Statement").

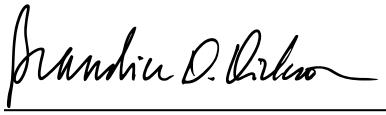
97. The claim was not withdrawn prior to the final hearing.

98. Petitioner, or Petitioner's attorneys, should have known that the claim that Respondent applied a total THC formula that was unadopted by rule would not be supported by the application of then-existing law to the material facts.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner's challenges are dismissed and Petitioner is ordered to pay Respondent $1,000.00 in costs and attorney's fees.

DONE AND ORDERED this 4th day of March, 2024, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.