

Regional Water Quality Control Board
North Coast Region

Executive Officer's Summary Report
Thursday, October 9, 2014
Best Western Miner's Inn
Yreka, California

ITEM: 4

SUBJECT: Update on the Cannabis Cultivation Waste Discharge Regulatory Program (*Diana Henriouille*)

BOARD ACTION: This is an information item only.

BACKGROUND: The North Coast Region is inundated with marijuana cultivation in headwaters and main river systems, with active, developed sites in steep and rugged terrain. The increased cultivation since the voters' passage of the Compassionate Use Act (Prop 215) and the legislature's passage of AB 420 has resulted in significant waste discharges and a loss of instream flows associated with improper development of rural landscapes on small, privately-owned parcels, and the diversion of springs and streams, to the detriment of water quality and the beneficial uses of water.

In 2013, staff from the Regional Water Board and other agencies, as well as other interested groups and parties, provided the Board with information about the observed and documented effects associated with the dramatic increase in marijuana cultivation activities occurring throughout the Region. Regional Water Board staff provided the Board with information about enforcement efforts and joint investigative efforts through various environmental crimes task forces, and the need for additional efforts both through development and implementation of a regulatory program and through education and outreach, in order to raise public awareness as to these issues, to encourage changes in site development and operational practices among the marijuana-growing community, to provide a vehicle for marijuana growers seeking to comply with water quality regulations, and to secure additional funding as necessary to further these efforts. At the request of the Board, staff counsel researched and reported on the Regional Water Board's legal authority and legal implications associated with the Regional Water Board's involvement in regulating the discharge of waste associated with marijuana cultivation. In early 2014, the Board expressed support of staff's proposed efforts to begin crafting a regulatory mechanism/ program for Board consideration and approval, and the Board requested that staff report back on progress with this effort in late 2014.

ISSUES: Regulatory Program Development
Enforcement
Statewide strategy
Increased staff resources
Education and outreach projects

Staff will provide the Board with brief updates on the status of enforcement, statewide efforts, new resources and staffing, and education and outreach projects, but the focus of today's item is a review of our regulatory program development and an overview of our draft regulatory mechanism.

I. Regulatory Program Development Status

Over 2014, staff have made significant progress in drafting a General Waiver of waste discharge requirements (Order) regulating the discharges of waste and use of surface waters associated with the cultivation of marijuana. Staff have circulated the draft internally among a limited number of key contributors, incorporated suggestions, and identified significant issues that warrant discussion with and input from stakeholder agencies, groups, and individuals among both the regulatory and regulated community. Staff have released the draft waiver, or an overview of the program, to various outside entities to begin discussions and solicit input. Those efforts are ongoing. Staff plan to bring the proposed Order to the Board for consideration in mid-2015.

Draft General Order Overview

This overview describes the draft Order and program as currently crafted and conceived.

Key Feature

The draft Order requires control of erosion and drainage features; proper spoil disposal; proper stream crossing design, construction and maintenance; water conservation and reasonable use; proper storage and handling of fertilizers, soil amendments, refuse and human waste, and petroleum products and other chemicals; and riparian and wetland management and protection associated with marijuana cultivation on private land. Subject to approval from the Executive Officer, Dischargers with similar operations to marijuana cultivation may also elect to enroll and comply with the Order to ensure their discharges are authorized.

Program Framework:

Any landowner or operator cultivating marijuana that results in a discharge of waste to an area that could affect waters of the State (including groundwater) will fall within one of three tiers depending on the nature of their operation and risk to water quality.

Dischargers shall be in the tier that covers the most impactful part of the operations (so different sections of property are not divided among the tiers).

Tier 1: The first tier is for dischargers with low risk to water quality based on certain physical characteristics of the operation such as proximity to surface water, nature and extent of site disturbance, and scale of operation. Tier 1 Dischargers do not directly divert surface water during the summer period. Dischargers in this tier must adhere to certain standard conditions. Enrollment is not required; however, dischargers are subject to administrative penalties if standard conditions are not met, and are encouraged to provide self-certification verification and to contact staff to schedule a site inspection.

Tier 2: Tier 2 is for dischargers with sites and/or operations that present a higher threat to water quality and water resources. Tier 2 sites do not meet the characteristics of Tier 1 sites. Tier 2 dischargers must adhere to certain standard conditions and must also develop and implement a water quality management plan. Enrollment and an annual fee are required, and dischargers are subject to administrative penalties if standard conditions are not met and/or a water quality management plan is not prepared or implemented.

Tier 3: The third tier is for dischargers with sites requiring cleanup and/or remediation or restoration based on past land development/ management that has resulted in a discharge or threatened discharge in violation of water quality standards. In addition to cleanup/remediation work, these dischargers must also adhere to standard conditions, and develop and implement a water quality management plan for any marijuana cultivation activities carried out during or following site cleanup. Enrollment and an annual fee are required for Tier 3, and Dischargers are subject to administrative penalties if standard conditions are not met and/or a water quality management plan is not prepared or implemented, and a cleanup/remediation plan is not developed or implemented. Tier 3 Dischargers are subject to an additional fee for agency oversight of cleanup activities.

Water Diversions:

The draft Order contains information, requirements, and general guidance provisions for water quality as it relates to the diversion and use of surface water. The Regional Water Board does not have jurisdiction to determine the scope and extent of any water right, or to grant or make changes to water rights permits and licenses. However, the Regional Water Board may request that the State Water Board consider various water right actions, refer cases to the Office of Enforcement, and request information pursuant to Water Code section 13267. Under Water Code 174, “[i]t is also the intention of the Legislature to combine the water rights and water quality functions of state government to provide for consideration of water pollution and water quality, and availability of unappropriated water whenever applications for appropriation of water are granted or waste discharge requirements or water quality objectives are established.”

Fee Structure:

Regional Water Board staff are proposing the following fee schedule:

Tier 2 - Annual enrollment fee, possibly with a surcharge based on number of plants.

Payment of fees, enrollment, and reporting may be accomplished through a pre-approved third party program.

Tier 3 - Annual enrollment fee for any proposed cultivation activities (consistent with those charged for Tier 2) plus additional fees or penalties associated with violations and cleanup oversight costs.

Compliance Assistance and Enforcement:

In the early stages of program implementation both prior to and after Order adoption, and during and after a designated enrollment period, staff anticipate conducting outreach to individuals or third party groups to provide assistance for Dischargers to be in compliance with the Order. Staff will conduct a certain amount of routine inspections on a yearly rotation and with the goal of eventually having some communication with every site. After the initial phase of implementation, the Regional Water Board will take enforcement actions, consistent with the State Water Resource Control Board's Water Quality Enforcement Policy, for violations of the Order, as appropriate.

Regional Water Board staff participate in environmental crimes task forces in several counties, as well as a statewide and a federal task force. Staff intend to coordinate environmental task force activities with implementation of the Order to the extent possible. Inspections allow staff to confirm that Dischargers have correctly identified their appropriate tier for coverage and are complying with applicable conditions and requirements. Dischargers who failed to enroll but can demonstrate compliance with the substantive requirements (including plans, schedule, and reasonable progress in bringing conditions on the site into compliance with the conditions) will generally not be subject to any additional enforcement response if the Discharger subsequently enrolls and pays applicable fees for the time they should have been enrolled. If water quality violations or impacts are confirmed, additional enforcement response is warranted. If already enrolled, Dischargers with cleanup obligations will need to comply under Tier 3. If not enrolled, Dischargers must enroll and comply with the Order, and pay all applicable fees for the time that they should have been enrolled, or otherwise be subject to an individual order. Enforcement response may also include assessment of penalties for violations, discharges of waste, or failure to comply.

CAVEATS

The Order does not preclude the need for permits that may be required by other governmental agencies.

The Cannabis Cultivation Waste Discharge Regulatory Program does not in any way authorize, endorse, sanction, permit or approve the cultivation, use, sale or other activities associated with marijuana. Individuals engaging in marijuana cultivation and other activities risk prosecution under federal law.

ISSUES FOR FURTHER DISCUSSION

Significant issues staff have identified for which they intend to seek input from stakeholders include, but are not limited to:

- The nature and type of new site development covered under the various Tiers, and the relationship between requirements under the draft Order and those of the State Water Board's Construction Stormwater Permit;
- Scope of Tier 1;

- Timeframes for Dischargers to enroll and to submit water quality management plans, and for Tier 3 Dischargers to submit Cleanup Plans;
- Third party programs and process for certification.

II. Recent Enforcement Activities

Over 2014, to date, enforcement efforts continue largely as discussed with the Board in past presentations. Staff participate in various environmental protection task forces, have attended a number of joint agency inspections, and have initiated and continue to pursue various enforcement actions as a result of violations identified or confirmed in the field.

III. Statewide Strategy

Increased statewide attention to the issue of environmental impacts from marijuana cultivation led to direction by the Governor and legislature for the State and Regional Water Boards and the Department of Fish and Wildlife (DFW) to develop a coordinated strategy to address the issue. Accordingly, staff of the Office of Enforcement (OE), as well as staff of Regions 1 and 5, and representatives from DFW developed a document entitled Proposed Strategy – Regulation and Enforcement of Unauthorized Diversions; Discharges of Waste to Surface and Groundwater Caused by Marijuana Cultivation. That document describes the proposed new program development in Region 5, as well as a statewide program, and also describes efforts underway and proposed expansions to that program in Region 1.

IV. New Staffing/Resources

Increased statewide attention to this issue also led to support by the Governor and legislature to fund a Budget Change Proposal adding new resources and staff to the Water Boards and to the DFW to implement the statewide strategy. As a result, Regions 1 and 5 have each received four new one-year limited-term positions, OE and DFW have received new staff as well, and efforts are underway to set up a longer term funding mechanism to sustain these positions after the first year. In Region 1, we have advertised for all four positions - two engineers, one scientist, and one geologist - and hope to complete filling those positions by mid-October.

V. Education and Outreach

Staff have been working closely with State Water Board staff in the contracts office, Division of Water Quality, and Office of Chief Counsel over the past several months to resolve issues in order to execute the contract for the Eel River Recovery Project's Marijuana Environmental Awareness Project. We hope to be able to report on progress of the project underway during our next update to the Board. In addition, we are nearing execution of the contract with the Mendocino County Resource Conservation District to develop the growers' guide for marijuana cultivators, and staff are beginning the grant agreement development process to execute agreements for the two Clean Water Act section 319(h) water temperature and flow-related grant projects (one with Cal Trout, the other with the Salmonid Restoration Federation) that were approved for funding earlier this year. Each of these projects will further our education and outreach efforts related to

the impacts to water quality and/or quantity associated with marijuana cultivation, and we will update the Board on all these projects during 2015.

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