

Environmental Issues in the Cannabis Industry: Evolving Regulations and Litigation for Marijuana, CBD, and Hemp

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Today's faculty features:

Jordan E.A. Ferguson, Attorney, **Venable LLP**, Los Angeles, CA

Danielle Mettler-LaFeir, Partner, **Barclay Damon LLP**, Rochester, NY

Mackenzie S. Schoonmaker, Principal, **Beveridge & Diamond**, New York, NY

Christopher D. (Chris) Strunk, Partner, **Gordon Rees Scully Mansukhani**, San Francisco, CA

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Environmental Regulatory Issues: Cannabis Growing and Processing

By: Danielle E. Mettler-LaFeir

Overview

- Regulatory Framework for Growing and Processing Cannabis (recreational, medical, hemp)
- Environmental Impacts of Growing and Processing Cannabis
- Requirements that May Apply to the Environmental Impacts of Cannabis Growing and Processing
 - A. Specific to Cannabis Production
 - B. Generally Applicable Environmental Regulations
- Key Takeaways

States with Recreational/Adult Use Programs

- Massachusetts
- Oregon
- California
- Michigan
- Washington
- Colorado
- Alaska
- Nevada
- Maine
- Vermont
- Washington, D.C.
- Illinois

Medical

- Growing and processing of medical marijuana for medicinal use is regulated solely by states
- Medical marijuana is prohibited federally by the Controlled Substances Act
- Range of requirements and limitations specific to each state

Regulatory Framework – Production of Hemp

- Hemp (Growing)
 - 2014 Farm Bill authorized State departments of agriculture to grow (or issue licenses to grow) industrial hemp for research purposes. (7 U.S.C. 5801)
 - The Agriculture Improvement Act of 2018 signed into law December 20, 2018 (popularly known as the 2018 Farm Bill) legalized the cultivation and sale of hemp, effective January 1, 2019. (7 U.S.C. Chapter 38, Subchapter VII Hemp Production)
 - Removed hemp (defined as the plant *Cannabis sativa* L. and any part of the plant with a delta-9 THC concentration of not more than 0.3 percent by dry weight) from the definition of marijuana in the Controlled Substances Act, (“CSA”) 21 U.S.C. § 812.
 - Required the United States Department of Agriculture (“USDA”) to issue regulations for growing hemp.

Regulatory Framework – Production of Hemp

(cont)

- Pursuant to the 2018 Farm Bill, hemp may only be produced:
 - With a USDA issued license;
 - Under a USDA-approved State or Tribal Plan; or,
 - Under a State’s existing industrial hemp pilot programs for one year from when the USDA rule is issued.

USDA Legal Opinion on Certain Provisions of the Agricultural Improvement Act of 2018 Relating to Hemp (May 28, 2019).

- October 31 2019, USDA issued an interim final rule. Therefore, after November 1, 2020, a grower would have had to be licensed by USDA or a state’s USDA approved plan.
- On October 1, 2020, Congress extended state pilot programs through September 2021

Regulatory Framework

Production of Hemp - State

- State authority to regulate the production of Hemp
 - States may not prohibit the interstate transport of hemp lawfully produced under a state or tribal plan, or under a license issued under the USDA plan
 - States may prohibit the growing, processing or sale of hemp and hemp products within its borders
 - Idaho is the only state where cultivation of hemp is prohibited
 - Specific requirements associated with hemp products vary by state.
 - States allowing hemp to be grown, must do so only:
 - According to USDA regulations;
 - Pursuant to a State/Tribal regulatory plan approved by the USDA ;
or,
 - Pursuant to a state pilot program (through September 2021)

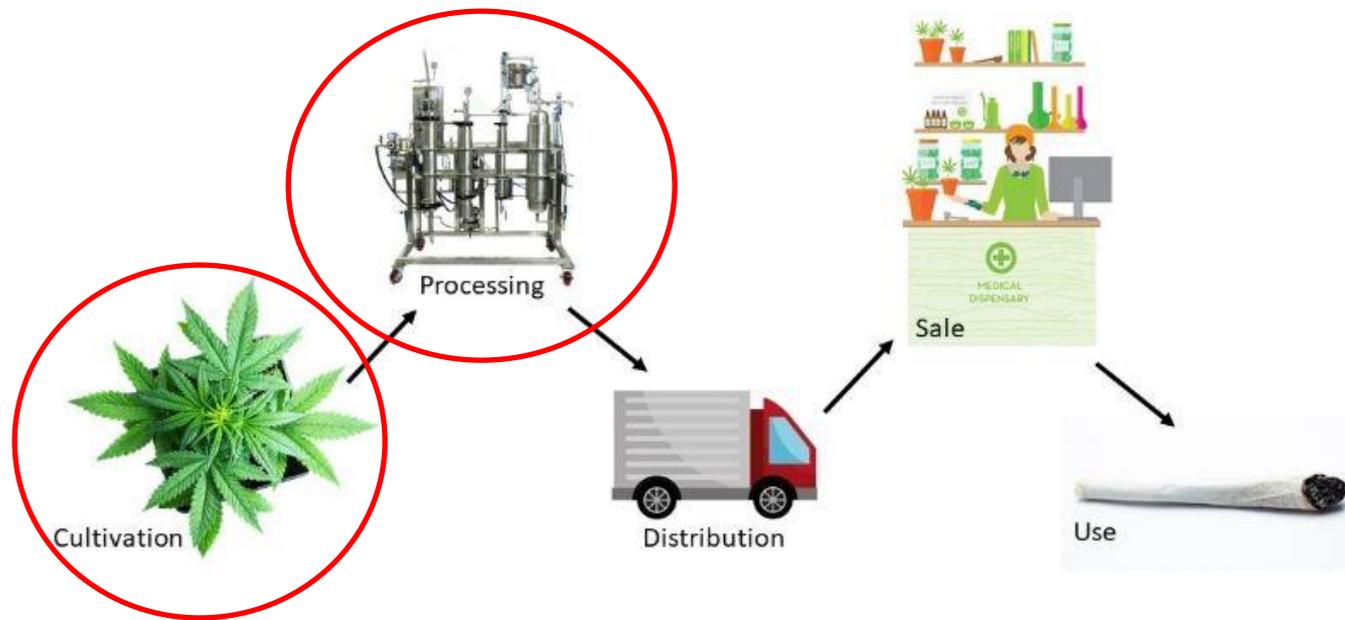
Regulatory Framework - Hemp Processing

- Facilities that process hemp, including extraction of CBD, may be subject to state and federal requirements, including licensing and environmental permitting
- Facilities that manufacture CBD and hemp products may also be subject to state and federal requirements, including licensing and environmental permitting

Regulatory Framework for Cannabis (that is not “hemp”)

- Federal. Cultivation and sale of cannabis (and cannabis products) that does not fall under the definition of “hemp” is still considered “marihuana,” a controlled substance, and is prohibited by the federal Controlled Substances Act.
- State. Cultivation, processing and sale of cannabis that does not fall under the definition of “hemp” is based on State law only (still prohibited federally).

Environmental Impacts of Cannabis Production



Source: *White Paper: The Environmental Impacts of the Marihuana Industry*, Michigan Department of Environmental Quality Marihuana Workgroup (September 17, 2018) <https://www.michigan.gov/marijuana/0,9306,7-386-89868-505455--,00.html>

Environmental Impacts of Cannabis Production

- Cultivation
 - Indoor
 - Energy use (emissions and climate change)
 - Water use
 - Waste
 - Wastewater
 - Land use
 - Outdoor
 - Water use
 - Wastewater/stormwater
 - Land use changes (forest/ undeveloped to agriculture, wetland and other restrictions)
 - Wildlife (including endangered species)
 - Pesticides / herbicides
- Processing (Marijuana & Hemp/Cannabidiol (“CBD”))
 - Water
 - Wastewater
 - Air emissions
 - Energy use

Regulation of Environmental Impacts from Cannabis Production & Processing

- Two types of environmental requirements that may apply to cannabis production operations:
 - Regulations specific to cannabis production and/or processing; and,
 - Existing environmental regulatory requirements that may apply to the production and/or processing of cannabis. Application is often based on State guidance and policy documents.

Requirements Specific to Cannabis Production Are Increasing Nationwide

- Nationwide, State and local regulators are ratcheting up environmental requirements applicable to the cannabis industry, particularly those related to:
 - Air (including odor)
 - Use and management of energy
 - Land disturbance and use
 - Water use
 - Waste management (water and solid waste)

Examples of State Environmental Requirements for Cannabis Production

- Alaska (Alaska Administrative Code, Chapter 306 Regulations of Marijuana Industry)
- California (California Code of Regulations, Title 3 Food and Agriculture, Division 8 Cannabis Cultivation)
- Washington (Washington Administrative Code, Title 314 Liquor and Cannabis Board)
- Massachusetts - Cannabis Control Commission regulations (935 CMR 500, 501 and 502)
- Michigan - Marijuana Regulatory Agency rules

Regulatory Requirements Not Specific to Cannabis

- Air
- Land Use
- Water
- Waste Disposal

Air

- Production facilities may require a State-issued air permit, local permit or approval, or be subject to operating requirements and limits.
- Outdoor growing operations are generally not subject to federal air quality regulations due to exemptions for agricultural operations.
- Air emissions from processing facilities, particularly oil extraction, may be subject to state or federal air permitting and/or subject to controls
 - Greenhouse gases (including carbon dioxide)
 - Volatile organic compounds (“VOCs”) and hazardous air emissions from solvents used in extraction activities (e.g. propane, butane, ethanol, isopropyl)
 - Combustion emission sources (generators, boilers, engines and equipment)
 - Odors

Land Use

- Agricultural activities may disturb or impact areas regulated by state or local requirements, and may be prohibited or require permitting (e.g. wetlands, critical wildlife habitat, etc.)
- Construction of processing facilities may disturb regulated areas and/or require state or local building/use permits

Water

- **Quantity**
 - Many states (particularly those in the Western United States) have strict rules on water rights, and require permitting and/or for the source of water to be identified and proof of the right to use the water needed for production;
 - Water withdrawals above a certain threshold may also be subject to state permitting;
- **Storm Water**
 - Construction activities that disturb one or more acres of land with a point source discharge of storm water generally require National Pollution Discharge Elimination System (“NPDES”) permitting pursuant to the Federal Water Pollution Control Act.
 - Processing facilities that are exposed to precipitation may also require permitting.
- **Pretreatment Requirements**
 - If a cannabis production facility discharges to a municipal wastewater treatment plant, it may be required to obtain a permit, and may be subject to Industrial Pretreatment requirements pursuant to 40 CFR 403.
- **Direct Discharges**
 - If a facility will discharge waste water directly to surface waters, the facility must have a NPDES permit (or state equivalent).

Waste Disposal

- Production of cannabis plants produces solid wastes, including stems, seeds, roots, stalks, and soils.
- Processing of cannabis may also result in waste, including plant material, chemicals such as butane, pesticides, etc.
- USDA regulations have specific requirements associated with disposal.
- Many states require this material to be ground up and destroyed prior to disposal, or have other disposal requirements and/or prohibitions.
- Hazardous waste disposal requirements may apply to wastes resulting from chemical treatment of cannabis plants and extraction activities.

Key Take Aways

- The regulation of the environmental impacts of growing and processing cannabis (recreational, medical and hemp) are often based on state and local laws that are not consistent from state to state or locale to locale.
- Cannabis (other than hemp) is still prohibited federally.
- Growing hemp is regulated under the USDA hemp regulations, a USDA-approved state program, or a state pilot program (through September 2021).
- Environmental requirements that may apply to cannabis processing, particularly extraction facilities, may require permits/approvals and controls.

Thank You



Danielle Mettler-LaFeir

Partner

dmettler@barclaydamon.com

585.295.4258



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Civil Litigation Risks in the Cannabis Space

Specific litigation risks for the cannabis industry

- Enforcement actions by various state and local environmental agencies (water boards, etc.) seeking administrative penalties.
- Private litigation risks
 - Products liability/toxic injury
 - Civil RICO
 - Environmental cleanup – CERCLA, RCRA, state law
 - Nuisance actions
 - California-specific issues: Prop 65, CEQA

Regulatory Enforcement



COLORADO
Air Quality

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Enforcement Actions

- Regulatory agency receives a citizen complaint and investigates
- If regulations are deemed to be violated, agency is empowered to:
 - Further investigate;
 - Impose fines and penalties; and
 - Bring civil actions for enforcement if necessary

Enforcement Actions

- Odors are primary concern
 - Drying, extraction
- In the Pacific Northwest, air quality authorities have stepped up odor and emissions-based enforcement actions.
 - *Green Freedom, LLC v. Olympic Region Clean Air Agency*, No. 16-048, 2016 WL 7233503, at *1 (Wash. P.C.H.B. Dec. 2, 2016);
 - *Avitas Agric., Inc. v. Puget Sound Clean Air Agency*, No. 16-003, 2017 WL 478809, at *2 (Wash. P.C.H.B. Jan. 26, 2017)

Enforcement Actions

- Both cases dealt with odors emanating from the facilities.
- The *Green Freedom* case involved a complaint brought by a private landowner.
- In addition to penalties, findings can be used as basis (or as support) for civil nuisance claims
- But **it isn't just odors**. Enforcement actions also result from:
 - Water issues (water quality, misappropriation)
 - Permit noncompliance (local & state)

Private Causes of Action



A nation of lawsuits? Some sobering statistics

- Per the National Center for State Courts, **16,000,000** civil cases filed in 2018; nearly **350,000** were tort cases.
- **Seven** of 8 “Judicial hellholes” have legal cannabis. (FL, CA, NY, PA, NJ, IL, LA)





Cannabis product liability evolves

- **Levy Thamba (2014).**
 - Consumes marijuana-infused cookie and consumes 65 mg of THC.
 - Jumps off of a balcony and dies. “Marijuana intoxication” was identified by the police report as the “chief contributing factor.”

Cannabis product liability evolves

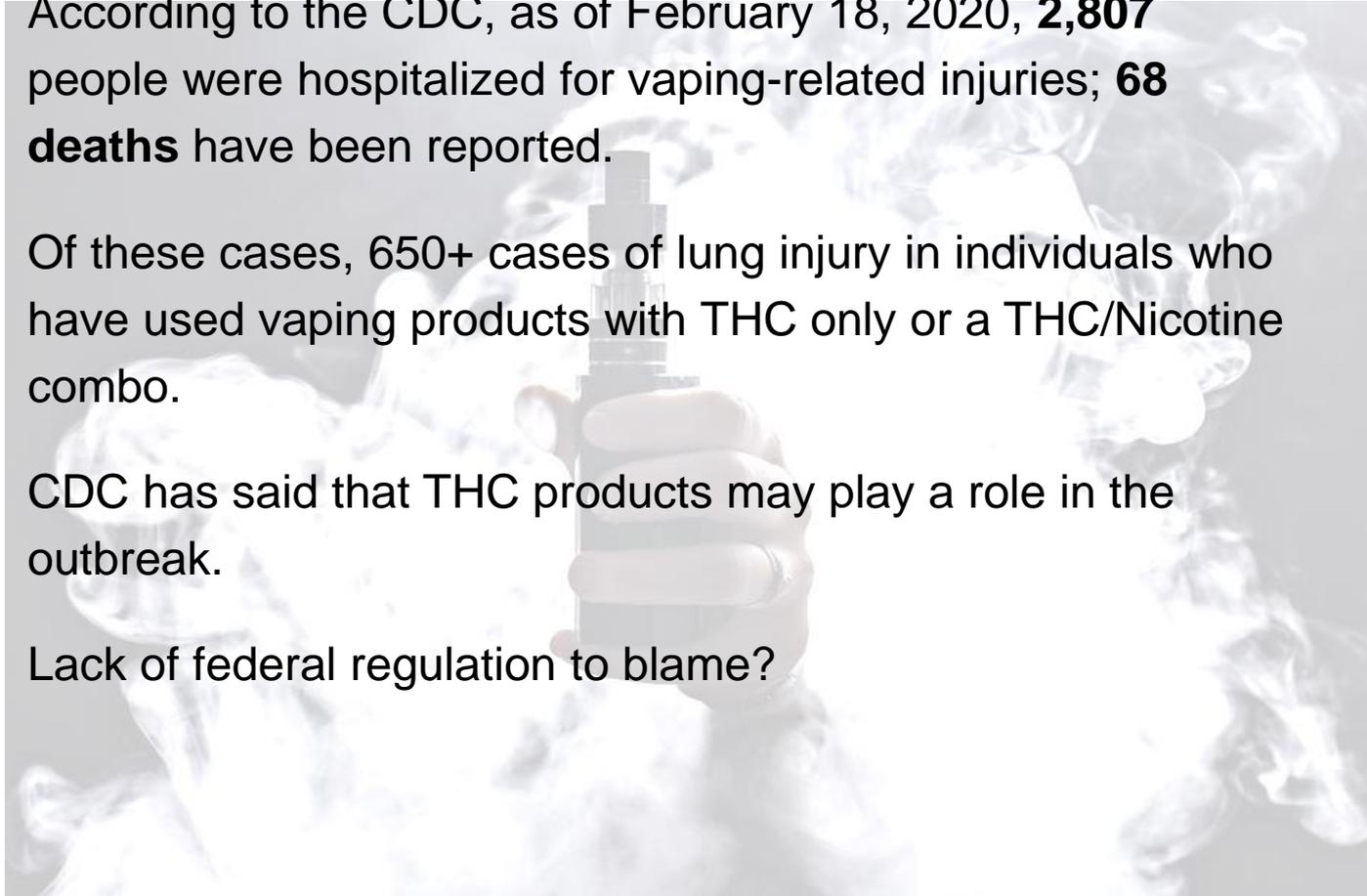
- **Flores v. LivWell (CO 2015).**
 - Diminished economic value does not constitute an “injury in fact.”
 - Court notes the lack of “any allegations that Plaintiffs suffered physical or emotional injury.”

Cannabis product liability evolves

- **Kirk v. Gaia's Garden (CO 2016).**
 - Surviving children of Richard Kirk sued the maker of cannabis-containing candy, Gaia's Garden, and a dispensary, Nutritional Elements, Inc.
 - Alleged consumption of "Karma Kandy Orange Ginger" caused "psychotic behavior, following ingestion of the marijuana infused edible candy" which led Richard Kirk to shoot and kill his wife, Kristine Kirk, at their family home.

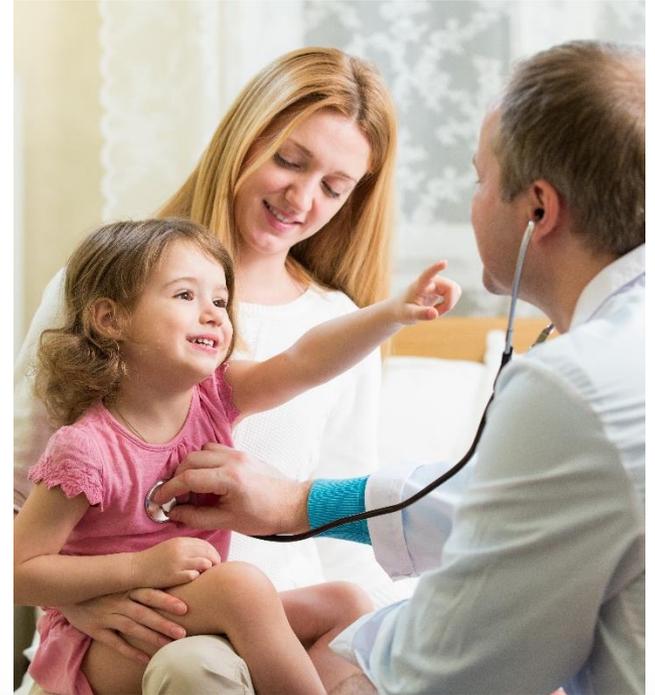
New liabilities -- vaping injuries

- According to the CDC, as of February 18, 2020, **2,807** people were hospitalized for vaping-related injuries; **68 deaths** have been reported.
- Of these cases, 650+ cases of lung injury in individuals who have used vaping products with THC only or a THC/Nicotine combo.
- CDC has said that THC products may play a role in the outbreak.
- Lack of federal regulation to blame?



Foreseeable risks?

- Accidental exposures in children. *JAMA Pediatrics* (2016)
- Edibles appear to account for more ER visits. *Annals of Internal Medicine* (2019)



Foreseeable risks?

- Packaging
- Warnings
- False claims
- Edibles
- High THC products (waxes, concentrates)



Foreseeable risks?

- Risk factors include:
 - Lack of national standardization
 - Quality control issues at extraction point/POS
 - Lack of testing
 - Use of unapproved products on cannabis

Solutions



- Legalization and national standardization
 - Still likely years away; COVID may present delays
- In the interim:
 - Product hazard analysis & warning placement
 - Packaging
 - Disclaimers & liability-limiting/risk-sharing agreements
 - **Insurance**

CERCLA & RCRA



CERCLA

- Stands for the Comprehensive Environmental Response, Compensation, and Liability Act, known also as Superfund.
- Provides a Federal "Superfund" to clean up uncontrolled or abandoned hazardous-waste sites as well as accidents, spills, and other emergency releases of pollutants and contaminants into the environment.



CERCLA

- Enforced by EPA or by private parties in civil litigation
- Through CERCLA, EPA was given power to seek out those parties responsible for any release and assure their cooperation in the cleanup.
- It was passed in 1980 in response to problematic hazardous waste practices.

RCRA

- The Resource Conservation and Recovery Act (RCRA) gives EPA the authority to control hazardous waste from the "cradle-to-grave."
- This includes the generation, transportation, treatment, storage, and disposal of hazardous waste. RCRA also set forth a framework for the management of non-hazardous solid wastes.



Why does this matter?

- Chemicals used in growing and extracting THC and CBD can be federally regulated hazardous wastes.
- Examples include solvents like **butane** and **ethanol**.
- Failure to properly dispose of hazardous wastes can result in criminal and/or civil penalties

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

June 2017 Grand Jury

19 CR 2439 WQH

UNITED STATES OF AMERICA,

Plaintiff,

v.

WELLGREENSCA, INC. (1),
LUNAR LOUSSIA (2),
NADIA MALLOIAN (3),

Defendants.

Case No. _____

I N D I C T M E N T

Title 18, U.S.C., Sec. 371 -
Conspiracy; Title 42, U.S.C.,
Sec. 6928(d)(1) - Illegal
Transportation of Hazardous Waste;
Title 42, U.S.C., Sec. 6928(d)(5) -
Transportation of Hazardous Waste
Without a Manifest; Title 18,
U.S.C., Sec. 2 - Aiding and
Abetting

US v. WellgreensCA, Inc. et al.



- Illegal dumping of 55 gallon drums of ethanol
- RCRA cited as the charging statute
- Potential jail time and substantial fines likely
- Company failed to comply with the law

Civil Actions

- Cannabis companies that engage in extraction or other industrial processes need to be aware that **releases** of contaminants on the property subject them to civil liability under CERCLA
- Costs of cleanup can be in the millions
- Available as a civil remedy to a landowner, who can seek contribution from past polluter as a “potentially responsible party.”

Civil RICO



Civil RICO

- Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* (1970) originally developed to combat organized crime.
- Brought down Lucchese Crime Family and Gambino Crime Family



Civil RICO

- It creates a private, civil cause of action that allows “[a]ny person injured in his business or property by reason of a violation of section 1962” to sue in federal court and obtain:
 - Treble damages
 - Costs
 - Attorneys fees

Bases for claims

- More than two dozen civil RICO claims have been filed against the cannabis industry, targeting the growers and arguing that this constitutes “racketeering activity.”
- Seeks damages for property injuries such as:
 - “Noxious odors” interfere with the use and enjoyment of land and diminishes its value; and
 - The operation of a federally “criminal enterprise” adjacent to the land decreases its value.

Largely unsuccessful – so far

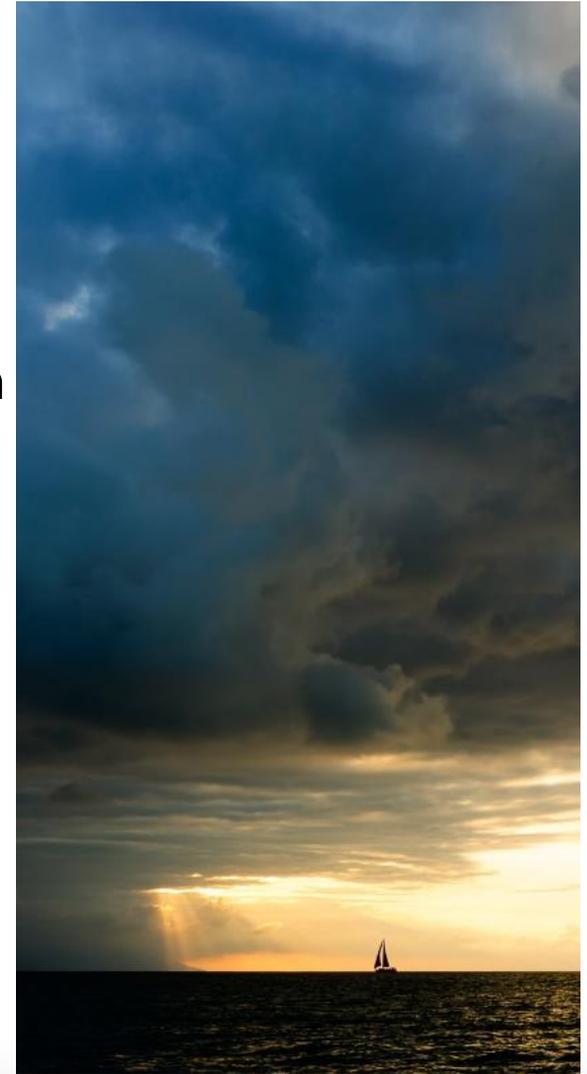
- *Safe Streets Alliance et al. v. Hickenlooper* (CO 2017):
 - Tenth Circuit held that landowners in Colorado had standing to move forward with a civil suit under RICO against a licensed marijuana cultivation enterprise located on an adjacent property,
 - Court finds the existence of a “three plausibly alleged” injuries.
 - On October 31, 2018, a jury returned a decision in favor of the marijuana cultivation enterprise, finding that the plaintiffs had not suffered an injury.

Largely unsuccessful – so far

- Ninth Circuit:
 - *Ainsworth v. Overby*, 326 F. Supp. 1111 (D. Or. 2018)
 - *Bokaie v. Green Earth Coffee LLC*, 2018 WL 6813212 (N.D. Ca. 2018)

But more on the horizon . . .

- April 2, 2019: *Momtazi Family LLC v. Yamill Naturals LLC*
- Court finds plaintiff alleged a concrete injury and case survives 12(b)(6) motion
- Some Civil RICO cases have resolved, other businesses have shut down.



Nuisance



Nuisance as an alternative?

- Garden variety private and public nuisance cases can arise out of same facts as Civil RICO
- Private nuisance:
 - Need only show interference with use or enjoyment of the property and that a reasonable person would be reasonably annoyed or disturbed
- Public nuisance:
 - Adds that the seriousness of harm outweighs the social utility.
- Nuisance as the next state when Civil RICO claims fail

Nuisance as an alternative?

- **Legality or illegality of activity is irrelevant.**
- Odor concerns are primary issue for cannabis-related nuisance claims
- California: wine industry vs. cannabis industry
 - Sonoma County
 - Santa Barbara County
- Private landowners



Pesticides



Pesticide Issues



Regulated by EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)

FEDERAL
FOOD, DRUG
& COSMETIC ACT

UNITED STATES FEDERAL FD&C ACT

EPA also regulates pesticides used for food or feed uses under the tolerance provisions of the Federal Food Drug and Cosmetic Act (FFDCA).



Under the FFDCA, EPA establishes the maximum amount of pesticide residue allowed in or on food or feed (known as a tolerance) or exemptions from tolerance.

Pesticide Issues

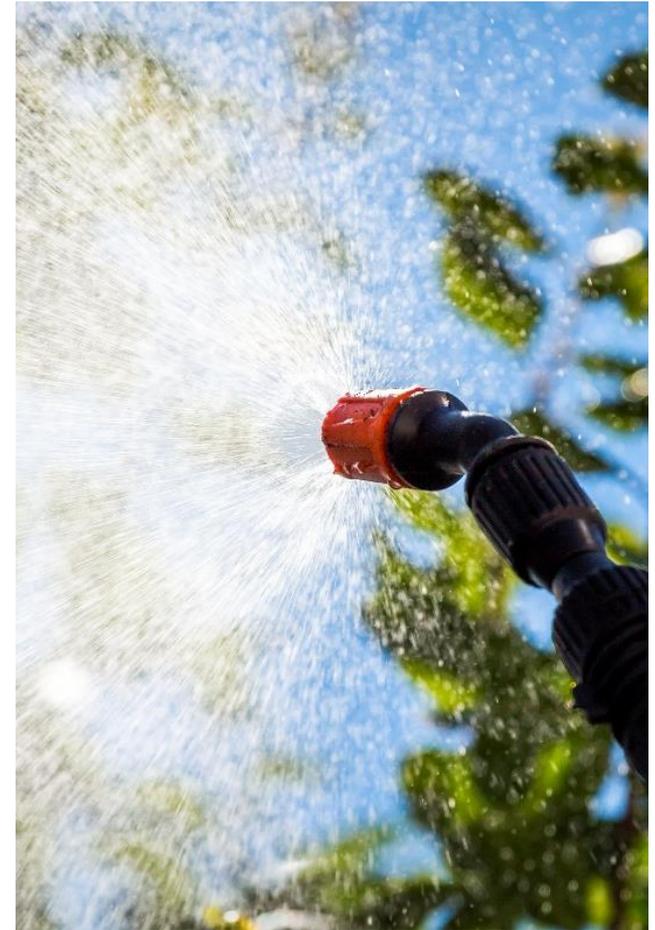
- **FIFRA violation** to use pesticide in a manner for which it is not registered.
- EPA has not approved the registration of any pesticide products for use on cannabis.
 - EPA has approved the registration of certain pesticide products for use on hemp.
- EPA has not established any tolerances or tolerance exemptions for pesticide residues in or on cannabis food products.
- Pesticide approval is a complex process. EPA must assess any risks to the environment or human health that may be associated with the new use.

State Cannabis Rules & Guidance

- Majority of states have rules or guidance addressing the limited circumstances in which pesticides may be lawfully used on cannabis within their jurisdictions.
- Application to cannabis permitted only when:
 - The active ingredient found in the product is **exempt** from residue tolerance requirements under the FFDCA; and
 - The product is **either** (i) exempt from federal FIFRA registration requirements; or (ii) otherwise registered for a use under FIFRA that is broad enough to cover cannabis.

State Cannabis Rules & Guidance

- “Broad enough” for use on cannabis?
 - “For use on outdoor vegetables” or “can be used on greenhouse plants” may be adequate.
 - In some instances, states also require that the pesticide be registered for use on tobacco.



Option to use Minimum Risk Pesticides Exempted under FIFRA 25(b)

- Condition 1: The product's active ingredients must only be those that are listed in 40 CFR 152.25(f)(1).
- Condition 2: The product's inert ingredients may only be those that have been classified by EPA as:
 - Listed in 40 CFR 152.25(f)(2)
 - commonly consumed food commodities, animal feed items, and edible fats and oils as described in 40 CFR 180.950(a), (b), and (c); and
 - certain chemical substances listed under 40 CFR 180.950(e).
- Condition 3: All of the ingredients (both active and inert) must be listed on the label. The active ingredient(s) must be listed by label display name and percentage by weight. Each inert ingredient must be listed by label display name.
- Condition 4: The product must not bear claims either to control or mitigate organisms that pose a threat to human health, or insects or rodents carrying specific diseases.
- Condition 5: The name of the producer or the company for whom the product was produced and the company's contact information must be displayed prominently on the product label.
- Condition 6: The label cannot include any false or misleading statements.

“Special Local Needs” Exemption to FIFRA

- Under Section 24(c), FIFRA provides that each state is authorized to register an additional use of a federally registered pesticide product if certain conditions are met.
- In spring 2017, Vermont, Nevada, Washington, and California each sought to issue four SLN registrations for cannabis uses of tolerance-exempt products. On June 22, 2017, EPA sent letters notifying these states of the Agency’s intent to disapprove the registrations.

Regulatory Authorities are Taking Pesticide Violations Seriously

- On July 9, 2020, the Massachusetts Cannabis Control Commission unanimously approved \$550,000 in combined settlements against two cannabis companies for the companies' improper use of pesticides on cannabis plants.
- Each settlement included not only an agreement to pay fines, but also requirements for detailed recordkeeping of pesticide usage, and agreements to submit each company's plants to additional testing.

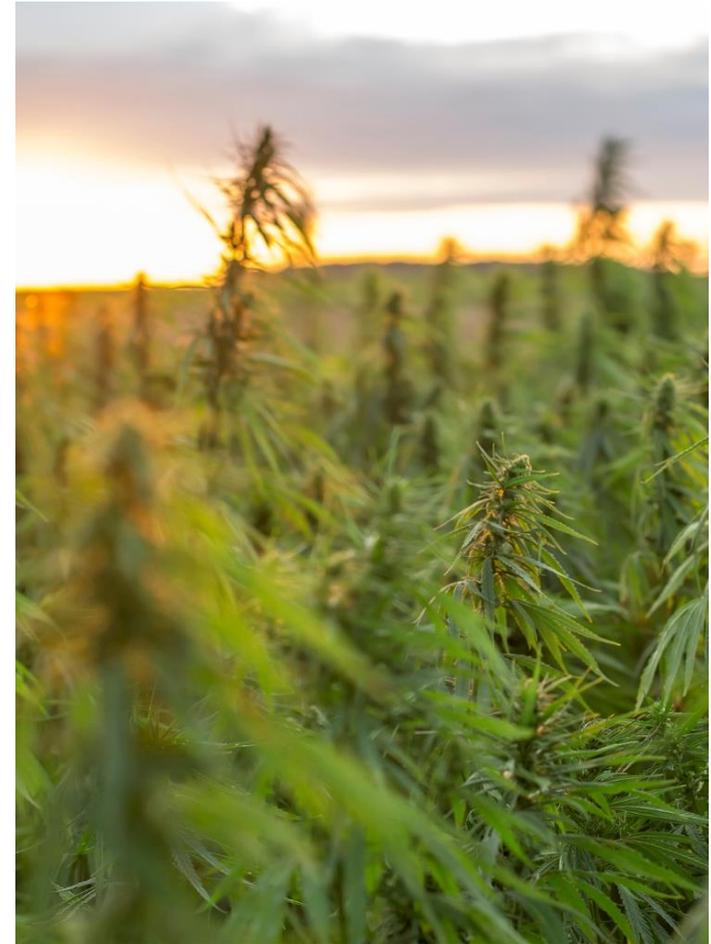
Hemp as a New Frontier?

- The 2018 Farm Bill removed industrial hemp (hemp that contains less than 0.3 percent of THC on a dry weight basis) from classification as a controlled substance.
- On August 21, 2019, EPA announced its receipt of ten applications seeking to add new hemp uses to pesticide products registered under FIFRA.
- These were approved on [December 19, 2019](#), so that the products were available for 2020 growing season.



Hemp has been added as a use site on 47 pesticides

- In December 2019, EPA indicated that it did not anticipate notifying the public of receipt of similar applications in the future. Since then, EPA has approved adding hemp to the use sites of 47 pesticides. Forty-six of the products are biopesticides and one is a conventional pesticide.
- List is available here: <https://www.epa.gov/pesticide-registration/pesticide-products-registered-use-hemp>



Questions?

Thank you!



Mackenzie Schoonmaker

Principal

New York, NY

mschoonmaker@bdlaw.com

(212) 702-5421

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Cannabis Environmental Review and Litigation under State-NEPA Laws

Jordan Ferguson

Venable LLP

(310) 229-0326

JFerguson@Venable.com

VENABLE LLP

OVERVIEW

- Overview of environmental review requirements under NEPA and state NEPA laws
- Summary of environmental impact review of cannabis projects, focusing on the California Environmental Quality Act (CEQA)
- Recent CEQA challenges to cannabis projects



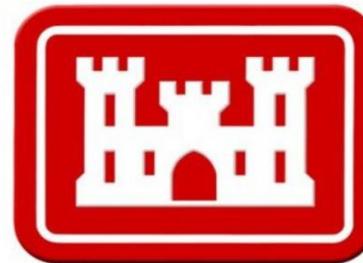
ENVIRONMENTAL REVIEW—NEPA BACKDROP

- The National Environmental Policy Act (NEPA) requires federal agencies to evaluate the potential environmental effects of “major federal actions” on the human environment.
 - When federal agencies propose a major federal action significantly affecting the quality of the human environment, they must prepare a detailed Environmental Impact Statement (EIS) analyzing the environmental impacts of the proposed action and a range of alternatives. U.S.C. § 4332(c).
 - Agencies may prepare a less detailed Environmental Assessment (EA) to determine if an EIS is required, and issue a Finding of No Significant Impacts (FONSI) if no significant impacts are expected.
 - In some cases, Categorical Exemptions apply, exempting actions from more detailed review.



ENVIRONMENTAL REVIEW—DOES NEPA APPLY?

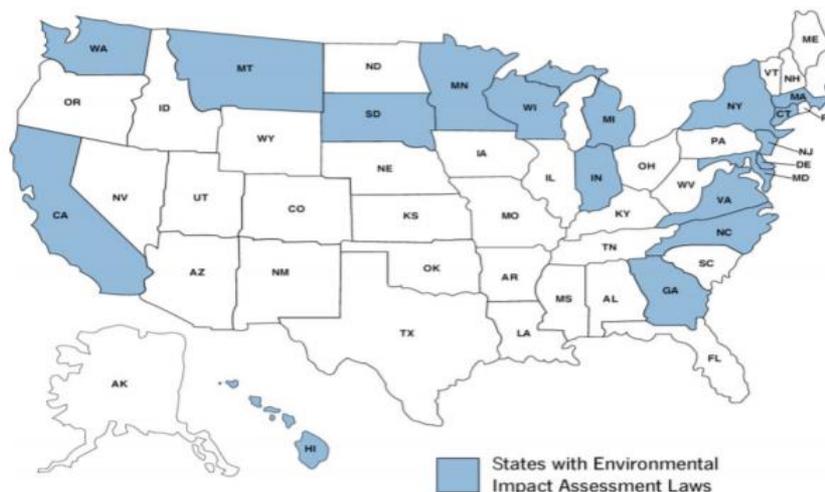
- “Major federal actions” include not just those carried out directly by federal agencies but also private sector projects approved or funded by federal agencies.
- Given that federal agencies are not approving or funding much in the way of cannabis projects *yet*, NEPA has not posed a major hurdle to date.
- But questions have been raised regarding the need for NEPA review of cannabis operations, including in connection with:
 - Land and forest managements plans approved by the U.S. Forest Service and Bureau of Land Management
 - Cannabis cultivation projects made possible by water diversions and/or stream crossings subject to federal approval under the Clean Water Act



ENVIRONMENTAL REVIEW—“STATE NEPA” LAWS

- Compliance with State or “Little NEPA” laws has proven more burdensome.
- 18 states and the District of Columbia have adopted their own environmental impact review laws modeled after NEPA.

Figure 3. States with Environmental Impact Assessment Laws
(e.g., “Little NEPA” laws)



Source: *The NEPA Book*. Solano Press Books

ENVIRONMENTAL REVIEW—“STATE NEPA” LAWS

- State NEPA laws vary some in their applicability. Some apply only to state agencies, while others also apply to local governments and any private projects requiring discretionary approval by state and/or local agencies.
- The laws generally track NEPA in requiring evaluation of the environmental consequences of proposed actions and potential alternatives.
- Some, including CEQA, have more teeth than NEPA, because they require that impacts be mitigated to below significance thresholds to the extent feasible.

Activities and projects subject to State Environmental Policy Acts (by state)			
State	State actions and projects	Local actions and projects	Private actions and projects
California	✓	✓	✓
Connecticut	✓		
Georgia	✓	✓	
Hawaii	✓		
Indiana	✓		
Maryland	✓		
Massachusetts	✓		
Minnesota	✓	✓	✓*
Montana	✓		
New Jersey	✓		
New York	✓	✓	✓†
North Carolina	✓		
South Dakota	✓		
Virginia	✓		
Washington	✓	✓	
Wisconsin	✓		

*Minnesota requires an environmental review of private activities that involve specific agricultural projects
 †Applies only to private actions in New York that require a state permit or state funding

SOURCE: Ballotpedia, https://ballotpedia.org/State_environmental_policy_acts

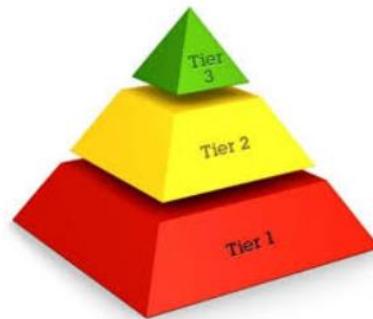
ENVIRONMENTAL REVIEW—PROLIFERATION OF CANNABIS PROJECTS

- State licenses issued to date
 - CalCannabis (cultivation licenses): ~400 annual licenses, ~3,150 provisional licenses, and thousands more temporary licenses
 - Bureau of Cannabis Control and Manufactured Cannabis Safety Branch have issued thousands more cannabis business licenses
 - California’s dual-licensing structure means local governments approve cannabis businesses too.
- Many CA cannabis businesses remain unlicensed
 - February 2018 report by the California Growers Association estimated 68,150 cannabis growers
 - Reasons why? (a backlog of CEQA review is one of several)



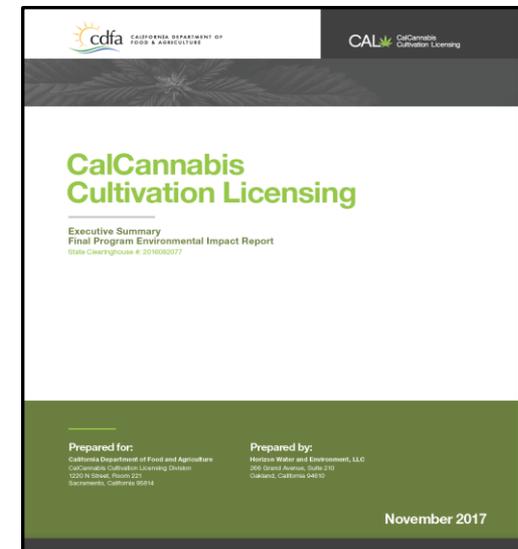
ENVIRONMENTAL REVIEW—CANNABIS CEQA REVIEW TO DATE

- CEQA review has been completed or is underway at three “tiers”
 - CEQA review by state licensing agencies of state regulation
 - CEQA review of local cannabis ordinances and licensing regimes by local governments
 - CEQA review of individual licenses



ENVIRONMENTAL REVIEW—CANNABIS CEQA REVIEW TO DATE

- CalCannabis prepared a Program EIR (PEIR) for its Cultivation Licensing Program in November 2017
- PEIR is intended for use in subsequent CEQA review including “to evaluate project-level cannabis cultivation activities, as well as local and regional programs, newly developed management approaches, or other emerging aspects of cannabis cultivation.”
- But the PEIR does not cover all local/site-specific impacts.



ENVIRONMENTAL REVIEW—CANNABIS CEQA REVIEW TO DATE

16 **1.4.1 Type of EIR: Program EIR**

17 This PEIR, when finalized and certified, will serve as a program-level EIR in accordance with
18 State CEQA Guidelines Section 15168 or as a first-tier EIR prepared in accordance with State

20 One of
21 CDFA's intentions in preparing the PEIR is to minimize the amount of duplicate information
22 that may be required in the future when considering site-specific issues associated with
23 license applications by dealing as comprehensively as possible at the program level with the
24 impacts of the Proposed Program, including cumulative impacts, considering regional issues
25 and similar overarching issues.

24 impacts of the Proposed Program, including cumulative impacts, considering regional issues
25 and similar overarching issues. In general, while substantial efforts have been made to
26 provide as specific an analysis as possible, project-level detail was generally not available or
27 feasible to provide, because of the large number of cultivation sites around the State, the
28 uncertainty regarding which cultivators may seek a license under the Proposed Program at
29 which locations, and the potential range of site-specific environmental issues which cannot
30 be predicted without a site-specific proposal without being unduly speculative.

ENVIRONMENTAL REVIEW—CANNABIS CEQA REVIEW TO DATE

- In most cases, additional local level CEQA review is required, which has caused licensing delays and CEQA litigation risk.
- Local governments have taken very different approaches to review of cannabis ordinances.
 - CEQA Exemptions (statutory and regulatory exemptions for CEQA analysis) (e.g. Yolo County)
 - Negative Declarations (e.g. Sonoma County)
 - Mitigated Negative Declarations (e.g. Mendocino County)
 - Environmental Impact Reports (e.g. Humboldt, Santa Barbara, Santa Cruz, Calaveras)

ENVIRONMENTAL REVIEW—CANNABIS CEQA REVIEW TO DATE

- The divergence in approaches to CEQA compliance is in part the product of differing conclusions about the environmental consequences of commercial cannabis activities including re:
 - The environmental effects of licensing /regulating on various resources such as water, air, and biological resources
 - The impacts of legalizing commercial cannabis activities relative to the baseline environmental conditions created by preexisting illegal commercial cannabis activities



ENVIRONMENTAL REVIEW—CANNABIS CEQA REVIEW TO DATE

- Some local governments found that in their CEQA reviews that a ban would be more environmentally beneficial than local legalization.
- By contrast, CalCannabis and several local governments found that regulating and licensing cannabis cultivation would be environmentally beneficial relative to the baseline condition of widespread illegal cannabis cultivation.
 - Reasoning: absent regulation “a greater number of unpermitted cultivators would continue to operate . . . result[ing] in impacts due to noncompliance with requirements related to water use, illegal use of pesticides, waste disposal, and illegally obtained energy.”
- Others, such as Santa Cruz and Santa Barbara Counties, found that their proposed cannabis programs would have significant and unavoidable direct impacts on several classes of environmental resources.



ENVIRONMENTAL REVIEW—CEQA LITIGATION

- Courts have ruled that local cannabis ordinances are “projects” subject to CEQA.
- ***Union of Med. Marijuana Patients, Inc. v. City of San Diego***, 7 Cal. 5th 1171 (2019)
 - City did not do CEQA review of ordinance limiting where/how dispensaries could operate, reasoning that the ordinance was not a “project.”
 - Reversing the Court of Appeal, California Supreme Court held
 - (1) The enactment of an ordinance was not a “project” subject to CEQA review in all cases, but
 - (2) The enactment of the cannabis ordinance in question was because it had the potential to cause reasonably foreseeable indirect environmental effects, such as increased traffic, increased self-cultivation of marijuana, and increased retail construction.

ENVIRONMENTAL REVIEW—CEQA LITIGATION

- Courts have ruled that agencies violated CEQA in relying on categorical exemptions.
- ***T.C.E.F., Inc. v. County of Kern***, No. F070043, 2016 Cal. App. Unpub. LEXIS 2333 (Mar. 29, 2016)
 - County determined a ballot measure that severely restricted dispensaries was exempt from CEQA under “common sense” exemption, which applies when a project has no potential to have significant environmental effects. Dispensaries sued under CEQA.
 - Court of Appeal held that a ballot measure was not exempt from CEQA review under the exemption due to potential environmental effects of forcing dispensaries out of town.
 - Reasoned that it is reasonably foreseeable that the law would cause some dispensaries to relocate outside of the county, causing indirect effects such as changed traffic patterns.

ENVIRONMENTAL REVIEW—CEQA LITIGATION

- Environmental and other citizen groups have challenged cannabis licensing ordinances and licenses under CEQA too. Several such suits have settled, others remain pending.
- ***Trinity Action Association v. County of Trinity***, Trinity County Superior Court Case. No. 19CV001 (2019)
 - Trinity Action Association (TAA) sued Trinity County and cannabis licensees, seeking to stop issuance and renewal of commercial cannabis cultivation licenses until the county has complied with CEQA.
 - TAA alleges that the county issued nearly 300 licenses without completing CEQA review despite potentially significant direct and cumulative impacts from cannabis cultivation on water supply, water quality, biological resources, and land use.
 - The County’s Board of Supervisors recently rejected a proposed settlement and the case remains pending.
 - The County prepared an IS/MND evaluating its cannabis ordinance, but is now in the process of preparing a PEIR for its cannabis licensing program.

ENVIRONMENTAL REVIEW—CEQA LITIGATION

- ***Friends of the Eel River v. County of Humboldt***, Humboldt County Superior Court Case No. CV10-495 (2018)
 - Environmental group filed CEQA challenge to county’s cannabis ordinance, which allows for licensing of several thousand cultivation sites, and associated EIR. Seeks to set aside the ordinance and EIR, and suspend cannabis cultivation licensing.
 - Complaint focused on impacts on watersheds and protected salmonids from cannabis cultivation, including increased sediment from roads, stream crossings, and grading activities; dewatering salmon-bearing streams; and introduction of toxic pesticides, rodenticides, and fertilizers.
 - The case settled when the County agreed to fund culvert replacements and road repairs in two Southern Humboldt watersheds critical to salmon and steelhead through 2023.

ENVIRONMENTAL REVIEW—CEQA LITIGATION

- ***SMC Marijuana Moratorium Coalition v. County of San Mateo***, Case No. 18CIV00206 (Filed: Jan. 12, 2018)
 - County ordinance allowed for and regulations commercial mixed-light cannabis cultivation in existing greenhouses in unincorporated areas of County. Prohibited all other cannabis activities. County conducted Initial Study and issued Negative Declaration.
 - Anti-cannabis group opposed to cannabis cultivation sued, resulting in a settlement pursuant to which the County repealed the ordinance.
- ***Mendocino County Blacktail Deer Association v. County of Mendocino Board of Supervisors***, Case No. SCUKCVPT 16-67623 (Mendocino County Super. Ct., filed June 14, 2016)
 - Challenge to use of a categorical exemption for a law creating a local commercial cannabis permitting program that settled, resulting in an injunction on issuance of permits pending additional CEQA review.

ENVIRONMENTAL REVIEW—CONSIDERATIONS FOR CANNABIS BUSINESSES SEEKING LICENSES

- CEQA risk is lower in jurisdictions that have completed local-level programmatic environmental review.
- Design your project as much as feasible to fit existing local CEQA coverage (if applicable).
- If no local CEQA coverage exists, design your project to minimize/avoid as much as feasible key impact areas (aesthetics; noise/odor; water quality; biological resources; energy usage/GHG emissions).
 - Analyze cumulative impacts and document conclusions with substantial evidence.

QUESTIONS?



Jordan Ferguson

Phone: (310) 229-0326

Email: JFerguson@Venable.com

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