
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

2021 - 2022 Regular

Bill No: SB 1426 **Hearing Date:** April 5, 2022
Author: Caballero
Version: February 18, 2022
Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: *Cannabis: water pollution crimes*

HISTORY

Source: San Bernardino County

Prior Legislation: AB 1138 (Rubio), Ch. 530, Stats. 2021
SB 427 (Eggman), Ch. 137, Stats. 2021
Proposition 64, as approved by the voters on November 8, 2016

Support: Association of California Water Agencies; California Municipal Utilities Association; California Police Chiefs Association; Community Water Systems Alliance; Rural County Representatives of California

Opposition: California Attorneys for Criminal Justice; California Public Defenders Association

PURPOSE

The purpose of this bill is to: 1) make it a felony to plant, cultivate, harvest, dry, or process more than 6 living cannabis plants when that activity involves theft of groundwater, unauthorized tapping into a water conveyance or storage infrastructure, digging an unpermitted, illegal well, or the pollution of groundwater, as specified; and 2) clarify that causing substantial environmental harm to public resources includes groundwater.

Existing law establishes the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA) to regulate the cultivation, distribution, transport, storage, manufacturing, processing, and sale of both medicinal cannabis and adult-use cannabis. (Bus. & Prof. Code, §§ 26000 et seq.)

Existing law provides that each person under the age of 18 who plants, cultivates, harvests, dries, or processes any cannabis plants shall be required to complete drug education or counseling and community service, as specified. (Health & Saf. Code, § 11358, subd. (a).)

Existing law provides that each person at least 18 years of age but less than 21 years of age who plants, cultivates, harvests, dries, or processes not more than six living cannabis plants is guilty of an infraction and a fine of not more than \$100. (Health & Saf. Code, § 11358, subd. (b).)

Existing law provides each person 18 years of age or over who plants, cultivates, harvests, dries, or processes more than six living cannabis plants shall be punished by imprisonment in a county

jail for a period of not more than six months or by a fine of not more than \$500, or by both that fine and imprisonment. (Health & Saf. Code, § 11358, subd. (c).)

Existing law provides that a person 18 years of age or over who plants, cultivates, harvests, dries, or processes more than six living cannabis plants, or any part thereof, may be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code if any of the following conditions exist:

- The person has one or more prior convictions for specified felonies or for an offense requiring sex offender registration.
- The person has two or more prior convictions for planting, cultivating, harvesting, drying, or processing more than six living cannabis plants.
- The offense resulted in any of the following:
 - Illegal diversion of water.
 - Violation of laws related to the discharge of waste.
 - Violation of laws related to polluting waters of the state.
 - Diversion or obstruction of the natural flow of rivers, streams, and lakes.
 - Dumping hazardous substances or other unlawful activity related to hazardous waste.
 - Violations of law related to endangered and threatened species, the Migratory Bird Treaty Act, or the unlawful taking of fish and wildlife.
 - Intentionally or with gross negligence causing substantial environmental harm to public lands or other public resources.(Health & Saf. Code, § 11358, subd. (d).)

This bill specifies that public resources include groundwater.

This bill makes theft of groundwater, unauthorized tapping into a water conveyance or storage infrastructure, or digging an unpermitted, illegal well a felony.

This bill makes the pollution of groundwater by the use of illegal pesticides or the improper or excessive use of pesticides, rodenticides, herbicides, or other hazardous chemicals a felony.

COMMENTS

1. Need for This Bill

According to the author:

Proposition 64, The Adult Use of Marijuana Act (2016) established that individuals found guilty of intentionally or with gross negligence causing substantial harm to public lands or other public resources while illegally planting, cultivating, harvesting, drying, or processing cannabis may be punished by imprisonment.

Illegal cannabis farms are a serious, growing threat across rural areas of California. Illicit cannabis cultivators frequently engage in human trafficking, water theft, and environmental pollution as part of their operations. Because some cultivation sites go undetected for years, the environmental damage could last

generations. California state law penalties are not strong enough to deter criminals from engaging in widespread illegal cannabis farming, nor do they recognize the danger illegal grows pose to water supply and groundwater pollution.

SB 1426 addresses the growing impact of illicit cannabis farms in two ways:

First, by clarifying that groundwater is a public resource, and
Second, by establishing that the theft of groundwater, unauthorized tapping into a water conveyance or storage infrastructure, or digging an unpermitted, illegal well may be punished by imprisonment if a court determines it to be appropriate.

2. Background

Despite the existence of a legal cannabis industry in the state following the approval of Proposition 64 by the voters in 2016, the illicit cannabis industry persists. One element of the illicit market involves illegal cannabis farms which are often located in rural parts of the state, and have been identified as the most common culprit of water theft. Water is reportedly being unlawfully taken or diverted from rivers, streams, municipal water storage facilities, fire hydrants, farms, homes, and private wells which is exacerbating the already limited water supply in the state due to the ongoing drought. A recently published article lays out the issue:

While farmers, ranchers and licensed marijuana growers scramble to obtain water through legal channels, clandestine operations are stealing it or purchasing it from illicit trucks.

In the Sierra Nevada, as many as 4,000 illegal grow sites are operating in Nevada County, according to county estimates. In the Antelope Valley, illegal grows have doubled from 200 last year to 400 today, according to county data, while other estimates put the number in the thousands.

...

Marijuana is not a particularly thirsty crop — using about the same amount of water as a tomato plant — but the drought’s severity means that even a modest water diversion can have impacts.

“Most Californians would be shocked and disappointed at the amount of water these unlicensed, illegal grows are using, especially as California suffers from a drought,” Curt Fallin, a federal Drug Enforcement Agency agent, said during a recent news conference. “By our calculation, the illegal grows in Los Angeles, Riverside and San Bernardino counties require an astounding 5.4 million gallons of water a day, every day.”

(Julie Cart, *Thieves are stealing California’s scare water. Where’s it going? Illegal marijuana farms*, <<https://calmatters.org/environment/2021/07/illegal-marijuana-growers-steal-california-water/>>)

3. One County's Experience

Impacted counties are taking steps to address the issue of illegal cannabis farms. San Bernardino County, the sponsor of this bill, has shared that it is tackling the issue of illegal cannabis cultivation on multiple fronts. The County has created a multi-disciplinary task force to increase communication and collaboration between county agencies. The members of the task force include the Sheriff's Office, District Attorney's Office, Land Use Services/Code Enforcement, County Counsel's Office, County Fire, Ag Weights and Measures, Public Health/Environmental Health Services, and the County Administrative Office. The DA's Office employs a dual civil and criminal enforcement approach, and its environmental unit has increased collaboration with local and state law enforcement agencies, local, state, and federal regulatory agencies, and local and federal prosecutorial agencies. The County has also passed ordinances to expedite the removal of property from illegal cannabis farms if dedicated to the illegal cultivation of cannabis as well as increase criminal penalties and administrative fines for unlawful operations.

(<https://hidesertstar.com/news/181560/officers-can-trash-pot-farm-leavings-under-new-rule/>); (<https://bosd3.sbcounty.gov/wp-content/uploads/sites/50/2021/04/Cannabis-Urgency-Ordinance-Adopted.pdf>.) Finally, the Sheriff's Department has increased enforcement efforts.

The following information was shared with the Committee regarding the activities of the Sheriff's Department:

Last August, the San Bernardino County Sheriff's Department started Operation Hammerstrike, a large-scale operation to eradicate illegal cannabis farming sites with five dedicated illegal marijuana eradication teams. Here's the stats to-date of their raids.

Total

Search Warrants: 635

Arrests: 759

Greenhouses Eradicated: 4,503

Indoor Growing Locations: 106

Plants Seized: 820,917

Pounds of Processed Cannabis: 116,155.50

Grams of Concentrated Cannabis: 12,509

Guns Seized: 224

Weekly Averages

Search Warrants: 23

Arrests: 16

Greenhouses Eradicated: 161

Indoor Growing Locations: 4

Plants Seized: 29,318

Pounds of Processed Cannabis: 4,148.40

Grams of Concentrated Cannabis: 446.75

Guns Seized: 8

The number of illegal cannabis farms were initially estimated by the County at roughly 1,300. The Mojave Water Agency estimates the number of illegal

cannabis sites in their service territory at 2,500. Some sites are only two acres, some are over 200 acres. Frequently these sites will use extensive amounts of clear plastic sheeting to create “hoop houses,” artificial green houses that can conserve water vapor loss from plants but also harms insects, birds, and other plants and wildlife. Gas or diesel generators will be run all night at times on these sites, creating greenhouse gas emissions and noise pollution.

...

Our efforts to mitigate environmental damages usually involve multiple local and state agencies. Dept. of Fish and Wildlife (CDFW) usually make determinations or handle the enforcement of major environmental violations. That sometimes includes HazMat/CUPA and the citations are forwarded to the County’s District Attorney for their consideration to prosecute as felonies. Typically, the Sheriff’s Department eradication teams make referrals to those agencies if they find environmental damage. CDFW also does their own enforcement and works up their own warrants independently of the Sheriff, so the County may not always be aware of properties that have major environmental issues.

County staff frequently encounter on-site dumping of sewage, trash, and other chemicals, and non-permitted grading and water wells. Each of these present significant issues for both enforcement and remediation.

4. Effect of This Bill

This bill was introduced in an attempt to address the proliferation of illicit cannabis farms throughout the state which are diverting water from public and private resources for their operations and unlawfully using and dumping chemicals, among other things. As partly referenced above, much of the conduct engaged in by illegal cannabis operations is currently subject to civil and criminal penalties under local ordinances, state law, and federal law. For example, all cannabis cultivation is unlawful under federal law. Some of the pollution-related conduct may constitute violations of federal environment law, including the Clean Water Act and Resource Conservation and Recovery Act, as well as violations of state environmental law. Existing law additionally establishes a variety of civil penalties related to unlawful commercial cannabis activity. Further, local governments may pass ordinances to establish or increase fines related to illicit cannabis cultivation.

Proponents of the bill argue that more robust criminal penalties are necessary to address issues related to illegal cannabis farms. Specifically, this bill would specify that “public resources” includes groundwater in the existing statute criminalizing planting, cultivating, harvesting, drying, or processing more than six living cannabis plants when the offense resulted in intentionally or with gross negligence causing substantial environmental harm to public lands or other public resources. This bill additionally creates two new felonies: theft of groundwater, unauthorized tapping into a water conveyance or storage infrastructure, or digging an unpermitted, illegal well; and pollution of groundwater by the use of illegal pesticides or the improper or excessive use of pesticides, rodenticides, herbicides, or other hazardous chemicals.

5. Argument in Support

According to the Rural County Representatives of California:

The issue of cannabis and particularly those surrounding illicit cultivation, continue to be of importance to RCRC's member counties. Rural counties are frequently the targets of large-scale illegal cannabis grows. The problems related to illegal cannabis cultivation, including water theft; trespass; hazardous waste due to the use of unregistered pesticides and fertilizers; trash and debris; and associated criminal activities have greatly increased in rural counties. Many of the counties plagued with illicit cannabis cultivation are also in the midst of a drought emergency, reinforcing the need to protect this finite resource. The presence of this activity within our communities makes permitting cannabis projects more controversial to the public and further hinders the legal industry.

California state law penalties are not strong enough to deter criminals from engaging in widespread illegal cannabis farming, nor does it recognize the danger illegal grows pose to water supply and groundwater pollution. Additional tools are needed to protect the public's health and safety and further discourage illicit cannabis operations while strengthening the market for those who operate legally.

SB 1426 amends Section 11358 of the Health and Safety Code to include groundwater as a public resource, and establish theft of groundwater, unauthorized tapping into a water conveyance or storage infrastructure, or digging an unpermitted illegal well, may also be punished by imprisonment. Strong penalties are an important step to deter illicit cannabis activities and the harmful effect it is having on our limited water resources.

6. Argument in Opposition

The California Public Defenders Association writes:

SB 1426, in effect, creates two new felony offenses: theft of groundwater, and the pollution of groundwater in the cultivation of cannabis. These new offenses would be punishable by up to three years in prison.

Though we are sympathetic to the desire to protect the environment during the cultivation of cannabis, using criminal penalties to achieve that end will be ineffective and ultimately counterproductive. We urge the author to use a different enforcement mechanism than the criminal law.

... SB 1426 seeks to take California backwards to a time when the state responded to marijuana offenses with felony convictions and prison sentences.

Even if the Legislature were to adopt this ill-advised measure, it would likely be invalidated by the courts. The AUMA is explicit in the ways it can be amended:

The Legislature may by majority vote amend, add, or repeal any provisions to further reduce the penalties for any of the offenses addressed by this Act. Except

as otherwise provided, the provisions of the Act may be amended by a two-thirds vote of the Legislature to further the purposes and intent of the Act.

By creating new cultivation crimes, SB 1426 clearly does not “further the purposes and intent” of the AUMA; in fact, it runs directly counter to them. Therefore, the AUMA cannot be amended in the way the SB 1426 proposes, even with a two-thirds majority.

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