



SO YOU WANT TO REGULATE CANNABIS IN YOUR COMMUNITY

BBK WEBINAR

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BEST BEST & KRIEGER
ATTORNEYS AT LAW

PRESENTERS



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Presentation Outline

- **Introduction to Legal Landscape**
 - Federal law
 - Controlled Substances Act
 - 2013 Cole Memo
 - State law
 - Case law – preemption and local authority to regulate
 - Statutory scheme – MAUCRSA
 - Local law
 - Highly customizable to address local concerns and opportunities
- **Local Regulation of Cannabis Under MAUCRSA**
 - Current municipal authority to regulate cannabis-related activities
 - Personal
 - Consumption
 - Personal indoor cultivation
 - Medical
 - Commercial
 - Risks associated with cannabis-related activities
 - Taxation (Brief overview)
- **Regulatory Challenges Associated with Local Regulation**
 - Cost Recovery
 - Conduct studies to determine the impact of processing cannabis-related applications
 - Utilities



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Federal Law

Controlled Substances Act

- Cannabis used for any purpose is a federal crime; Schedule I Drug.
- Aiding and abetting liability;
- Any distribution of cannabis in any premises is illegal.



Federal Law

Gonzales v. Raich (2005) 545 U.S. 1

- Federal law enforceable despite Compassionate Use Act or Medical Marijuana Program
- No federal medical necessity defense
- Commerce Clause gives Congress power to regulate controlled substances including cannabis for all purposes



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Federal Law

- Controlled Substances Act
 - Cannabis is classified as a Schedule 1 narcotic
- DOJ memos re Enforcement Priorities
 - Sale/Distribution to Minors
 - Interstate Commerce
 - Use of revenues for other illegal activity
 - Trafficking of other illegal substances
 - Violence and firearm use
 - Driving under the influence
 - Cultivation and use on public/Federal land



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State Law – Preemption

- Cities, towns and counties are not preempted by state law from enacting ordinances regulating the location of cannabis distribution facilities. *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729.
- Cities, towns and counties are not preempted by state law from regulating outdoor cultivation of cannabis. *Kirby v. County of Fresno* (2015) 242 Cal.App.4th 940; *Maral v. City of Live Oak* (2013) 221 Cal.App.4th 975.



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State Law – Statutory Scheme

SENATE BILL 94

- Prior to SB 94, there were two separate regulatory schemes: the Medical Cannabis Regulation and Safety Act (MCRSA) and the Adult Use of Marijuana Act (AUMA).
- In June 2017, Gov. Jerry Brown signed SB 94 into law, creating a single regulatory scheme that addresses both medical cannabis and recreational cannabis known as the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA).



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State Law – Statutory Scheme

Assembly Bill 133

- Governor Jerry Brown signed AB 133 on September 16, 2017. The law went into effect immediately.
- AB 133 removes the requirement that different commercial license types of cannabis businesses (e.g., cultivators, manufacturers, retailers, etc.) maintain “separate and distinct” premises. By removing that requirement, a single physical location can now hold multiple state licenses, subject to applicable local ordinances.
- The bill amends the definition of “delivery” to remove the requirement that use of a technology platform by a retailer must be owned and controlled by the retailer.
- The bill also removed the word “physical” from the requirement that licensees maintain a “physical copy” of customers’ delivery requests, opening the door for use of electronic methods.
- Additionally, AB 133 removed the restriction that medicinal cannabis manufacturers only manufacture products for sale by medicinal retailers.



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State Law – Statutory Scheme

Regulatory Oversight

- Bureau of Cannabis Control
 - Within Dept. of Consumer Affairs
 - Retailers, distributors, testing laboratories and microbusinesses (track-and-trace)
- Dept. of Food and Agriculture
 - Cultivation and implementation of track-and-trace system for plants from cultivation to sale
- Dept. of Public Health
 - Manufacturing



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State Law – Statutory Scheme

Various State Licenses

- Types 1 through 3 – Cultivation; specialty, outdoor, and indoor; small and medium (Jan. 2018)
- Type 4 – Cultivation; Nursery
- Type 5 – Cultivation; outdoor/indoor; large (Jan. 2023)
- Type 6/7 – Manufacturing 1 and 2
- Type 8 – Testing
- Type 10 – Retailer
- Type 11 – Distributor
- Type 12 – Microbusiness



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State Law – Statutory Scheme

- Bureau of Cannabis Control regulations under MAUCRSA
 - Licensing and enforcement program for commercial cannabis distributors, retailers, testing laboratories, and microbusinesses
 - Summary of emergency regulations as part of program description
 - Draft Initial Study/Negative Declaration
 - Comments due October 6, 2017



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State Law – Statutory Scheme

State Licensing of Commercial Operations

- All nonmedical cannabis businesses must have a state license
- State License cannot be issued to an applicant whose operations would violate the provisions of any local ordinance or regulation
- State license will be valid for one year
- Separate state license required for each business location
- Licensing schedule under current law



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Local Regulation

- **Local Regulation of Cannabis Under MAUCRSA**
 - Current municipal authority to regulate cannabis-related activities
 - Personal
 - Consumption
 - Personal indoor cultivation
 - Medical
 - Commercial
 - Taxation



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Personal Use

- AGE: 21 years of age or older
- POSSESSION: May possess, process, transport, purchase, obtain, or give away
 - 28.5 grams of non-concentrated non-medical cannabis, or 8 grams of concentrated cannabis products
- USE: May smoke or ingest cannabis or cannabis products
- CULTIVATION: May possess, plant, cultivate, harvest, dry or process up to 6 plants per residence for personal use subject to “reasonable regulation.”



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Restrictions on Personal Use

- No smoking in a public place (except where authorized locally)
- No smoking where smoking tobacco is prohibited
- No smoking within 1,000 feet of a school, day care center or youth center
- No smoking while driving or riding in a vehicle
- Cities may prohibit smoking and possession in buildings owned, leased, or occupied by the city
- Employers may maintain drug-free workplaces



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Personal Cultivation

- Local governments may “reasonably regulate” but not prohibit personal indoor cultivation of up to 6 cannabis plants within a private residence.
- Includes cultivation within a greenhouse or other structure on the same parcel of property that is not visible from a public space.
- Local governments may regulate or prohibit personal outdoor cultivation.



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Questions about Personal Cultivation

- What are “reasonable regulations” on personal cultivation of 6 plants within a personal residence?
- Examples:
 - A local requirement for a residential cultivation permit, with an appropriate fee;
 - Requiring as a condition of the permit, that the permit holder agree to periodic inspections (upon appropriate notice), to ensure that cultivation is not:
 - In excess of the six-plant limit
 - Drawing more electrical power from the grid that the structure/house is designed to withstand, thereby causing a fire hazard
 - Presenting a health hazard such as mold accumulation
 - Using more water than is reasonably required to cultivate six plants
 - Express local regulations requiring cultivation to comply with the Fire Code, Building Code and reasonable limitations on the use of water



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Local regulation/prohibition of Commercial Operations

- **Cities/counties may regulate or completely prohibit state-licensed cannabis businesses (recreational and medical)** but may not prohibit use of public roads for deliveries in another jurisdiction
- **State standards are minimum standards.**
Cities/counties may establish additional standards, regulations re: health & safety, environmental protection, testing, security, food safety, and worker protections



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Local regulation/prohibition of Commercial Operations

- SB 94 does not require a city or county to enact a regulatory scheme or prohibition by certain date.
- Lori Ajax was quoted last week saying she anticipates that State will begin issuing licenses beginning January 1, 2018.
- If city or county regulations are not in place before business applies for state license, state license either will not issue or be subject to local regulations.



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Local Regulation

- **Regulatory Challenges Associated with Local Regulation**
 - Enforcement
 - Risks associated with cannabis-related activities
 - Cost Recovery
 - Conduct studies to determine the impact of processing cannabis-related applications
 - Utilities



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Risks associated with commercial cannabis activities

Dispensaries/retailers:

- Loitering
 - (Mitigating action: enforce anti-loitering regulations; enforce security site plan)
- Consumption of cannabis products on site and leaving under the influence
 - (Mitigating action: prohibit onsite consumption)
- Cash business – target for robberies. Due to large sums of cash on hand in addition to cannabis inventory, security is a major concern for any cannabis facility, especially retail stores.
 - (Mitigating action: Local codes can vary, but in some states, an alarm system and video surveillance system are required by law.)



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Risks associated with commercial cannabis activities

Cannabis cultivation:

- Fire/electrical: High intensity lamps which may increase chance of electrical fires.
 - (Mitigating action: ensure that electrical system conforms with building and fire standards)
- Chemicals: Illegal chemicals for fertilizer and pesticides being used on product
 - (Mitigation action: state to regulate pesticide use)
- Odor: Potential to emit odors from cultivation site. Cannabis plants emit a very strong “skunk like” odor.
 - (Mitigation action: local authorities typically require ventilation systems to be installed such that any odors are prevented from leaving the premises. This is usually accomplished by installing a charcoal filter on the discharge of the exhaust duct. Other methods to reduce odors include ozone generators and ionizers.)



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Risks associated with commercial cannabis activities

Cannabis cultivation cont'd

- Mold: In order to maximize the rate of plant growth, humidity levels must be kept in the optimum range. If the humidity gets excessively high, the grow room becomes a conducive environment for the growth of mold and pathogenic organisms.
 - (Solution: The walls and ceiling construction of the room should include vapor barriers and corrosion resistant materials. The walls should have sufficient insulation behind the vapor barrier to minimize the chances of moisture in the air condensing and forming water droplets on the wall.)
- Security: Because the sale of cannabis is still illegal under federal law, most banks have not been willing to work with cannabis related businesses. This has made it difficult or impossible for facility operators to obtain banking services, forcing them to operate as all-cash businesses. Due to large sums of cash on hand in addition to cannabis inventory, security is a major concern for any cannabis facility, especially retail stores.
 - (Solution: Local codes can vary, but in some states, an alarm system and video surveillance system are required by law.)



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Risks associated with commercial cannabis activities

Manufacturing

- Butane extraction: Butane extraction involves soaking raw cannabis – flower or trim – in butane to extract the THC. Without proper ventilation, a room can fill with gas, and a spark can ignite a fireball. Propane can be used in a similar fashion, with much of the same risk.
- CO2 extraction: side-steps the flammable danger of hydrocarbon extraction using butane or propane, but the gas can still be deadly. The process uses a combination of high temperature and pressure to turn CO2 into a liquid that acts as a solvent. The solvent then passes through finely ground raw cannabis in an extraction reactor column. Once the solvent has worked to isolate the desired compounds, - cannabinoids and terpenes – a change in temperature and pressure returns the CO2 to gas. The released gas leaves behind resin and oil that can be incorporated into infused products. (Solution: state regulations re extraction; train personnel re use of equipment and adequate ventilation)



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Risks associated with commercial cannabis activities

Manufacturing Cont'd

- Alcohol extraction: Another common extraction method is an alcohol distillation. Although alcohol or 190-proof liquor is the most common solvent used in this method, almost any flammable liquid can be used. Cannabis leaves and buds are soaked in the alcohol, and the liquid is then boiled off, leaving the oil behind.
 - (Mitigating action: A hazardous vapor exhaust hood is required to be installed over the extraction process equipment to capture any flammable vapors released. Equipment must be rated for heating flammable liquids, and open flames are prohibited.)
- Ventilation/Odor: Potential to emit odors from cultivation site. Cannabis plants emit a very strong “skunk like” odor, and local authorities typically require ventilation systems to be installed such that any odors are prevented from leaving the premises.
 - (Mitigating action: This is usually accomplished by installing a charcoal filter on the discharge of the exhaust duct. Other methods to reduce odors include ozone generators and ionizers)
- Finances/Auditing: Auditing difficulties (how to impose/how to audit)
 - (Mitigating action: require point of sale data and ability of city to audit books)



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Risks associated with commercial cannabis activities

Deliveries:

- Robbery: Cars become targets (carry a lot of cash, frequently are easy to spot)
- Tracking issues: Harder to regulate (inherently a multi-jurisdictional operation, harder to track violators)
- Finances/Auditing: Auditing difficulties (how to impose/how to audit)
 - (Mitigating action: require point of sale data and ability of city to audit books)
- Security: Because the sale of cannabis is still illegal under federal law, most banks have not been willing to work with cannabis related businesses. This has made it difficult or impossible for facility operators to obtain banking services, forcing them to operate as all-cash businesses. Due to large sums of cash on hand in addition to cannabis inventory, security is a major concern for any cannabis facility, especially retail stores.
 - (Mitigating action: Local codes can vary, but in some states, an alarm system and video surveillance system are required by law.)



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Risks associated with commercial cannabis activities

Testing Facilities:

- General Issues: There are serious issues even in states with testing regulations. In Colorado, for example, the state inspects laboratories before allowing them to conduct tests on cannabis. To receive a state license, labs must meet certain personnel, quality control, security, chain of custody and reporting qualifications, according to the state's Marijuana Enforcement Division. Labs must have manuals outlining standard operating procedures and show they can retain specimens responsibly
- Transportation: Transportation of cannabis into and out of the facility comes with public safety risks
 - (Mitigating action: require safety plan which includes delivery safety measures)



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MAUCRSA and Taxation of Cannabis

- Adds state excise tax of 15% of the average market price of any retail sale by a cannabis retailer on the privilege of purchasing cannabis at retail (Section 34011(a)). Effective January 1, 2018.
- Adds excise tax of \$9.25/dry-weight ounce (flowers) and \$2.75/dry-weight ounce leaves on the privilege of cultivating cannabis. Effective January 1, 2018.
- MAUCRSA does not affect local governments' authority to impose taxes on medical or non-medical cannabis.
- Exemptions:
 - Cannabis cultivated for personal use is exempt from cultivation tax.
 - Medical cannabis is exempt from state/local sales tax but NOT other state or local taxes. Effective November 9, 2016



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Allocation of State Excise Taxes on Cannabis under MAUCRSA

60%

youth programs, substance abuse education, prevention and treatment

20%

environmental cleanup, remediation, and restoration

20%

reduce DUI, reduce negative health impacts re: cannabis legalization

- A city, town (or county) that bans cultivation, including outside personal cultivation, or the retail sale of cannabis, is not eligible for some grants.



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Local Taxes and Fees on Cannabis

- MAUCRSA: The new state excise taxes are “in addition to the sales and use tax imposed by the state and local governments” (Calif Rev & Tax Code §34011)
- New, increased, or extended local taxes require voter approval (2/3 for special tax; majority vote for general tax)
- The most common local excise tax is a **business license tax**:
 - Dispensing ■ Manufacturing
 - Cultivation ■ Transportation
- Local governments' sales tax may not differ from Bradley-Burns Uniform Sales and Use Tax Law in either what is taxed or the rate of the tax.



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Taxation and Revenue

- Examples of tax measures:
 - **Davis:**
 - 10% tax on the gross receipts of cannabis businesses (medical and non-medical) via business license tax
 - **Coachella**
 - 6% gross receipts tax on all cannabis businesses (cultivation, processing, manufacture, delivery, distribution, storing, or sale) operating within the City.
 - \$15.00 per square foot of space utilized for cannabis.
 - “Grow rooms” where cannabis is harvested and dried
 - “Lab” space where cannabis is tested for quality control
 - “Factory floor” where cannabis is processed and manufactured into cannabis-infused products, packaging and labeling areas, and areas used for distribution and transport.



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Taxation and Revenue

- Examples of tax measures:
 - **Cathedral City**
 - 15% per dollar tax of gross receipts.
 - The tax applies to all cannabis collectives and dispensaries, defined broadly to include cannabis businesses that involve "planting, cultivating, harvesting, transporting, dispensing, delivering, providing, manufacturing, compounding, converting, processing, preparing storing, packaging, or testing any part of the cannabis plant for medical purposes."
 - **Desert Hot Springs**
 - Annual tax of \$25 per square foot for the first 3,000 square feet in connection with the cultivation of cannabis for casual/recreational use.
 - Monthly tax of 10% of gross receipts from the sales of cannabis for casual/recreational use.



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Taxation and Revenue

- Examples of tax measures
 - **Santa Cruz**
 - 10% of gross receipts on any "cannabis business," defined broadly to include both medical or nonmedical cannabis sales – including distribution, delivery, manufacturing, storing, wholesale and retail sales.
 - **Sacramento**
 - 4% of each dollar of gross receipts on medical cannabis
 - 10% tax on the gross receipts of cannabis businesses providing recreational cannabis.

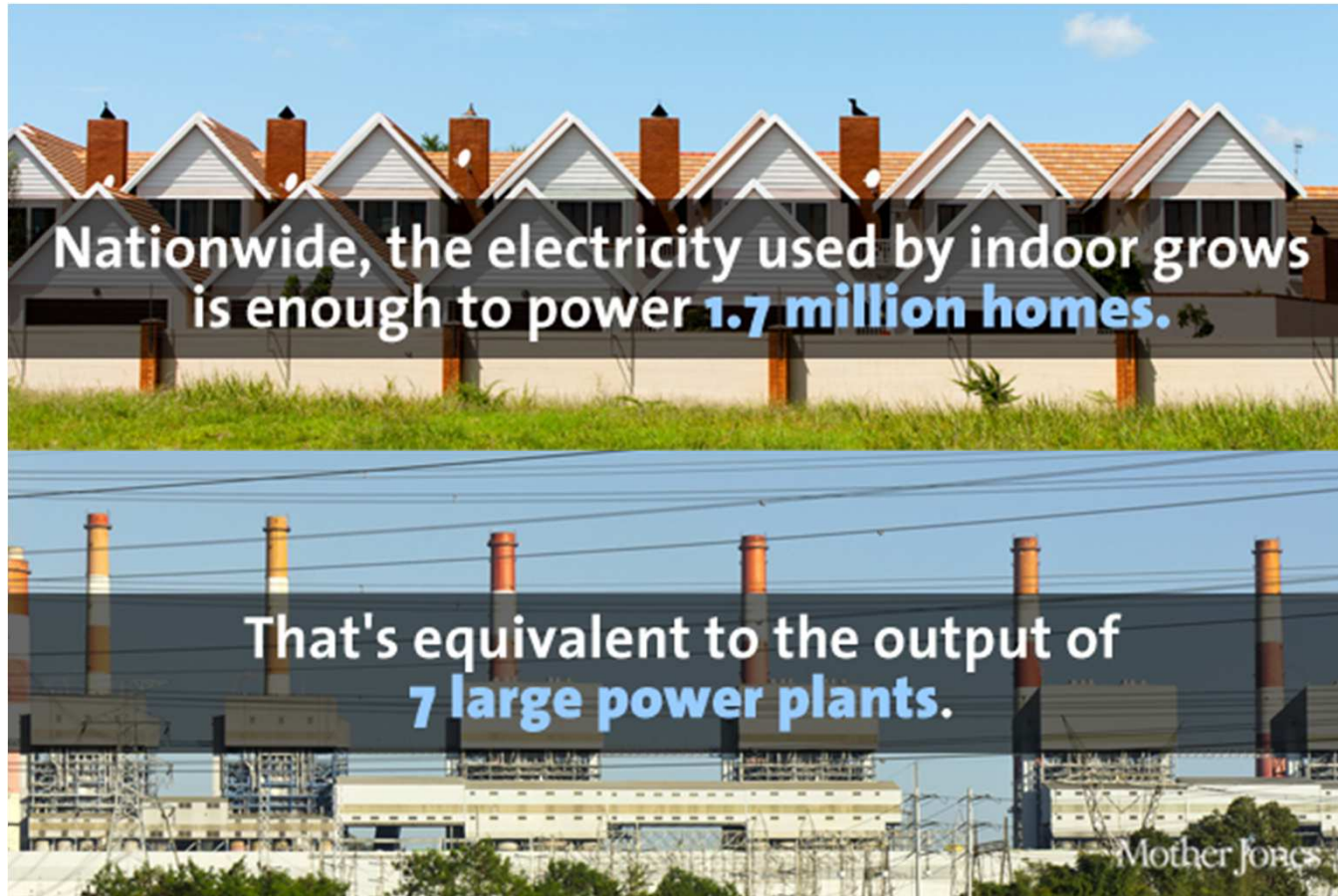


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Getting into the Weeds: Energy Use – Indoor Cultivation

In California, indoor marijuana grows account for about **9 percent** of household electricity use.



An indoor grow module accommodating **4 plants** sucks as much electricity as **29 refrigerators**.



Mother Jones



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Getting into the Weeds: Energy Use – Indoor Cultivation

- Every 2.2 pounds of cannabis produced indoors requires approximately 5,000 kilowatt-hours (kWh) of energy. An average plant can yield approximately 5 lbs of cannabis. That's 10,000 kWh of energy per plant!
- For comparison, 16 kWh of energy is required to produce 2.2 lbs of aluminum, which is typically considered to be an energy-intensive product.
- It is estimated that indoor cannabis production in California in 2018 will account for 16% of the industry (432,000 plants).
- Another 24% will be mixed light (324,000 equivalent plants).
- The Math: 7.56 BILLION kWh per year



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Getting into the Weeds: Energy Use – Indoor Cultivation



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Getting into the Weeds: Energy Use – Indoor Cultivation

Function	Percentage of Total Facility Electricity Consumption
HVAC and Dehumidification	51%
Lighting	38%
Space Heating ¹	5%
Water Heating	3%
CO ₂ Injection	2%
Drying/Curing	1%

¹Assumes electric heat.

Source: Northwest Power and Conservation Council (2014).



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Indoor Cultivation and Impacts on Utilities

- Indoor cultivation consumes a copious amount of electricity.
- New levels of energy consumption may disrupt levels of service and may create capacity issues.
 - Three junctures:
 - Building's capacity to draw in electricity
 - Utility's ability to provide building with sufficient electricity
 - Utility's ability to provide region or zone with sufficient electricity



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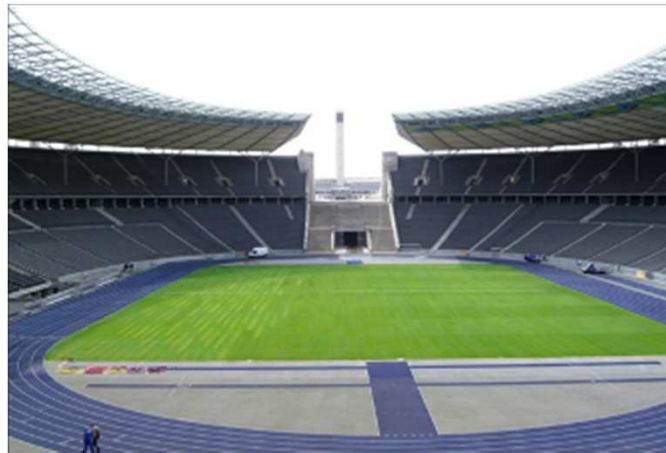
Getting into the Weeds: Water Supply and Water Quality



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Getting into the Weeds: Water Supply and Water Quality

Indoor Cultivation is anticipated to need approximately between 1.1 - 4.8 million gallons per day; 408 million to 1.6 billion gallons of water per year.



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Getting into the Weeds: Water Supply and Water Quality

- Illegal Growers have engaged in activities that can negatively impact waters of the state and threaten or damage aquatic habitat and groundwater, including:
 - Grading, terracing, dam, and road construction, causing erosion and sediment deposition in streams
 - Deforestation and habitat fragmentation
 - Illegal use of rodenticides, fungicides, herbicides and insecticides
 - Use of soil amendments and fertilizers in situations where run off to surface waters may occur
 - Discarding of trash and haphazard management of human waste
 - Substandard storage of hazardous materials such as diesel and gasoline
 - Unauthorized diversion of water from streams



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Questions?



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