

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

DIVISION OF WATER RIGHTS

ORDER WR 2023-0041-DWR

CEASE AND DESIST ORDER

In the Matter of Unauthorized Diversion by

Kenneth & Donna Bowman
In

Trinity County

On

APNs: 022-200-031-000, 022-200-033-000

and

Mendocino County On

APN: 011-53 -08-01

Source: Unnamed Springs and Streams tributary to the Main-stem Eel River

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, Kenneth & Donna Bowman (hereinafter the Diverters) are violating or threatening to violate requirements set forth in Water Code Section 1831, subdivision (d):
 - a. The State Water Board, Division of Water Rights (Division) staff observed the Diverters diverting water from a non-riparian source to cultivate cannabis.
 - b. Division staff observed the Diverters using water to cultivate approximately 14,264 cannabis plants on April 29, 2021, without a license issued by California Department of Food and Agriculture (CDFA)

CalCannabis¹ as required by Chapter 6 of Division 10 of the Business and Professions Code (Bus. & Prof. Code, section 26060 et. seq.); and

- c. Division staff also observed and documented diversions of water for cannabis cultivation in violation of an applicable requirement established by the State Water Board in the *Cannabis Cultivation Policy - Principles and Guidelines for Cannabis Cultivation* (Cannabis Cultivation Policy) pursuant to Water Code, section 13149.
2. This Order directs the Diverter to cease and desist the activities causing the vibration(s) and to take the corrective actions described below.

CEASE AND DESIST 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)(1) and (6) provide:

(1) The prohibition against the unauthorized diversion or use of water subject to Division 2 of the Water Code (Wat. Code section 1052).

(6) Any diversion or use of water for cannabis cultivation if any of paragraphs (1) to (5), inclusive, or 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.

(8) The diversion is not in compliance with an applicable limitation or requirement established by the board or the Department of Fish and Wildlife under Section 13149.

(C) The diversion or use is not in compliance with a requirement imposed under paragraphs (1) and (2) of subdivision (b) of Section 26060.1 of, and paragraph (3) of subdivision (a) of Section 26070 of, the Business and Professions Code.

¹ Three state programs merged to form the Department of Cannabis Control (DCC). Those programs were the Bureau of Cannabis Control in the Department of Consumer Affairs, the Manufactured Cannabis Safety Branch in the Department of Public Health, and CalCannabis Cultivation Licensing in the Department of Food and Agriculture. Effective July 12, 2021, DCC is the state program tasked with licensing, inspecting, and regulating cannabis activities in California. However, because the site inspection and records review for this matter occurred prior to July 12, 2021, this Order references CDFA rather than DCC when identifying the licensing agency.

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. Diverter: Kenneth & Donna Bowman own the Property where the Water Code violations are occurring at all times relevant to this Order.

STATEMENT OF FACTS AND INFORMATION

5. Diverter: The Diverters own the properties where the Water Code violations occurred at all times relevant to this Order.
6. Property and Ownership: According to Trinity County Property records, the Diverters acquired APN 022-200-033-000 on March 8, 2001, and APN 022-200-031-000 on June 6, 2001. According to Mendocino County Property records, the Diverters acquired APN 011-530-08-01 on March 8, 2001 (collectively the Property).
7. Watershed Information: The Property is located in the Chamise Creek-Eel River Watershed. Water for cannabis cultivation was diverted from two unnamed streams and two unnamed springs that are tributary to Eel River. The Main-stem Eel River was declared by Water Right Order 98-08² to be a State Wild and Scenic River from 100 yards below Van Arsdale Dam to the Pacific Ocean. As a Wild and Scenic River, the State Water Board is limited from processing or accepting new applications to appropriate water unless the diversion and use of water fall within two limited exceptions approved by the Secretary of the Resources Agency. In accordance with the Public Resources Code, Division 5 Chapter 1.4, California Wild and Scenic Rivers Act, section 5093.50 et seq., it is the policy of the State of California, that certain rivers which possess extraordinary scenic, recreational, fishery, or wildlife values shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state. The Legislature declares that such use of these rivers is the highest and most beneficial use and is a reasonable and beneficial use of water within the meaning of section 2 of Article X of the California Constitution.
8. Water Rights Records Review: Prior to the inspection on April 27, 2021, Division staff examined available State Water Board records and found no evidence of an

² Fully Appropriated Streams List (ca.gov) Available at https://www.waterboards.ca.gov/waterrights/water_issues/programs/fully_appropriated_streams/docs/fas_list.pdf

existing Statement, water right permit, license, or registration for the diversions and use of water occurring on the Property. Subsequent to the inspection, on May 11, 2021, and September 24, 2021, Division staff again examined available State Water Board records and did not find evidence of an existing Statement, water right permit, license, or registration for the diversion and use of water occurring on the Property. Division staff checked again on July 12, 2022, and did not find a water right record for Ken or Donna Bowman.

9. CDFA License Records Review: On April 27, 2021, Division staff reviewed CDFA records of commercial cannabis cultivation licenses to determine if there was any license on file that would authorize commercial cannabis cultivation on the Property at the time of the aerial imagery. Division staff did not find any such licenses. Again, on October 27, 2022, Division staff reviewed cannabis cultivation licenses and did not find any such license for the Diverters.
10. Aerial Imagery Review:
On April 27, 2021, the Division reviewed aerial imagery of the Property and made the following observations:
 - a. Google Earth aerial imagery dated August 2017 is the earliest available aerial imagery showing a greenhouse and outdoor cannabis cultivation occurring on the Property.
 - b. LandVision imagery dated April 17, 2018, depicts graded areas, and greenhouse structures that are indicative of cannabis cultivation.
 - c. Google aerial imagery dated June 18, 2020, shows thirteen greenhouses and four hoop houses on the Property.
 - d. LandVision aerial imagery dated July 14, 2020, shows fifteen greenhouses on the Property.
 - e. LandVision aerial imagery dated December 7, 2020, shows ten greenhouses and three hoop houses.
11. Inspection Basis: In April 2021, the Division was notified by the California Department of Fish and Wildlife (CDFW) of a search warrant inspection of the Property based on illegal cannabis cultivation and possible surface water diversion used for cannabis cultivation. On April 29, 2021, Division staff, CDFW staff and
• Regional Board staff, participated in a search warrant inspection of the Property. The Diverters were not present during the inspection.
12. Points of Diversion: During the April 29, 2021 inspection, Division staff observed the following points of diversion (POD) related to the investigation of water use and diversion for cannabis cultivation:
 - a. POD1 is a groundwater well located approximately 150 feet away from an unnamed stream tributary to the Eel River. The total depth of the well was undetermined. On June 8, 2021, Division staff searched the Department

of Water Resources (DWR) well records and a DWR well completion report was not found on file. The well is constructed with a $\frac{3}{4}$ inch PVC pipe and the top of the well is equipped with a spigot shut off valve to control flow. Water from POD1 is pumped through a $\frac{3}{4}$ -inch polyvinyl chloride water supply line to Point of Storage 4 (POS4). Water diverted from POD1 is used for cannabis irrigation at Place of Use (POU) 2-3. POD1 is located within Mendocino County APN 011-530-08-01 owned by the Diverters. The Division is not asserting jurisdiction over POD1.

- b. POD2 is an impoundment 4 feet wide and 2.5 feet high made out of debris placed in the unnamed spring channel that allows water to pool behind the dam and be diverted to off-stream storage at POS2. The unnamed spring has defined bed and banks downstream from POD2 and water was flowing into and out of the diversion structure at the time of the inspection. Water from the unnamed spring flows off the property and is tributary to the Eel River. POD2 was not actively diverting water during the inspection because the water line was disconnected. Water from POD2 is conveyed by gravity through a 1-inch polyethylene water supply line to POS2. Water diverted from POD2 is used for cannabis cultivation irrigation at POU2-3. POD2 is located within Mendocino County APN 011-530-08-01 owned by the Diverters and appears to be riparian to the unnamed spring.
- c. POD3 is a point of diversion to off-stream storage located on an unnamed stream. POD3 is a $\frac{1}{2}$ inch polyethylene pipe installed into the unnamed stream at the inlet of a culvert road crossing where a pool of stream water facilitates the diversion of water by creating hydraulic head. The unnamed stream has defined bed and banks upstream and downstream from POD3 and water was flowing into and out of the diversion structure and off the property to the Eel River. The POD3 was actively diverting water during the inspection with a $\frac{1}{2}$ -inch polyethylene water line that passively diverts water by gravity to POS2. Water diverted from POD3 is used for domestic use and cannabis cultivation irrigation at POU1-3. POD3 is located within Mendocino County APN 011-530-08-01 owned by the Diverters and appears to be riparian to the unnamed stream.
- d. POD4 is a point of diversion to off-stream storage made from hand stacked rock that allows water to pool behind the dam in an impoundment 12 feet wide and 3 feet high located on an unnamed stream tributary to the Eel River. The unnamed stream has defined bed and banks upstream and downstream from POD4 and water was flowing into and out of the diversion structure at the time of the inspection. The POD4 was not actively diverting water during the inspection. Water diverted from POD4 goes to off-stream storage in POS6. Water from POD4 is pumped through a 1-inch polyethylene water supply line to POS6. Water diverted from POD4 is used for cannabis cultivation irrigation at POU3. POD4 is located

within Mendocino County APN 011-530-08-01 owned by the Diverters and appears to be riparian to the unnamed stream.

- e. POD5 is a point of diversion -to off-stream storage located at the headwaters of an unnamed spring that is a tributary to the Eel River. POD5 consists of a water trough placed in the headwaters of the spring with a ¾ inch PVC pipe diverting water into the water trough. The unnamed spring has defined bed and banks upstream and downstream from POD5 and water was flowing into and out of the water trough at the time of the inspection. Water from the unnamed spring flows off the property. POD5 was not actively diverting water during the inspection. Water diverted from POD5 is conveyed by gravity through a ¾-inch polyethylene black water supply line to POS16. Water diverted from POD5 is used for cannabis cultivation irrigation at POU4-6. POD5 is not riparian to POU6 where water was observed to be diverted and used. POD5 is located within Trinity County APN 022-200-033-000. POU6 is located on the neighboring property located (APN 022-200-031-000).

13. Inspection Report and Notice of Violation: On April 29, 2021, at the conclusion of the inspection, Division staff left a Notice of Violation (Field NOV) summarizing Water Code violations observed during the inspection. Following the inspection, on July 8, 2021, Division staff sent an Inspection Report to the Diverter. The Inspection Report describes the observations made by Division staff during the inspection, the violations relating to those observations, and provides compliance options and recommended corrective actions for each of the alleged violations (Attachment 1). Division staff mailed the Inspection Report to the Diverter via certified mail on July 8, 2021. Based on the United States Postal Service!:) (USPS) tracking on July 14, 2021, at 1:15 PM the Diverter received the Inspection Report.
14. Response to Notice of Violation: The Diverters retained an attorney to assist with the alleged violations documented during the inspection. On June 30, 2021, Division staff received an email containing a letter from the Diverters' attorney directed to CDFW and the North Coast Regional Water Quality Control Board (Regional Water Board). The letter stated that the Diverters intended to comply with the corrective actions outlined in the reports they received in response to the alleged violations. The Division's counsel subsequently had numerous conversations with the Diverters' and their counsel. Nevertheless, the Divertei-s have not filed for an appropriate water right or implemented corrective actions to bring the violations on the Property into compliance with the Water Code and the Cannabis Cultivation Policy.
15. Inspection observations in summary identify a continued threat of unauthorized diversion from a non-riparian source in violation of and threatened violation of Water Code section 1052. The diversion of waters at POD5 for use at POU6 results in an unauthorized diversion to. use on lands non riparian to the point of diversion.

16. Confirmation of the Need for CDFA License: Based on Division staff's observations during the site inspection and the cultivation visible in aerial imagery, 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.
17. Cannabis Cultivation Policy Requirements: The State Water Board's Cannabis Cultivation Policy originally went into effect on December 18, 2017. The Policy contains principles, guidelines, and requirements (Requirements) adopted pursuant to Water Code section 13149, for the diversion or use of water for cannabis cultivation in areas where cannabis cultivation may have the potential to substantially affect instream flow.
 - a. The Cannabis Cultivation Policy defines cannabis cultivation as: "Any activity involving or necessary for the planting, growing, pruning, harvesting, drying, curing, or trimming of cannabis. This term includes but is not limited to: (1) water diversions for cannabis cultivation, and (2) activities that prepare or develop a cannabis cultivation site or otherwise support cannabis cultivation and which discharge or threaten to discharge waste to waters of the state."
 - b. Division staff observed numerous violations of Cannabis Cultivation Policy requirements during the May 12, 2021, inspection, and documented those violations in the Field NOV, including: failing to comply with the Narrative and Numeric Instream Flow Requirements No. 4., The Surface Water Dry Season Forbearance Period (Section 2, Term 66); Failure to render diversion intake inoperable during the Surface Water Dry Season Forbearance Period (Section 2, Term 77); failure to install separate measuring devices to quantify water diversions to and from each storage facility and purpose of use (Section 2, Term 81); failure to install water measuring device or maintain diversion records (Section 2, Term 82); water storage facility without device to prevent water overflow (Section 2, Term 92); failure to secure tank openings (Section 2, Term 93); failure to maintain daily records of water use for cannabis irrigation (Section 2, Term 98).

ALLEGED VIOLATIONS AND THREATENED VIOLATIONS

18. Based on the findings described above, including observations made during the inspection(s), the Diverters are violating or threatening to violate the following requirement described in Water Code Section 1831, subdivision (d)(1):
 - a. The Diverter violated and is threatening to violate Water Code section 1052. Division staff documented an unauthorized diversion and use of a non-riparian diversion in violation Water Code section 1052.

19. Based on the findings described above, including observations made during the inspection(s), the Diverters are violated and threaten to violate the following requirements described in Water Code Section 1831, subdivision (d)(1)(A):

- a. Any person engaged in commercial cannabis activity must obtain a state license. (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. O); 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).) Cultivation licensing requirements are set forth in Chapter 6 of Division 10 of the Business and Professions Code, commencing at section 26060.
- b. Based on Division staff's observations during the April 29, 2021 inspection, staff determined that the observed scale of cannabis cultivation occurring on the Property required a CDFG commercial cannabis license under Chapter 6 (commencing with Section 26060) of Division 10 of the Business and Professions Code. Division staff observed approximately 14,264 cannabis plants growing with an approximate total area of 36,945 sq. ft., irrigated from surface water diversions at POD 2-4. Division staff found no record that Diverter obtained the required license from CalCannabis for the observed cannabis cultivation on the Property.
- c. The Diverters remain as the owners of record for the Property. Due to the Diverters' ownership of the Property and the relative ease by which a cannabis cultivation irrigation system can be re-established there exists a threat the Diverters will continue to divert and use water for commercial cannabis cultivation on the Property without a state license(s).

20. Based on the findings described above, including observations made during the inspection(s), the Diverter is violating or threatening to violate the following requirements described in Water Code Section 1831, subdivision (d)(6)(B):

- a. Division staff documented that the Diverters failed to comply with an applicable requirement established by the State Water Board in the Cannabis Cultivation Policy 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 April 29, 2021 inspection, Division staff documented active surface water diversion from POD3 for cannabis cultivation during the forbearance period in violation of this, requirement. Water diverted from POD3 was used for domestic and cannabis cultivation at three POU's (POU1-3).

- ii. The Diverters have not filed for a water right or implemented the corrective actions detailed in the Inspection Report to bring the violations on the Property into compliance with the Water Code and the Cannabis Cultivation Policy. Considering the aerial imagery indicating a history of cannabis cultivation activities on the Property, the seasonal nature of cannabis cultivation, and the failure to engage with Division staff concerning the need to implement corrective actions in response to the violations, the threat of violation of Water Code, section 13149 persists at the Property.

SECTION 1834 NOTICE REQUIREMENTS

21. The Diverter received the draft COO via personal delivery on June 30, 2023, in Santa Rosa, California. Thus, in accordance with Water Code Section 1834, subdivision (a), the Division, has provided the Diverter with notice of the 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)(6)(A)-(B)..
22. This notice includes the facts and information as stated above that describes the basis for the violations and threatened violations, and informs 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 Board within 20 days after receipt of this notice, the Board may adopt a cease and desist order based on the statement of facts and information set forth within this notice, without a hearing.
23. The Diverter did not submit a timely hearing request in response to the draft COO.

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

1. The Diverter shall immediately cease and desist the diversion of water from POD5 for use at POU6 until such a time as an appropriate water right has been

obtained authorizing the diversion of non-riparian water for use at a non-riparian POU.

- 2 The Diverter shall immediately cease and desist any diversion or use of water from POD2-5 for cannabis cultivation until a commercial cannabis license under Chapter 6 (commencing with Section 26060) of Division 10 of the Business and Professions Code is obtained. The requirement to obtain a cultivation license also incorporates the requirement to obtain a water right pursuant to Business and Professions Code section 26060.1(a)(2)(A).
3. If the Diverters intend to seasonally store water or to cultivate cannabis, the Diverters shall submit a draft compliance plan for review and approval by the Division within 30 days of the date of adoption of this Order. If the Diverters intends to cultivate and use water for domestic purposes, the compliance plan must detail what actions will be taken to ensure that a commercial cannabis license or a domestic use license is obtained prior to any diversion and use of water from the unnamed spring and that cannabis cultivation water will not be diverted from the unnamed spring during the surface water dry season forbearance period (April 1 - October 31) for irrigation of cannabis. The draft compliance plan must also describe how they will permit or utilize water for domestic purposes. The draft compliance plan must include installation of adequate water storage to enable the Diverters to divert during the non-forbearance period and store water at a capacity sufficient to irrigate through the forbearance period without diverting from surface water. If the Diverters intend to seasonally store water diverted from the unnamed stream or spring, the draft compliance plan must include a timeline for obtaining an appropriative water right, such as a Cannabis Small Irrigation Use Registration. The Diverters must ensure that any actions contained in the draft compliance plan comply with all applicable local, state, and federal requirements. Within 60 days of the final compliance plan approval date, the Diverters must implement the actions contained in the compliance plan. If the Diverters anticipate implementation of the compliance plan will require additional time beyond 60 days, then the compliance plan shall propose an alternative date of completion.
4. Upon completion of the compliance plan the Diverter must provide an as-built final completion report stamped by a licensed professional experienced in the field of work implemented.

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 requirements 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 board adopts this Order.

STATE WATER RESOURCES CONTROL BOARD



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

Date: AUG 15, 2023