

HOW GREEN IS THE “GREEN RUSH”? RECOGNIZING THE ENVIRONMENTAL CONCERNS FACING THE CANNABIS INDUSTRY

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INTRODUCTION

Marijuana is a Schedule I controlled substance and remains illegal, for all purposes, under Federal law.³ But, after 2018’s ballot initiatives, and the State of Illinois’ legislative enactments, 33 states plus the District of Columbia have legal, medical, and/or recreational cannabis regimes.⁴ States where marijuana has been broadly legal for years have designated dispensaries as “essential businesses” during the COVID-19 crisis.⁵ States that already have medical marijuana, such as New Jersey and Pennsylvania, are exploring full legalization.⁶ Other states, such as Wisconsin and Kansas, are evaluating legislative proposals to decriminalize and regulate medical marijuana, and both have approved hemp-derived cannabidiol (CBD) oils with low tetrahydrocannabinol (THC) content.⁷ Even Texas governor Greg Abbott indicated during a recent debate that he is “open to some form of decriminalization.”⁸

3. 21 U.S.C. § 841 (2018) (prohibiting the manufacture and distribution of marijuana); *id.* § 812(c)(a)–(d)(1) (identifying marijuana as a Schedule I substance). The information in this article is not intended to constitute legal advice. Possession, use, distribution, and sale of cannabis are illegal under federal law, and nothing in this article is intended to provide any guidance or assistance in violating federal law.

4. Robert McCoppin, *Legal Marijuana is Coming to Illinois as Gov. Pritzker Signs Bill He Calls ‘Important and Overdue to Our State’* (June 25, 2019), <https://www.chicagotribune.com/news/breaking/ct-governor-to-sign-recreational-marijuana-law-20190624-ee2bswlsq5eqvkcibuq6oz6id5i-story.html>; Jeremy Berke & Skye Gould, *Legal Marijuana Just Went on Sale in Illinois. Here are All the States Where Cannabis is Legal* (Jan. 1, 2020), <https://www.businessinsider.com/legal-marijuana-states-2018-1>.

5. Caitlin O’Kane, *Marijuana Dispensaries in some States Deemed an “Essential Services” During Coronavirus Lockdowns* (Mar. 25, 2020), <https://www.cbsnews.com/news/marijuana-dispensaries-in-some-states-deemed-an-essential-service-during-coronavirus-lockdowns/>. California, New Jersey, Colorado, and Vermont are just some of the states that have so designated their dispensaries, with some states even permitting curbside pickup and even prescriptions via telehealth. *Id.*

6. Tom Angell, *These States are Most Likely to Legalize Marijuana in 2019* (Dec. 26, 2018), <https://www.forbes.com/sites/tomangell/2018/12/26/these-states-are-most-likely-to-legalize-marijuana-in-2019/#41fb0a85adda>.

7. *Id.*; Kansas, MARIJUANA POL’Y PROJECT, <https://www.mpp.org/states/kansas/> (last updated Jan. 14, 2020); Wisconsin, MARIJUANA POL’Y PROJECT, <https://www.mpp.org/states/wisconsin/> (last updated Apr. 20, 2020). Cannabis plants have over 113 different cannabinoids, with THC and CBD being the best known. Delta-9 THC is the primary psychoactive ingredient in cannabis. Adam Drury, *The Ultimate Guide to Cannabinoids in Cannabis* (Apr. 6, 2018), <https://hightimes.com/health/science/cannabinoids/>.

8. Angell, *supra* note 6.

Multiple bills are percolating through the U.S. Congress to address the federal/state conflict; some bills seek to legalize marijuana and end Category I scheduling of all cannabis. One such bill, H.R. 420, seeks to regulate marijuana like alcohol.⁹ Although the current COVID-19 crisis may delay action, votes will eventually be taken.

The cannabis industry has already begun to contend with a dizzying patchwork of state laws and local ordinances governing the farmers, dispensaries, and ancillary businesses as they deal with licensing, distribution, and manufacturing of their products. However, some of the most significant—and underappreciated—challenges facing the emerging cannabis industry are in the environmental arena. Litigation is a significant risk: litigants have already filed toxic tort and product liability claims, civil lawsuits under the Racketeer Influenced and Corrupt Organizations Act (RICO),¹⁰ citizen suit public nuisance claims,¹¹ and claims under California’s Safe Drinking Water and Toxic Enforcement Act of 1986 (“Prop 65”).¹² In addition, the industry faces state regulatory challenges in terms of resource use (water and land), sustainability and energy use, compliance with waste disposal, and pesticide laws. Recognizing these issues and risks is the first step towards solving them.

I. LITIGATION RISKS

Litigation poses an existential risk to any business. The National Center for State Courts’ Court Statistics Project recently estimated that, of the approximately 84 million cases filed in 2016, 18%—

9. H.R. 420, 116th Cong. (2019).

10. Racketeer Influence and Corrupt Organization Act (RICO) of 1970, 18 U.S.C. §§ 1961–1968 (2018).

11. Nick Welsh, *Public Nuisance Lawsuit Filed Against Cannabis Growers* (Mar. 2, 2020), <https://www.independent.com/2020/03/02/public-nuisance-lawsuit-filed-against-cannabis-growers/>. The Santa Barbara Santa Barbara County Coalition for Responsible Cannabis named four greenhouse operations, with plaintiffs seeking relief “from the awful smells and noxious odors and chemicals that they are being assaulted with on a daily basis.” *Id.*

12. CAL. HEALTH & SAFETY CODE §§ 25249.5–25249.13 (West 2020); *see also* Indictment at ¶¶ 1, 8, *United States v. Wellgreensca*, No. 19-CR-2439-WQH, (S.D. Cal. June 19, 2019), <https://www.lion.com/getmedia/01c19fca-d466-4b61-9c1a-c00baaf03e8e/WellgreensCA-Indictment> (highlighting the generation of hazardous waste by the cannabis industry and alleging multiple violations of RCRA including illegal transportation of hazardous waste under section 6928(d)(1) and transportation of hazardous waste without a manifest under section 6928(d)(5). Also alleging that the business owners and administrators participated in conspiracy to engage in these violations).

approximately 15,000,000—were civil cases,¹³ —including approximately 56,000 tort claims filed in California alone.¹⁴

Despite being legal under specific state laws, cannabis-based businesses face Not in My Back Yard (NIMBY)¹⁵ campaigns and others opposed to cannabis for a myriad of reasons.¹⁶ Additionally, lawyers are focusing on suing the industry and encouraging others to do the same.¹⁷ All of these factors lead to an environment ripe for litigation.

a. Products liability

Traditional products liability for toxic injury presents a potentially significant ongoing concern for cannabis growers, makers of cannabis products (including edibles), as well as dispensaries and retail locations. These claims, whether sounding in strict liability, negligence, or failure to warn, can be very costly.¹⁸ Further, industry participants are potentially vulnerable in the areas of labeling (inadequate warnings), packaging (proper containers and childproof containers), and quality control (including the use of labs for testing of products to avoid contaminants).

One of the first toxic tort products liability cases the cannabis industry confronted was *Flores v. LivWell*.¹⁹ In that case, the plaintiffs

13. NAT'L CTR. FOR STATE COURTS, *Composition of Incoming Cases, All Trial Courts, 2016* (Jan. 11, 2018), <http://www.courtstatistics.org/~media/Microsites/Files/CSP/National-Overview-2016/EWSC-2016-Overview-Page-4-Comp.ashx>.

14. JUDICIAL COUNSEL OF CAL., 2017 COURT STATISTICS REPORT, STATEWIDE CASELOAD TRENDS, 2006–2007 THROUGH 2015–2016, 121–25 (2017).

15. See Denis J. Brion, *An Essay on LULU, NIMBY, and the Problem of Distributive Justice*, 15 BOS. C. ENVTL. AFF. L. REV. 437, 438 (1988) (explaining that “NIMBY” refers to the concept that there are some facilities most people desire so long as the facilities are not located near their homes).

16. See Jeremy Nemeth & Eric Ross, *Planning for Marijuana: The Cannabis Conundrum*, 80 J. AM. PLAN. ASS'N 6, 7–8 (2014) (describing reasons for campaigning against cannabis-based businesses); Peter Hecht, *How Liberal Marin County Turned NIMBY on Cannabis* (Feb. 27, 2018), <https://www.leafly.com/news/politics/how-liberal-marin-county-turned-nimby-on-cannabis> (describing community attempt to ban cannabis).

17. Alex Malyshev, *As Cannabis Industry Matures, Expect a Lot More Litigation* (Sept. 19, 2019), <https://www.thinkadvisor.com/2019/09/19/as-cannabis-industry-matures-expect-a-lot-more-litigation/>.

18. David Evans et al., *Litigating Against the Marijuana Industry* (July 29, 2018), <https://vimeo.com/281275757>.

19. See generally Plaintiffs' Class Action Complaint for Damages & Injunctive Relief, *Flores v. LiveWell, Inc.*, No. 2015-CV-33528 (Dist. Ct. Cty. Denver Oct. 5, 2015), <https://mjbizdaily.com/wp-content/uploads/2015/10/2015-10-05-04-49-31-Flores-v.-LiveWell-Complaint-FINAL.pdf> (bringing a civil claim against a cannabis company); Mishan Wroe & Josue Aparicio, *Growing Concerns: Marijuana Industry Hit with Its First Ever Product Liability Lawsuit*, SCHIFF HARDIN (Oct. 31, 2015),

argued that the economic value of their cannabis was diminished because the grower and distributor, LivWell, used a fungicide that was not registered by the U.S. Environmental Protection Agency (EPA) for use on cannabis plants.²⁰ The chemical was allegedly hazardous when burned.²¹ In issuing its order dismissing the case, the court engaged in a straightforward standing analysis under *Wimberly v. Ettenberg*.²² Under *Wimberly*, a plaintiff is required to demonstrate both that “(1) he suffered an injury in fact, and (2) his injury was to a legally protected interest.”²³ The court found that:

Plaintiffs’ sole stated injury is that they overpaid for defendant’s product. There are no allegations that the product did not perform as it was supposed to, and indeed the Complaint alleges that Plaintiffs consumed the product. . . [n]or are there any allegations that Plaintiffs suffered physical or emotional injury.²⁴

Citing various cases that a claim of diminished value does not state an injury in fact, including *Rule v. Fort Dodge Animal Health, Inc.* and *Rivera v. Wyeth-Ayerst Laboratories*, the court found the authorities cited by plaintiffs unavailing because no possibility of reselling the purchased marijuana existed.²⁵ As such, the court found that plaintiffs suffered no injury in fact and dismissed the cases.²⁶

<https://www.productliabilityandmasstorts.com/2015/10/growing-concerns-marijuana-industry-hit-with-its-first-ever-product-liability-lawsuit/> (describing the lawsuit).

20. Plaintiffs’ Class Action Complaint for Damages & Injunctive Relief, *supra* note 19, ¶ 1.

21. *Id.* ¶ 14.

22. Order on Defendant LivWell’s Motion to Dismiss at 2, *Flores v. LiveWell, Inc.*, No. 2015-CV-33528 (Dist. Ct. Cty. Denver Feb. 11, 2016), <https://www.etdefenseinsight.com/wp-content/uploads/2016/04/ORDER-ON-DEFENDANT-LIVWELLS-MOTION-TO-DISMISS.pdf>.

23. *Id.*

24. *Id.* at 2–3.

25. *Id.* at 3–4.

26. *Id.* at 5. This concept is well ensconced in the established economic loss doctrine, which holds that a plaintiff in a product liability or negligence action may not recover for purely economic injury better suited to a non-tort cause of action. This includes “the loss of value or use of the product itself, and the cost to repair or replace the product.” *U.S. Gypsum v. Mayor & City Council of Balt.*, 336 Md. 145, 156 (1994); *Tolan & Son, Inc. v. KLLM Architects, Inc.*, 719 N.E. 2d 288, 294 (Ill. App. Ct. 1999) (“[T]ort law is not intended to compensate parties for monetary los[s]es suffered as a result of duties which are owed to them simply as a result of a contract.”); *see also E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871 (1986) (“[A] manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself.”)

The court dismissed the *LivWell* suit because the plaintiffs lacked standing to proceed in the absence of a legally cognizable injury-in-fact.²⁷ However, in so ruling, the court supplied a roadmap for future lawsuits. The court's explicit statement that plaintiffs did not allege a physical injury suggests that such an allegation would have allowed plaintiffs to proceed with their lawsuit.²⁸

"Actual injury" came quickly enough. In 2016, a wrongful death products liability case was filed in Denver, Colorado.²⁹ In *Andrew Kirk v. Richard Kirk*, the Richard Kirk's children sued the maker of cannabis containing candy, Gaia's Garden, and a dispensary, Nutritional Elements, Inc.³⁰ Plaintiffs alleged that Richard Kirk's 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.³¹ The complaint advanced multiple causes of action, including strict liability and negligent failure to warn.³² Ultimately, the dispensary settled the case for an undisclosed amount.³³

These cases exemplify the vulnerabilities within the industry to products liability claims. Plaintiffs may try additional avenues as well. Accidental exposures to children are one such avenue. The Journal of the American Medical Association Pediatrics published a retrospective cohort study of hospital admissions at Children's Hospital Colorado (Aurora) to evaluate unintentional marijuana exposures in children.³⁴ The study evaluated approximately 240 instances of children's exposures.³⁵ The median age of the sample population was 2.4 years old.³⁶ The study found that edible products were involved in more than

27. Order on Defendant LivWell's Motion to Dismiss, *supra* note 22, at 5.

28. *Id.* at 4-5.

29. Complaint for Damages & Jury Demand at paras. 22, 36, *Kirk v. Kirk*, No. 2016-CV-31310, (Dist. Ct. Cty. Denver Apr. 13, 2016), https://www.courthousenews.com/wp-content/uploads/2017/05/Kirk.v.Gaia_.pdf.

30. *Id.* ¶¶ 1-7.

31. *Id.* ¶¶ 12, 14, 36.

32. *See generally id.* (listing six claims for relief).

33. Cannabis Law Grp., *Marijuana Product Liability Lawsuits May Pick Up in 2019* (Jan. 15, 2019), <https://www.marijuanalawyerblog.com/marijuana-product-liability-lawsuits-may-pick-up-in-2019/>.

34. *See generally* George Sam Wang et al., *Unintentional Pediatric Exposures to Marijuana in Colorado, 2009-2015*, J. AM. MED. ASS'N PEDIATRICS, Sept. 6, 2016.

35. *See id.* at 3 (charting the number of state pediatric marijuana exposure cases).

36. *Id.*

48% of exposures.³⁷ For 9% of the exposure scenarios, the products were not in a child-resistant container.³⁸ In California, cannabis-infused gummies caused 19 people, mostly teens and children, to become ill at a birthday party.³⁹ While some states like Colorado have responded by advancing legislation to ban cannabis products in shapes likely to attract children, others have not.⁴⁰ Thus, inadequate packaging—combined with attractive shapes, flavors and colors likely to attract children—may create liability exposure.⁴¹

Another potential source of liability is contaminated cannabis. A lack of national standardization and quality control during harvesting, processing/extraction, and/or point of sale may result in unintended bacterial or chemical exposures to consumers.⁴²

Finally, engineered cannabis strains or extracted cannabis concentrates with high THC may themselves be a source of liability.⁴³ Consumers unfamiliar with or unaware of the potential effects may suffer injury as a result.⁴⁴

37. *Id.*

38. *Id.* at 5.

39. See Lindzi Wessel, *Mass Marijuana Overdose in California is Latest in Worrisome Trend of Children Poisoned* (Aug. 9, 2016), <https://www.statnews.com/2016/08/09/edible-marijuana-kids/> (reporting on a mass marijuana overdose that happened at a birthday party in California where 19 people were sickened after ingesting marijuana infused gummies).

40. Associated Press, *Colorado Bans Pot Gummy Bears, Other Edibles Appealing to Kids* (Oct. 2, 2017), <https://www.cbsnews.com/news/colorado-bans-pot-gummy-bears-other-edibles-shapes/>.

41. See CHLOE GROSSMAN ET AL., COUNCIL ON RESPONSIBLE CANNABIS REG. & NAT'L CANNABIS INDUSTRY ASS'N, *CANNABIS PACKAGING & LABELING: REGULATORY RECOMMENDATIONS FOR STATES & NATIONS* 34–35 (2014) (recommending prohibiting packaging that is attractive to minors).

42. See Nicholas Sullivan et al., *Determination of Pesticide Residues in Cannabis Smoke*, *J. TOXICOLOGY*, Apr. 2013, at 1–2 (describing lack of regulation of pesticide application); Penelope Overton, *Lack of Mandated Testing Could Expose Cannabis Users to Toxins*, *PORTLAND PRESS HERALD*, <https://www.pressherald.com/2018/12/30/lack-of-mandated-testing-could-expose-cannabis-users-to-toxins> (last updated Dec. 30, 2018) (describing lack of testing requirements).

43. See Chris Roberts, *What's Wrong with Genetically Modified Marijuana—And Are You Smoking Some Right Now?* (Sept. 6, 2019), <https://observer.com/2019/09/gmo-marijuana-effects-identification/> (describing genetically modified cannabis).

44. See Raj Persaud, *Has Cannabis Been Secretly Genetically Modified to Render It More Dangerous?* (July 22, 2012), https://www.huffingtonpost.co.uk/dr-raj-persaud/has-cannabis-been-secretly-modified-_b_1688684.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAF0JWXJUP8cpq7SjhSKdE302H30p5Xukl88GXN8pFRWWQg_HPCJDOgeH3lJupvJRH8wWpF0LTvi8snaFUodBIPbqnvqSp62FjVeko2zoDmVovIBSGN_C45AdLT_o3wtt4E3H4nF9f40thMEK6J5FMKnyu6mUpYK7TaP6QGjYxgkt (describing the potential danger of unregulated, genetic modification).

b. Civil RICO Claims

In another example of NIMBY litigation, private plaintiffs, often backed by moneyed anti-cannabis interests, have brought suit against legal cannabis business owners in federal court under RICO in multiple states, including Oregon, Colorado, and California.⁴⁵ Originally intended to combat organized crime, RICO permits private civil claims and authorizes treble damages, attorney’s fees, and potential injunctive relief.⁴⁶

Initially, these suits prompted settlements, and even claimed some early legal victories.⁴⁷ In 2017, in *Safe Streets Alliance v. Hickenlooper*,⁴⁸ the Tenth Circuit held that landowners in Colorado could move forward with a civil suit under RICO against a licensed marijuana cultivation enterprise located on an adjacent property.⁴⁹ The landowners claimed that the existence of the marijuana cultivation enterprise, as well as the noise and smell coming from the enterprise, damaged their property.⁵⁰ The Tenth Circuit found “three plausibly alleged” injuries, including odor and property value diminution and remanded the case back to the district court for further proceedings.⁵¹

However, 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.⁵² Two decisions out of the Ninth Circuit quickly followed *Safe Streets—Ainsworth v. Overby* and *Bokaie v. Green Earth Coffee*.⁵³ Each held that the plaintiffs failed to properly allege

45. See Kara Thorvaldsen, *RICO Suits Against Cannabis Companies and Co-Conspirators Slow to Gain Traction* (Nov. 13, 2018), <https://www.natlawreview.com/article/rico-suits-against-cannabis-companies-and-co-conspirators-slow-to-gain-traction> (describing RICO lawsuits against cannabis companies).

46. 18 U.S.C. §§ 1961, 1964 (2018); see also *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1077 (9th Cir. 1986) (holding that injunctive relief is not available to a private plaintiff in civil RICO suits). But see *Nat’l Org. of Women v. Schiedler*, 267 F.3d 687, 700 (7th Cir. 2001) (holding that RICO authorizes private plaintiffs to seek injunctive relief).

47. See, e.g., Ricardo Baca, *Anti-pot Racketeering Suit Settles, Opens Door for Future RICO Claims* (Oct. 2, 2016), <https://www.denverpost.com/2015/12/30/anti-pot-racketeering-suit-settles-opens-door-for-future-rico-claims/> (describing settlement); *Safe Sts. All. v. Hickenlooper*, 859 F.3d 865, 891 (10th Cir. 2017) (holding plaintiffs’ RICO claims could proceed).

48. *Safe Sts. All.*, 859 F.3d 865.

49. *Id.* at 885.

50. *Id.* at 879, 887.

51. *Id.* at 890–91.

52. Thorvaldsen, *supra* note 45.

53. *Ainsworth v. Overby*, 326 F. Supp. 1111 (D. Or. 2018); *Bokaie v. Green Earth Coffee, LLC*, No. 18-cv-05244-JST, 2018 WL 6813212 (N.D. Ca. Dec. 27, 2018).

injury to person or property under RICO and dismissed the claims.⁵⁴ *Bokaie* was particularly favorable to the defendant, with the court expressly noting that RICO “was intended to combat organized crime, not to provide a federal cause of action and treble damages to every plaintiff.”⁵⁵

Despite the decisions in *Ainsworth* and *Bokaie*, the U.S. District Court for the District of Oregon in *Momtazi Family v. Mary E. Wagner*, issued an order on August 27, 2019 denying the defendant’s motion to dismiss for failure to state a claim and lack of subject matter jurisdiction.⁵⁶ The defendant was an adjacent property owner who grew marijuana legally on his premises under Oregon law, and the plaintiff owned a vineyard.⁵⁷

Unlike previous decisions in *Bokaie* and *Ainsworth*, the court found that the *Momtazi Family* plaintiff had alleged sufficient facts to establish constitutional standing to bring its claim under the Article III “case or controversy” requirement of the U.S. Constitution.⁵⁸ Citing the landmark *Lujan v. Defenders of Wildlife*, the Court noted that a plaintiff must show they suffered “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.”⁵⁹ However, the court found that the alleged injuries, including that “an order for grapes was cancelled as a result of the customer’s concern that the grapes were contaminated by the marijuana smell” and concerns about “diminished marketability” of the grapes, were sufficiently “concrete and particularized” to permit the claim to go forward.⁶⁰

54. *Bokaie*, 2018 WL 6813212 at *7; *Ainsworth*, 326 F. Supp. 3d at 1116.

55. *Bokaie*, 2018 WL 6813212 at *3.

56. *Momtazi Family, LLC v. Mary E. Wagner*, No. 3:19-CV-00476-BR, 2019 WL 4059178 at *1, *7 (D. Or. Aug. 27, 2019).

57. *Id.* at *1.

58. *Id.* at *3–4.

59. *Id.* at *3 (citing *Lujan v. Def’s of Wildlife*, 504 U.S. 555, 560 (1992)).

60. *Id.* at *4–5. The court identified the other bases for the existence of a “concrete injury” as follows:

[T]he value of its property has been diminished, it has been unable to market its grapes, a reservoir on its property was damaged, a calf was killed, and another cow damaged as a direct and proximate result of Defendants’ activities to grow marijuana on their property. . . . In addition, Plaintiff alleges the terracing on Defendants’ property has caused dirt to flow downhill into the reservoir on Plaintiff’s property and has been damaging fish and wildlife.

While civil RICO lawsuits have been largely unsuccessful against the industry, litigants continue to bring cases, and the risk remains that litigants may appeal the cases to the conservative-majority U.S. Supreme Court.

b. Nuisance Claims

If civil RICO claims fail, the industry is ripe for targeting with “garden variety” public and private nuisance claims. These claims frequently take the form of citizen suits, with organized groups of citizens acting as plaintiff.⁶¹

Bringing a nuisance claim is relatively straightforward, especially in a jurisdiction like California. While private nuisance claims typically require showing interference with some rights in land, public nuisance claims do not.⁶² They merely require that the nuisance complained about be “indecent or offensive to the senses.” Cannabis odors are very recognizable and foment sometimes strong reactions from neighbors. Nuisance claims may be the new frontier of NIMBY pushback from impacted neighbors, providing a civil cause of action against businesses which will survive broad legality of the industry for years to come.

On this record the Court concludes Plaintiff has alleged injuries in fact that are concrete, particularized, and actual. These allegations are sufficient to establish Plaintiff's constitutional standing, and, therefore, the Court has subject-matter jurisdiction over this case.

Id. at *4.

61. There are multiple examples of these kinds of claims around the country. In California, Santa Clara Citizens for Responsive Cannabis recently brought suit for fumes impacting a local high school. Giana Magnoli, *3 Carpinteria Residents File Nuisance Lawsuit Against Cannabis Farms* (Mar. 2, 2020),

https://www.noozhawk.com/article/carpinteria_residents_file_nuisance_lawsuit_against_cannabis_farm s. In Michigan, Ypsilanti Township prevailed in a nuisance case against a private couple for emitting marijuana fumes into their neighborhood. Tom Perkins, *Ypsilanti Township Wins ‘Seminal’ Case Against Couple Pumping Intense Marijuana Fumes into Neighborhood* (updated Apr. 3, 2019), https://www.mlive.com/news/ann-arbor/2014/07/ypsilanti_township_wins_seminal.html. And a first of its kind nuisance case in Oregon involved allegations of hemp and marijuana cross pollination, destroying the value of a hemp crop. *Jack Hempicine LLC v. Leo Mulkey Inc.*, Case No. 18CV38712 (Ore. filed Aug. 31, 2018).

62. See Judicial Council of California Civil Jury Instructions (CACI) Nos. 2020 & 2021 (2017) (“Private nuisance concerns injury to a property interest. Public nuisance is not dependent on an interference with rights of land: ‘[A] private nuisance is a civil wrong based on disturbance of rights in land while a public nuisance is not dependent upon a disturbance of rights in land but upon an interference with the rights of the community at large.’ (*Venuto v. Owens-Corning Fiberglas Corp.*, 22 Cal.App.3d 116, 124 (1971)).

c. Targeting of the Cannabis Industry in California with Environmental Laws

As is frequently the case, cannabis cultivators in California have unique issues, particularly in the environmental realm. Discussed below are environmental regulatory issues specific to California.

1. Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop 65)

California's Prop 65⁶³ has provided California-based advocacy groups ample opportunity to target the cannabis industry. Prop 65 requires businesses to provide warnings to Californians about significant exposures to chemicals that cause cancer, birth defects, or other reproductive harm.⁶⁴ The California Attorney General's office, any district attorney, or any individual acting in the public interest can enforce Prop 65.⁶⁵ Penalties for violations may be as high as \$2,500 per violation per day, and the lawsuits can be difficult to defend against.⁶⁶ "Marijuana smoke" was added to the Prop 65 list of chemicals on June 19, 2009.⁶⁷ In August 2009, the California Environmental Protection Agency published a report proffering evidence of its carcinogenicity.⁶⁸

Over the last two years, hundreds of cannabis-related Prop 65 notices of violation have been served by at least two citizen enforcers—the Clean Cannabis Initiative, LLC⁶⁹ and the Center for Advanced Public Awareness, Inc.⁷⁰ Sonoma Patient Group, the longest-running dispensary in Santa Rosa, recently paid \$40,000 to settle a claim.⁷¹

63. CAL. HEALTH & SAFETY CODE §§ 25249.5–25249.14 (West 2020).

64. *Id.* § 25249.6.

65. *Id.* § 25249.7(c), (d).

66. *Id.* § 25249.7(b).

67. CAL. CODE REGS. tit. 27, § 27001 (2020).

68. RAJPAL S. TOMAR ET AL., CAL. ENVTL. PROT. AGENCY, EVIDENCE ON THE CARCINOGENICITY OF MARIJUANA SMOKE, (2009).

69. Notice of Violation letter from Mark Morrison, Morrison Law Firm, to TKO, Care of Domain by Proxy LLC, and appropriate public enforcement agencies (Aug. 7, 2017).

70. Julie Johnson, *Santa Rosa Cannabis Dispensary Fined for Failing to Provide Cancer Warnings* (May 29, 2018), <https://www.northbaybusinessjournal.com/northbay/sonomacounty/8376224-181/santa-rosa-cannabis-dispensary-fined>.

71. *Id.*

2. California Environmental Quality Act (CEQA)

In California, CEQA generally requires that a proposed business evaluate its environmental impacts and means of mitigating substantial impacts.⁷² Many cannabis businesses in California are facing CEQA compliance challenges because temporary CEQA exemptions granted to municipalities (such as the city of Los Angeles⁷³) are expiring.⁷⁴ This may require the businesses themselves to directly participate in the compliance process.

These categories represent some, but certainly not all, of the litigation risks facing the industry.

II. ENVIRONMENTAL REGULATORY CONCERNS

In addition to other private claims, the industry must also address significant environmental regulatory issues.

a. Water

Water usage and water rights are significant issues for cannabis growers, particularly on the West Coast. California's water boards require that cannabis cultivators planning to divert surface water have a water right to do so.⁷⁵ Further, cultivators must document water supply sources in order to obtain a CalCannabis cultivation license.⁷⁶ Limited water resources in California have created tension between existing property owners and cannabis cultivators. For example, in Sonoma County, existing businesses and homeowners are seeking to

72. See generally CAL. PUB. RES. CODE § 21156 (West 2020) (identifying the legislative intent of CEQA as requiring analysis of potential environmental impacts of proposed projects).

73. Notice of Exemption, ENV-2017-3361-SE, from Office of the County Clerk, City of Los Angeles to City of Los Angeles Department of City Planning (Sept. 5, 2017).

74. John Schroyer, *California Environmental Regulations and Marijuana: Q&A with Green Wise's Pamela Epstein*, MARIJUANA BUS. DAILY (Mar. 19, 2019) https://mjbizdaily.com/california-environmental-regulations-marijuana-green-wise-pamela-epstein/?utm_medium=email&utm_source=mjbiz_daily&utm_campaign=MJD_20190319_NEWS_Daily_03192019.

75. *Cannabis Water Rights*, CAL. WATER BDS. https://www.waterboards.ca.gov/water_issues/programs/cannabis/cannabis_water_rights.html (last updated July 7, 2019).

76. *Id.*

set up an exclusion zone for cannabis cultivation.⁷⁷ The State Water Board has also identified “Cannabis Priority Watersheds” throughout the state that are at increased risk as a result of cannabis cultivation activities, which could significantly impact native species or cause other environmental harm.⁷⁸

Water rights, however, are not the only issue. Water quality issues are especially significant. For example, California’s Regional State Water Resources Control Boards, which have struggled with illegal waste discharges, finalized a regulatory package which went into effect on October 17, 2017.⁷⁹ The regulations address waste discharge and other water issues, and 2018 was the first full year of the program.⁸⁰ The California Water Board has identified a number of activities that have resulted in negative impacts on water quality, including grading and site development, domestic waste discharges, timber conversions, and improper chemical storage and releases.⁸¹ This could ultimately create liability for cannabis businesses under relevant environmental cleanup statutes, including the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA).⁸²

77. Letter from Harriet Buckwalter, Co-Chair, and Linda Sartor, Co-Chair, Friends of the Mark West Watershed, to Sonoma County Board of Supervisors (July 16, 2018), <http://winewaterwatch.org/2018/07/mark-west-springs-area-dewatered-by-vineyards-and-cannabis-operations/>.

78. *California Priority Watersheds*, CAL. WATER BDS., https://www.waterboards.ca.gov/water_issues/programs/cannabis/california_priority_watersheds.html (last updated Nov. 1, 2018).

79. *State Board – Cannabis Cultivation Water Quality*, CAL. WATER BDS., https://www.waterboards.ca.gov/water_issues/programs/cannabis/cannabis_water_quality.html (last updated Apr. 16, 2020).

80. *Id.*; see also CAL. WATER CODE § 13276(b) (“The state board or appropriate regional board shall address discharges of waste resulting from cannabis cultivation under the Medicinal and Adult-Use Cannabis Regulation and Safety Act and associated activities, including by adopting a general permit, establishing waste discharge requirements.”).

81. Yvonne West, Director, Office of Enforcement Cal. State Water Res. Control Bd., Address at the Environmental Law Conference at Yosemite: Water Boards’ Statewide Cannabis Cultivation Policy, Implementation, and Enforcement (Oct. 19, 2018).

82. Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq. (2018); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq. (2018).

b. Air

In the Pacific Northwest, Washington's air quality authorities have stepped up odor- and emissions-based enforcement actions. In 2017, there were two enforcement cases in Washington State that dealt with air quality permitting for cannabis cultivation operations: *Green Freedom, LLC v. Olympic Region Clean Air Agency*, and *Avitas Agric., Inc. v. Puget Sound Clean Air Agency*.⁸³ Both cases dealt with odors emanating from the facilities.⁸⁴ Notably, the *Green Freedom* case involved a complaint brought by a private landowner.⁸⁵

c. Energy & Climate

The cannabis industry has also been singled out for its high energy consumption, exacerbated by 24-hour lighting requirements, heating, ventilation, and air conditioning at large-scale grow facilities.⁸⁶ Indoor cannabis cultivation taxes resources, and increases fossil fuel use, leaving a potentially significant carbon footprint.⁸⁷ While legalization may eliminate much of the need for indoor grow operations,⁸⁸ many within the industry feel that indoor growing—and the ability to strictly control growing conditions—results in a superior product.⁸⁹ As such, widespread legalization will not result in elimination of indoor grows.

d. Pesticides & Enforcement

The EPA regulates pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).⁹⁰ The EPA also regulates

83. *Green Freedom, LLC v. Olympic Region Clean Air Agency*, PCHB No. 16-048, 2016 WL 7233503 (Wash. Pol. Control Bd.); *Avitas Agric., Inc. v. Puget Sound Clean Air Agency*, PCHB No. 16-003, 2017 WL 478809 (Wash. Pol. Control Bd.).

84. *Green Freedom*, 2016 WL 7233503 at *1; *Avitas Agric.*, 2017 WL 478809 at *2–*3.

85. *Green Freedom*, 2016 WL 7233503 at *2.

86. Melanie Sevchenko, *Pot is Power Hungry: Why the Marijuana Industry's Energy Footprint Is Growing* (Feb. 27, 2016), <https://www.theguardian.com/us-news/2016/feb/27/marijuana-industry-huge-energy-footprint>.

87. Oliver Milman, *Not So Green: How the Weed Industry is a Glutton for Fossil Fuels* (June 20, 2017), <https://www.theguardian.com/society/2017/jun/20/cannabis-climate-change-fossil-fuels>.

88. *Id.*

89. Trevor Hennings, *Growing Cannabis Indoors v. Outdoors: 3 Key Differences* (May 29, 2016), <https://www.leafly.com/news/growing/indoor-vs-outdoor-cannabis-growing-3-key-differences>.

90. Federal Insecticide, Fungicide, and Rodenticide Act of 1947, 7 U.S.C. §§ 136–136y (2018); 40 C.F.R. § 152.1 (2018).

pesticides used for food or feed uses under the tolerance provisions of the Federal Food Drug and Cosmetic Act (FFDCA).⁹¹ Under the FFDCA, the EPA establishes the maximum amount of pesticide residue allowed in or on food or feed (known as a tolerance) or exemptions from those tolerances.⁹²

Any person or entity using a pesticide in a manner for which it is not registered is in violation of FIFRA.⁹³ In view of the illegal status of cannabis in the United States, the EPA has neither approved the registration of any pesticide products for use on cannabis, nor established any tolerances or tolerance exemptions for pesticide residues in or on cannabis food products.⁹⁴ However, the EPA has approved pesticides for use on industrial hemp with .3% or less THC by volume, given industrial hemp's new legal status under the Agricultural Improvement Act of 2018 (commonly known as the Farm Bill).⁹⁵ Notably, obtaining approval for a new pesticide use can involve a complex pre-approval process in which the applicants must generate and submit scientific data to allow the EPA to assess any risks to the environment or human health that may be associated with the new use.⁹⁶

In the absence of any pesticides with federally registered cannabis uses at this time, a majority of states where some form of cannabis is legal have adopted rules or guidance addressing the limited circumstances in which pesticides may be lawfully used on cannabis within their jurisdictions.⁹⁷ In general, these states provide that a pesticide product may be applied to cannabis under state law as long as the active ingredient found in the product is exempt from residue tolerance requirements under the FFDCA and the product is: (i) exempt from federal FIFRA registration requirements; or (ii) otherwise registered for a use under FIFRA that is broad enough to cover cannabis (i.e., “for use on outdoor vegetables” or “can be used

91. Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 346 (2018).

92. *Id.* §§ 346–346a.

93. 7 U.S.C. § 136j (2018).

94. Nate Seltenrich, *Into the Weeds: Regulating Pesticides in Cannabis*, 127 ENVTL. HEALTH PERSP. 42001-2 (2019).

95. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 297A, 132 Stat. 4490.

96. 7 U.S.C. § 136a(c)(1).

97. Jacob Holzman & Jacob Fischler, *As States Legalize Marijuana, Pesticides May be a Blind Spot* (Sept. 16, 2019), <https://www.rollcall.com/2019/09/16/as-states-legalize-marijuana-pesticides-may-be-a-blind-spot/>.

on greenhouse plants”).⁹⁸ In some instances, states also require that the pesticide be registered for use on tobacco.⁹⁹ Several states have attempted to address this issue by invoking the “Special Local Needs” (SLN) provisions of FIFRA. Under § 24(c), FIFRA provides that each state may register an additional use of a federally registered pesticide product if certain conditions are met.¹⁰⁰ The EPA currently rejects this approach for cannabis uses.¹⁰¹ In spring 2017, Vermont, Nevada, Washington, and California each sought to issue four SLN

98. Below is a partial listing of various states’ guidance materials on cannabis pesticide use: **Alaska:** *Cannabis and Pesticides*, ALA. DEP’T. OF ENVTL. HEALTH, <https://dec.alaska.gov/eh/pest/cannabis-and-pesticides/> (last visited Apr. 14, 2020) (detailing Alaska’s guidance on pesticide use on cannabis); *List of Pesticides that Meet Alaska Criteria for Use on Marijuana*, ALA. DEP’T. OF ENVTL. HEALTH, <http://dec.alaska.gov/media/14350/cannabis-pesticides-alaska.xlsx> (last visited Apr. 14, 2020) (listing some pesticides that meet criteria to be used on cannabis crops); **California:** CAL. ENVTL. PROT. AGENCY DEP’T OF PESTICIDE REG., CANNABIS PESTICIDES THAT ARE LEGAL TO USE (2017) (listing examples of pesticides that are legal to use on cannabis in California, provided they meet certain criteria); **Colorado:** *Pesticide Use in Cannabis Production Information*, COLO. DEP’T OF AGRIC., <https://www.colorado.gov/pacific/agplants/pesticide-use-cannabis-production-information> (last visited May 2, 2020) (providing information on Colorado’s regulations on pesticide use in cannabis cultivation); COLO. DEP’T OF AGRIC., PESTICIDES ALLOWED FOR USE IN CANNABIS PRODUCTION (Dec. 26, 2019), <https://drive.google.com/file/d/1upPu4MAr15Wcdy0eOgP7fkgFDTTsmQo0/view> (providing a list of permissible pesticides for cannabis cultivation in Colorado); **Maine:** ME. DEP’T OF AGRIC., SELECTING EPA REGISTERED PESTICIDE PRODUCTS NOT PROHIBITED FOR USE ON CANNABIS IN MAINE (2020), (demonstrating whether a pesticide can be used on cannabis in Maine); **Maryland:** *Use of Pesticides on Medical Cannabis in Maryland*, NATALIE M. LAPRADE MD. MED. CANNABIS COMM’N, <https://mmcc.maryland.gov/Pages/Pesticide-Application.aspx> (last updated July 11, 2018) (explaining Maryland’s regulations on the use of pesticides on medical cannabis); MD. DEP’T OF AGRIC., PESTICIDE LIST (providing a list of pesticides for use in cultivation of medical cannabis); **Massachusetts:** Letter from John Lebeaux, Massachusetts Commissioner of Agriculture, to Cultivators of Marijuana and Hemp (Sept. 26, 2018) (detailing the Massachusetts prohibition on applying any pesticide to cannabis products unless explicitly approved by the Department); **Nevada:** NEV. DEP’T OF AGRIC., MEDICAL MARIJUANA PESTICIDE LIST (2019) (establishing a list of pesticides that are not legally prohibited for use on medical/recreational marijuana pursuant to Nevada Revised Statute Chapter 586); **Oregon:** *Guide List for Pesticides and Cannabis*, OR. DEP’T OF AGRIC., <https://www.oregon.gov/ODA/programs/Pesticides/Pages/CannabisPesticides.aspx> (last visited May 2, 2020) (providing a guide for pesticide use and cannabis in Oregon); **Washington:** *Pesticide & Fertilizer Use on Marijuana*, WASH. DEP’T OF AGRIC., <https://agr.wa.gov/departments/marijuana/pesticide-use> (last visited May 2, 2020) (providing a guide on pesticides and cannabis in Washington, including the Pesticide Information Center OnLine (PICOL) Data Base and a list of pesticides allowed for use on marijuana).

99. See U.S. GENERAL ACCOUNTING OFFICE, GAO-03-485, PESTICIDES ON TOBACCO: FEDERAL ACTIVITIES TO ASSESS RISKS AND MONITOR RESIDUES (2003) (explaining that the EPA places regulations on pesticide use for tobacco, some specific to state geology, waterways, and susceptibility to ecological harm).

100. Telisport W. Putsavage, *Legal Pot Industry Bugged by Lack of Pesticide Guidance*, 37 N.Y. ENVTL. L. 75, 76 (2017); 40 C.F.R. § 162.152.

101. Joseph Misulonas, *The EPA Won’t Regulate Harmful Pesticides in Marijuana Crops*, <https://www.civilized.life/articles/epa-no-marijuana-pesticide-regulation/> (last visited Apr. 14, 2020).

registrations for uses of tolerance-exempt products on cannabis.¹⁰² On June 22, 2017, the EPA sent letters notifying these states of the Agency's intent to disapprove the registrations.¹⁰³ Three of the states withdrew their SLN applications; the EPA disapproved Nevada's application on July 3, 2017.¹⁰⁴ This was a change of course from an EPA letter sent to Colorado in 2015, which had signaled that the EPA would consider SLN registrations for cannabis uses under some circumstances.¹⁰⁵ By contrast, in December 2019, the EPA approved adding industrial hemp to the use sites of 10 pesticides, consistent with the provisions of the Farm Bill.¹⁰⁶

CONCLUSION

As cannabis businesses establish and expand their operations, it is critical that they understand and adapt to a broad range of issues. This includes the environmental compliance and enforcement issues with which all businesses must grapple, as well as the exposure to litigation risk that such enterprises face from the existing and evolving legal and regulatory landscape. The litigation risks are magnified by anti-marijuana interest groups and the conflict between Federal illegality and state legality under which the industry may still operate for some time. Awareness of the issues is the first step in the process; subsequent engagement of appropriate consultants, experts, and legal counsel needed to address these issues will result in a stronger, environmentally sustainable industry.

102. See Cannabis Status Update from the U.S. Env'tl. Prot. Agency Pesticide Program Dialogue Committee Meeting (Nov. 1, 2017) (listing the states seeking a SLN registration for tolerance exempt products to use on cannabis plants).

103. Disapproval of Pesticide Product Registrations for Special Local Needs, 82 Fed. Reg. 47,733 (Oct. 13, 2017); Cannabis Status Update, *supra* note 102.

104. Cannabis Status Update, *supra* note 102.

105. Letter from Jack Housenger, Dir., Env't'l Prot. Agency, Office Pesticide Programs, to Mitchell Yergert, Dir., Colo. Dep't Ag. Div. Plant Indus. (May 19, 2015).

106. *Pesticide Products Registered for Use on Hemp*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/pesticide-registration/pesticide-products-registered-use-hemp> (last visited May 2, 2020).