

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

ORDER WR 2023-0036-DWR

CEASE AND DESIST ORDER

In the Matter of Unauthorized Diversion by

Ignacio Lupian
in
Lake County
on
APN: 002-012-390-000

The Assistant Deputy Director for Water Rights, acting under authority delegated by the State Water Resources Control Board (State Water Board), hereby finds:

SUMMARY OF DETERMINATIONS

1. Based on the facts and information contained herein, Ignacio Lupian (Diverter) is violating or threatening to violate requirements set forth in Water Code section 1831, subdivision (d)(6)(A), by diverting and using water for cannabis cultivation without the necessary state cultivation license.
2. This Order directs the Diverter to cease and desist the activities causing the violation(s) or threatened violation(s) and to take the corrective actions described below.

CEASE AND DESIST ORDER AUTHORITY

3. Water Code section 1831, subdivision (a), provides that the State Water Board may issue an order to cease and desist from violation(s) or threatened violations(s) of the requirements described in section 1831, subdivision (d). Specifically, Water Code section 1831, subdivision (d) provides in relevant part:

(6) Any diversion or use of water for cannabis cultivation if [...] any of the following applies:

(A) A license is required, but has not been obtained, under Chapter 6 (commencing with Section 26060) or Chapter 7 (commencing with Section 26070) of Division 10 of the Business and Professions Code.

4. Water Code section 1834, subdivision (a), provides that the State Water Board shall give notice informing the party that he or she may request a hearing not later than 20 days from the date on which the notice is received. If the party does not timely request a hearing, section 1834, subdivision (a) authorizes the Board to adopt a cease-and-desist order based on the statement of facts and information set forth in the notice without a hearing. The State Water Board delegated this authority to the Deputy Director for Water Rights in Resolution 2012-0029. The Deputy Director has redelegated this authority to the Assistant Deputy Director for Water Rights.

STATEMENT OF FACTS AND INFORMATION

5. Property: The violations and threatened violations at issue were observed on Lake County Assessor's Parcel Number (APN) 002-012-390-000 (hereinafter the Property).
6. Property Ownership: Lake County records indicate that the Diverter acquired the Property on July 15, 2015, and has owned the Property at all times relevant here.
7. Watershed Information: The Property is located in the upper Main-stem Eel River Watershed specifically in the Hyrdologic Unit Code (HUC) 12 watershed designated as Bear Creek-Rice Fork Eel River. Water for cannabis cultivation was diverted from an unnamed spring that is tributary to Little Soda Creek, which is a tributary of the HUC 12 Bear Creek Rice Fork sub watershed. Little Soda Creek is a tributary of the Main Stem Eel River. Downstream from the Property, in neighboring Mendocino County, the Main-stem Eel River is a state designated Wild and Scenic River from 100 yards below the Van Arsdale Dam to the Pacific Ocean.
8. Investigation Trigger: On June 1, 2021, the Division was notified by the California Department of Fish and Wildlife (CDFW) of a search warrant inspection in of the Property based on suspected illegal cannabis cultivation with possible surface water diversions on the Property. CDFW coordinated with Division staff to participate on the inspection, and the warrant authorized Division staff participation.
9. Water Rights Records Review: On June 2, 2021, Division staff searched for available State Water Board records in the Division of Water Rights Electronic Water Rights Management System (eWRIMS) and found no existing Statement, water right permit, license, or registration on file for the Property.
10. Well Records Review: On June 2, 2021, Division staff searched for available Department of Water Resources records in the online Well Completion Report database and found no existing records of the existence of a groundwater well on the Property.
11. Commercial Cannabis Cultivation License Records Review: On June 2, 2021, Division staff reviewed the California Department of Cannabis Control's (DCC's) commercial cannabis cultivation license records current to March 17, 2021, to determine if there was an active or pending license on file that would authorize the commercial cannabis

cultivation observed on the Property.¹ Division staff found no such license on record for the Property. On April 7, 2022, Division staff searched DCC's cultivation license records current to April 6, 2022, and again found no such license on record.

12. Inspection: Division staff, accompanied by CDFW Game Wardens and scientific staff, and Lake County Sheriff's Office, conducted an inspection of the Property on June 3, 2021, starting at 3:00 p.m. Neither the Diverter, nor a representative of the Diverter, was present during the inspection. Division staff observed a total of approximately 220 cannabis plants, along with a surface water diversion and related irrigation infrastructure, on the Property.
13. Points of Diversion: Division staff observed and documented one Point of Diversion (POD), two points of storage (POS) and two Points of Use (POU) on the Property during the June 3, 2021, inspection.
 - a. POD1/POS2 is a developed unnamed spring with defined bed and banks downstream flowing off the Property and tributary to Little Soda Creek, which is tributary to the Main Stem Eel River. POD1/POS2 consists of an onstream excavated pit reservoir 30 feet in diameter and approximately four (4) feet deep, surrounded by wetland vegetation. The reservoir is identified as POS2. The spring and downstream channel were flowing during the inspection. A gasoline pump located on the bank of the reservoir conveys water to POS1 through a black 1-inch polyethylene water line. Division staff did not observe any diversion control gate, dam release, or bypass structure in place at POD1/POS2 that could allow water diverted and stored to be released downstream.
14. Aerial Imagery Review: On June 21, 2021, and again on September 20, 2021, Division staff reviewed aerial imagery of the Property and made the following observations:
 - a. On June 21, 2021, Division staff reviewed Google Earth aerial imagery dated July 2, 2018, showing a similar cultivation greenhouse observed by Division Staff at POU1.
 - b. On June 21, 2021, Division staff reviewed LandVision aerial imagery dated June 29, 2019, showing a similar cultivation greenhouse observed by Division Staff at POU1.
 - c. On September 20, 2021, Division staff reviewed LandVision aerial imagery dated August 24, 2017, which shows the initial construction of the frame of the greenhouse at POU1.

¹ The California Department of Food and Agriculture (CDFA) was the state licensing authority for commercial cannabis cultivation until those functions were legislatively merged into DCC on July 12, 2021. For ease of reference in this Complaint, all references to DCC for licenses or licensing requirements that existed at the time of the inspection shall mean CDFA.

- d. On September 20, 2021, Division staff reviewed LandVision aerial imagery dated August 26, 2020, which showed graded areas and greenhouses at POU1 & POU2, consistent with cannabis cultivation activities.
 - e. On September 20, 2021, Division staff reviewed LandVision aerial imagery dated August 26, 2020, and confirmed multiple graded areas throughout the Property indicating potential commercial cannabis cultivation. The image shows cultivation occurring at both POU1 and POU2, which were observed during the June 3, 2021, inspection.
15. Inspection Report and Notice of Violation: On July 29, 2021, Division staff sent the Diverter a Notice of Violation and Inspection Report (NOV/IR) via certified mail. United States Postal Service Records indicate that the Diverter received the NOV/IR on July 31, 2021. The NOV/IR described the observations made by Division staff, the violations relating to those observations and the recommended corrective actions for the violations.
16. Landowner/Diverter Response: The Diverter established contact with the Division, in response to the NOV/IR, on August 5, 2021. The Diverter stated that cannabis cultivation would no longer continue on the Property and that a domestic use was desired from water diverted at POD1. To date, the Diverter has submitted photos depicting the removal of cannabis cultivation infrastructure on the Property and has since filed for a Small Domestic Use Registration (received by the Division on October 27, 2021).
17. Commercial Cannabis Cultivation License Requirements: CalCannabis established a commercial cannabis cultivation licensing program pursuant to Chapter 6 (commencing with section 26060) of Division 10 of the Business and Professions Code. CDFA began issuing licenses on January 1, 2018. The type of cultivation license required is dependent on the size of cultivation (measured by total canopy or number of mature plants) and whether the cultivation uses no artificial lighting (i.e. outdoor), exclusively artificial lighting (i.e. indoor), or mixed-lighting. Based on the review of aerial images and Division staff's observations during the site inspection, the cannabis cultivation occurring on the Property is of a scale sufficient to require a commercial cannabis cultivation license under Chapter 6 (commencing with Section 26060) of Division 10 of the California Business and Professions Code.
18. Water Rights Records Review: On October 13, 2021, Division staff searched eWRIMS and again found no such records.
19. Water Rights Records Review: On October 27, 2021, the Division staff reviewed available water rights records and found that the SDUR application for POD1 had been received and the registration is in the queue for review and approval.
20. Water Rights Records Review: On December 17, 2021, Division staff searched available State Water Boards records in eWRIMS and found a Small Domestic Use

Registration filed on behalf of the Diverter, with application ID D033248. D033248 is currently listed as pending.

21. Commercial Cannabis Cultivation License Records Review: On April 5, 2022, Division searched DCC's cultivation license records, current to February 23, 2022, and again found no such license on record.

VIOLATIONS AND THREATENED VIOLATIONS

22. Based on the findings described above, including observations made during the inspection, the Diverter is violating or threatening to violate a requirement described in Water Code section 1831, subdivision (d)(6)(A):

- a. Any person engaged in commercial cannabis activity must obtain a state license from CDFA. (Bus. & Prof. Code § 26037.5, subd. (a); 4 Cal. Code Regs. §15000.1, subd. (a).) "Commercial cannabis activity" includes cultivation. (Bus. & Prof. Code § 26001, subd. (j); 4 Cal. Code Regs. § 15000, subd. (o).) The only exceptions to the cultivation licensing requirement are for persons cultivating not more than six living cannabis plants, or certain nonprofit entities in limited circumstances not applicable here. (Bus. & Prof. Code § 26037.5, subd. (b).) CDFA's cultivation licensing requirements are set forth in Chapter 6 of Division 10 of the Business and Professions Code, commencing at section 26060.
- b. During the June 3, 2021, inspection, Division staff observed approximately 220 cannabis plants growing in 2 greenhouses, with an approximate total cultivation area of 4,920 sq. ft., irrigated from surface water diversions at POD1. Cannabis cultivation of the scale observed by Division staff on the Property required a CDFA commercial cannabis license under Chapter 6 (commencing with Section 26060) of Division 10 of the Business and Professions Code.
- c. On April 5, 2022, Division staff verified that the Diverter is in the process of coming into compliance. The Diverter has contacted staff to indicate that they will not continue cannabis cultivation activities on the Property. However, the Diverter appears to have a history of cultivation based on review of aerial imagery. There is a potential that the Diverter will continue to divert or use water for commercial cannabis cultivation on the Property that requires a license under Chapter 6 (commencing with Section 26060) of Division 10 of the Business and Professions Code.

23. Based on the findings described above, including observations made during the inspection, the Diverter is violating or threatening to violate a requirement described in Water Code section 1831, subdivision (d)(6)(B):

- a. Division staff documented that the Diverter failed to comply with an applicable requirement established by the State Water Board in the *Cannabis Cultivation Policy – Principles and Guidelines for Cannabis Cultivation* (Cannabis

Cultivation Policy)² pursuant to Water Code, section 13149.

- i. **Cannabis Cultivation Policy, Attachment A, Section 2, Term 66 Violation:** Term 66 requires that all surface water diversions for cannabis cultivation comply with the surface water Numeric and Narrative Instream Flow Requirements found in the Cannabis Cultivation Policy. Numeric and Narrative Instream Flow Requirements No. 4 prohibits surface water diversions for cannabis cultivation activities between April 1 through October 31 of each calendar year. During the June 3, 2021 inspection, Division staff documented active surface water diversion from POD1 for cannabis cultivation during the forbearance period in violation of this requirement. LandVision aerial imagery from August 2020 that depicts greenhouses with what appears to be cannabis plant canopy present at POU1 & POU2, and evidence of cannabis cultivation occurring in the greenhouses collected during the June 3, 2021, inspection, suggests that the greenhouses were likely used for cannabis cultivation on the Property in 2020. POD1 was the sole source of water observed on the Property during the inspection and was likely used to irrigate any cannabis grown in 2020.
- ii. The Diverter contacted Division staff in response to the IR and provided evidence that the corrective actions detailed in the IR have been taken. Considering the aerial imagery indicating a history of cannabis cultivation activities on the Property, there is the potential that the Diverter will continue to cultivate cannabis on the Property and divert surface water during the next forbearance period in violation of this requirement.

SECTION 1834 NOTICE REQUIREMENTS

24. On April 10, 2023, in accordance with Water Code section 1834, subdivision (a), the Division provided the Diverter with notice of the State Water Board's intent to issue an order determining that the Diverter is violating or threatening to violate requirements described in Water Code section 1831, subdivision (d).
25. The notice included the facts and information stated above, which describe the basis for the violations and threatened violations, and informed the Diverter that unless a written request for a hearing signed by or on behalf of the notified party is delivered to or received by mail by the State Water Board within 20 days after receipt of the notice, the State Water Board may adopt a cease and desist order based on the statement of facts and information set forth in the notice, without a hearing.

² The State Water Board on October 17, 2017, adopted the Cannabis Policy (Order No. WQ-2017-023-DWQ). This Order became effective December 18, 2017, upon the approval of the Office of Administrative Law. On February 5, 2019, the State Water Board adopted Order No. WQ-2019-001-DWQ, amending the Cannabis Policy effective April 16, 2019.

26. The Diverter did not timely request a hearing on the allegations contained in the notice, and to date has not requested a hearing.
27. The Assistant Deputy Director has determined that it would be appropriate to issue this Order based on the statement of facts and information set forth in the notice, as set forth above.

IT IS HEREBY ORDERED, pursuant to sections 1831 through 1836 of the California Water Code, that:

1. The Diverter shall immediately cease and desist any diversion and use of water from the unnamed spring and unnamed stream for cannabis cultivation on the Property unless authorized under a valid water right.
2. If the Diverter plans to cultivate in the future, an appropriative water right such as a cannabis Small Irrigation Use Registration must be obtained by the Diverter prior to any diversion or use of water for cannabis cultivation activities occurring on the Property.
3. The Diverter must implement the compliance plan within 60 days of the final compliance plan approval date.

ADDITIONAL INFORMATION

Consequences of Non-Compliance: Failure to comply with the requirements of this Order may result in additional enforcement, which may include the imposition of administrative civil liability or referral to the Attorney General to take further injunctive enforcement actions or seek civil liability, pursuant to Water Code section 1845. Civil liability, whether administrative or judicial, may be up to \$1,000 for each day in which the violation occurs, or up to \$10,000 for each day in which the violation occurs during drought.

Reservation of Enforcement Authority and Discretion: Nothing in this Order is intended to or shall be construed to limit or preclude the State Water Board from exercising its authority under any statute, regulation, ordinance, or other law.

Regulatory Changes: Nothing in this Order shall excuse the Diverter from meeting any more stringent requirements that may be imposed hereafter by applicable legally binding legislation, regulations, or water right permit requirements.

Compliance with Other Regulatory Requirements: Nothing in this Order shall excuse the Diverter from meeting any additional regulatory requirement that may be imposed by other local, State, or federal regulatory entities for corrective actions taken to comply with this Order.

Exemption from CEQA: This is an action to enforce the laws and regulations administered by the State Water Board. The State Water Board finds that issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, sections 21000 et seq.), in accordance with section 15321(a)(2), Title

14, of the California Code of Regulations. This action may also be considered exempt because it is an action by a regulatory agency for the protection of natural resources (Cal. Code Regs., tit. 14, § 15307) and an action by a regulatory agency for the protection of the environment (Cal. Code Regs., tit. 14, § 15308).

Effective Date: This Order is effective upon issuance, pursuant to Water Code section 1832.

Petition for Reconsideration: Any interested person or entity may petition the State Water Board for reconsideration of this Order pursuant to Water Code section 1122. Such petition shall be filed not later than 30 days from the date the State Water Board adopts this Order.

STATE WATER RESOURCES CONTROL BOARD

ORIGINAL SIGNED BY:

*Julé Rizzardo, Assistant Deputy Director
Division of Water Rights*

Date: July 14, 2023