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ENVIRONMENTAL LAW

How States Are Regulating Environmental Impacts of a Newly Legalized Industry

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Special to the Legal

Now legalized in some form in 32 states and the District of Columbia, marijuana is continuing its transition from a niche business in a handful of states to a national industry. Because the federal government still considers marijuana, or cannabis, to be a Schedule I controlled substance under the Controlled Substances Act (CSA), individual states have taken the lead in creating a legal, regulated marketplace for cannabis production and use. To that end, each state may have different goals in regulating the legal marketplace for cannabis, and businesses hoping to operate in or provide services for the newly legalized industry must understand the patchwork of compliance requirements they will face. This column surveys some of the ways states have chosen to regulate the environmental impacts of cannabis legalization in an effort to understand which issues have been prime targets for regulation, where some regulatory inconsistencies between the states exist, and what may be growing targets for regulation in the future.

HOW STATES REGULATE CANNABIS WASTE

Perhaps the most universal target of regulation among the legalizing states is the cannabis waste lifecycle. Most states impose specific requirements for the management and disposal of solid cannabis waste. Those requirements include rendering the waste unusable by blending it with noncannabis waste. Many states specify that the resulting blended waste must consist of at least 50 percent noncannabis waste, e.g., 1 Colo. Code Regs. Sections 212-2.307(E)(1), while other states simply require that the cannabis waste be both unusable and unrecognizable, see e.g., 28 Pa. Code Section 1151.40(b). Nonconsumable, solid wastes with which to blend cannabis waste include paper, plastic, cardboard, food, soil and other wastes, e.g., 3 Alaska Admin. Code tit. 3, Section 306.740(d).

Washington is one of the few states to classify cannabis waste under a different category if the waste, before blending with noncannabis waste, contains 10 percent or greater tetrahydrocannabinol (THC) concentration, which then must be managed as a dangerous waste under state law. On the other hand, for example, Oregon is perhaps more permissive in its approach to cannabis waste disposal by being one of the few states to permit the sale or transfer of cannabis waste between licensees.

After blending the cannabis waste, most states impose requirements on securing and accounting for cannabis waste from its generation to its disposal. California and Colorado are among the majority of states that require cannabis retailers and producers to dispose of cannabis waste in a secured receptacle or secured area, see 1 Colo. Code Regs. Section 212-2.307(G); Cal. Code Regs. tit. 16, Section 5055(c). In many states it remains unclear as to whether waste haulers, temporary transfer stations and landfills must also keep cannabis waste secure. At least one state, Colorado, has made clear in an advisory letter that the continued

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> *"If the legal landscape changes at the federal level, or if environmental impacts become more significant, the federal government may take a different regulatory approach."*

management and security of cannabis waste during transport or while at a transfer station is managed pursuant to the state's existing waste management regulations.

States' regulation of the cannabis waste stream extends to strict recordkeeping. Most states require its licensees to keep comprehensive records of the amount of waste produced, and to include their recordkeeping plan at the license application stage. Some states like Washington have implemented a state traceability system which requires producers or retailers to record and be able to trace the product from seed to disposal. Massachusetts and New York go as far as requiring the retailer to record the date, type and quantity of waste disposed, the manner and location of disposal, and the signatures of two employees present during the disposal or other handling of the waste.

CONSEQUENCES OF NO FEDERAL INVOLVEMENT

Despite the federal government's relatively hands-off approach to the legalization effort among the states, the federal government's continued classification of cannabis as a Class I controlled substance under the CSA has had trickle-down impacts on cannabis producers and retailers. Some of those impacts may be relatively minor, such as the Bureau of Reclamation prohibiting the use of its contract water for cannabis production. Other impacts may be more localized, as evidenced by anecdotes of compost haulers refusing to accept cannabis waste for fear of violating the CSA.

One of the more meaningful impacts has been the Environmental Protection Agency's (EPA) prohibition on the use of registered pesticides in cannabis cultivation. The EPA has not registered any pesticides for use in cannabis production, despite states like Vermont and Nevada submitting special local needs registrations to use certain tolerance-exempt products for cannabis cultivation. Although states have authority to register pesticide products at the state level, states like Massachusetts authorize pesticide use only when the pesticides have been authorized by the EPA, meaning that pesticide use in cannabis production is effectively prohibited in Massachusetts.

The Massachusetts Department of Agricultural Resources recently issued a cease-and-desist order to a cannabis grower who applied unapproved pesticides to its crop, pesticides which, according to the cultivator, were natural compounds approved for use on organic food and approved for use on cannabis by at least four other states. To be sure, some dispensaries are not seeing consistent enforcement of the prohibition, see Dan Adams, "Marijuana dispensary slams state for pesticide bust," The Boston Globe, Sept. 13, 2018. Other states like Washington, for example, have established their own action levels for certain pesticides. Colorado and California recently mandated testing on cannabis products for the presence of pesticides and other potential contaminants.

RESOURCE REGULATION MAY BE NEXT

As the cannabis industry grows, the targets of regulation may grow along with it. One growing target may be resource consumption—because cannabis cultivation can require a significant amount of water and energy, states are beginning to rein in the industry's resource consumption. The cannabis industry, for example, accounts for nearly 4 percent of Denver's electricity usage. This year, Boulder, Colorado, passed an ordinance requiring cannabis facilities to report their energy consumption to the city and to offset 100 percent of their consumption with renewable energy use or credits. Massachusetts has restricted the amount of energy used in grow lighting to an average of 36 watts per square foot of cultivation space. The limit effectively forces producers to switch from high-intensity discharge lamps, commonly used in indoor cultivation, to more energy efficient, but perhaps less effective, LED bulbs.

KEY AREAS TO WATCH

• **Continuing focus on the cannabis waste stream**. State regulations generally have been consistent in regulating the cannabis waste stream. Producers and retailers with multi-state operations can standardize their waste stream practices, but should also be aware of certain unique requirements among states.

• **Identifying risks and opportunities as waste generation grows**. Those producing cannabis waste should have contingency plans in a market where waste transporters may be limited. Those providing waste transporting and disposing services should capitalize on a growing industry and understand the relatively consistent regulatory approach pertaining to the cannabis waste stream.

• **Maintaining flexible production strategies**. Acceptable pesticides and types of lighting may vary from state to state. Other states may continue to implement restrictions on resources used in producing cannabis.

• **Keeping an eye on federal involvement**. For now, the federal government has been relatively uninvolved with the environmental impacts of the industry. If the legal landscape changes at the federal level, or if environmental impacts become more significant, the federal government may take a different regulatory approach. •

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