



Fresno Cannabis Association

Support and advocacy for Fresno County and the Central Valley

September 7, 2015

To: Central Valley Regional Water Quality Control Board members and staff

From: Michael S. Green, president
Fresno Cannabis Association

Re: General Order for Cannabis Cultivation (Draft)

The Fresno Cannabis Association represents medical cannabis patients in Fresno County and its incorporated cities. We also work to inform patient advocates and organizations in the Central Valley.

Our organization previously submitted comments in opposition to the draft waiver program as it was then proposed to the North Coast Regional Water Quality Control Board. We have since received additional information about the Regional Water Boards and have met with staff members. We also have received additional input from cannabis growers in Fresno and the Central Valley. Based on that feedback, we are pleased to offer our support for the General Order for Cannabis Cultivation.

However, we would like to suggest the following changes be made before the final order is adopted. For reference purposes, the headings and numbering track those used in the draft order.

Overview

1. Word choice: Cannabis cultivation has grown substantially, but not "exponentially."
3. No effort is apparently under way to integrate cannabis cultivators into existing regulatory programs, and none seems likely in the near future. The proposed order should be described as permanent.
4. Suggested revision: "The cultivation of cannabis plants, where cultivation activities occupy and/or disturb less than 2,000 square feet, has not been demonstrated to cause more than *de minimis* impacts to water quality. Such cultivation activities do not pose a significant threat to water quality and are not covered under this General Order."

This change, and the deletion of plant counts, would track with the North Coast regulations as adopted. This is important to encourage consistency among the Regional Water Boards and, more importantly, to help establish a "bright line" rule for enforcement that can be communicated to growers in counties that straddle district borders. The following counties are only partially covered by the draft General Order, and inter-region consistency should be considered: Modoc, Lassen, Glenn, Plumas, Sierra, Nevada, Placer, Lake, Napa, Solano, Contra Costa, Alameda, El Dorado, Alpine, San Benito and Kern.

The rationale for the broader exemption was discussed in the North Coast staff's [response to comments](#):

"Staff concurs with the request of various commenters to establish a threshold for permit coverage based on an area of cultivation rather than a plant count. Size of cultivation area is a relevant indicator of threat to water quality because level of threat is proportional to the area of disturbed or exposed soil, the amount of water used, the potential for storm water runoff, and the potential for groundwater impacts. Size of cultivation area is also a field measurement that will facilitate site-specific determination of Order coverage." (pp. 13-14)

Our association also concurs with this finding. We further note that pending legislation in Sacramento and/or a likely legalization ballot initiative in 2016 could change exempt activities under state law. The 2,000-square-foot exemption would likely be more than sufficient to accommodate any increase in, or abandonment of, the hard plant counts that currently apply to cultivation under state and local laws.

Even if it didn't, defined cultivation areas of 2,000 square feet or less can and should be considered as a valid threshold for determining activities with *de minimis* impacts on water quality. The exemption would be flexible enough to cover both personal cultivation and small-scale commercial cultivation.

5. Suggested revision: "This term does not include those individuals whose cultivation activities occupy and/or disturb less than 2,000 square feet."

For frame of reference, the table below summarizes county ordinances governing medical cannabis cultivation within the Central Valley region. Most local ordinances address only personal cultivation, not the collective or commercial growing operations that soon will be licensed under state law.

County	Outdoor limit	County	Outdoor limit	County	Outdoor limit
Alameda	N/A	Lake	6 plants	Shasta	Outdoor ban
Alpine	N/A	Lassen	24 plants	Sierra	72 plants*
Amador	12 plants	Madera	120 sq. ft.	Solano	N/A
Butte	150 sq. ft.	Mariposa	24 plants	Stanislaus	N/A
Calaveras	N/A	Merced	12 plants	Sutter	No maximum
Colusa	N/A	Modoc	24 plants	Tehama	12 plants
Contra Costa	De facto ban	Napa	N/A	Tulare	99 plants*
El Dorado	600 sq. ft.	Nevada	1000 sq. ft.	Tuolumne	N/A
Glenn	100 sq. ft.	Plumas	N/A	Yuba	Outdoor ban
Fresno	Total ban	Sacramento	Outdoor ban	Yolo	N/A
Kern	12 plants	San Benito	N/A		
Kings	Outdoor ban	San Joaquin	Total ban	*Collective cultivation	

Regulatory Considerations

11. Suggested addition: "It is anticipated that the California Legislature and/or California voters will pass new laws and regulations declaring cannabis to be an agricultural crop."

18. Delete last sentence. We have received no information to support the idea that cannabis cultivation will be covered by the Irrigated Lands Regulatory Program.

19. It is unfortunate that cannabis cultivators will not be able to utilize existing ag "coalitions" serving ILRP permittees to achieve cost savings that producers of other crops enjoy. The difficulty and expense of creating a similar coalition to serve cannabis growers only is not examined in the Draft Order, nor is any guidance given as to whether regional or district-wide third-party inspection and certification programs are preferred. Deferring this critical component of the General Order to a date uncertain will likely prove to be a major impediment in gaining the desired levels of compliance.

To address these concerns, the Board should consider directing staff to prepare a technical document for interested parties explaining the Board's preferred data-collection and data-sharing methodologies; the contractual and financial bonding requirements applied to existing ag coalitions; and subsequently issue a Request for Proposals for third-party certification providers no later than July 1, 2016. Such requirements were described in the North Coast order as "substantive and procedural mechanisms" to collect the required "basic spatial information for watershed-scale program effectiveness reporting." Refer, e.g., to items 21, 22 and 33 for the North Coast order as adopted.

20. Although the reporting requirements are described as "relatively simple to complete relative to other regulatory programs," Attachment C of the proposed General Order is a one-page placeholder document containing no details as to what the annual reports must contain. **We are unable to provide comments on a process and documents that have not been made available for public review.** If they follow the North Coast requirements for Tier 2 and Tier 3, the annual reports aren't simple at all.

To expand on this idea, we must compare and contrast the "Notice of Intent" forms proposed by Central Valley staff (Attachment B) with the nine-page NOI adopted by the North Coast board (Attachment A). The differences are substantial, both in their complexity and the type of information requested. The North Coast NOI acts as a preliminary "report" of sorts and provides a checklist for self-certification and for use by third-party inspectors. The Central Valley NOI is more fairly described as a checklist that describes who may or may not apply for cultivation permits; does not include any site-specific inspection elements for self-certification or third-party inspectors; and provides only general information as to the level of detail required to submit Site Management Plans for Tier 3 cultivators.

As a practical matter, the proposed Central Valley NOI may be the more pragmatic approach, given that permits will not be made available in a number of counties where outdoor cultivation is banned. However, it does not describe in any detail the type of information that will be required downstream after the NOI application is filed. A supplemental form or information packet is recommended.

21. As noted above, it is anticipated that cannabis will be declared to be an agricultural crop along with industrial hemp. In this context, it is important to develop regulations under which cannabis cultivation is not declared to be contrary to "present and anticipated future beneficial uses" in all cases. Instead, the guiding principle should be that cannabis cultivation is, or soon will be, a beneficial use, and thus the focus of the regulations is to ensure such cultivation does not cause undue water quality degradation.

California Environmental Quality Act

22. We disagree with the proposed finding that the Central Valley board's program of permitting of existing cannabis cultivation sites is CEQA-exempt under CEQA Guidelines Sec. 15301. This is wholly inconsistent with Board findings that cannabis cultivation is occurring in environmentally sensitive areas and, in fact, frequently causes serious environmental impacts in those sensitive areas.

Within that context, many existing cultivation sites fall under the Sec. 15300.2 class of exceptions. More specifically, a program regulating existing cannabis cultivation sites is not categorically exempt from CEQA pursuant to:

Sec. 15300.2(a): Many of the cannabis cultivation sites documented by staff and other state agencies exist within a "particularly sensitive environment."

Sec. 15300.2(b): The number of cannabis cultivation sites within the massive Central Valley region has not been documented nor subjected to baseline analysis; however, the overview refers to cultivation that is increasing "exponentially," thus "resulting in significant water quality impacts." The exemption is inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant. Such impacts are the primary justification for the proposed regulations.

Sec. 15300.2(c): The categorical exemption "shall not" be used when there is a reasonable possibility that existing cultivation sites may have significant impacts due to "unusual circumstances." As will be discussed in greater detail below, the Central Valley board will not issue permits to existing cultivation sites in counties where such sites are prohibited by local ordinance. This presents a de facto "unusual circumstance" in that the Board proposes to adopt a permit program with the full knowledge that it will not be available for, or applicable to, an unknown but significant number of existing cultivation sites.

Without belaboring the point, we will note that the North Coast staff prepared an Initial Study and Mitigated Negative Declaration, which the North Coast board adopted. As a matter of due diligence, and to encourage other regional boards to more fully explore the potential environmental impacts of their respective regulations, **we request the Board to direct staff to prepare an Initial Study.**

23. This section describes the proposed NOI as a demonstration of CEQA compliance. It is unclear whether the Central Valley board has the legal authority to enforce every aspect of CEQA, or to make issuance of permits contingent upon proof of permitting from other state, local and federal agencies. Indeed, by imposing such requirements, the practical effect is to put the Central Valley board at the very back of the regulatory bus. This will hamper the Central Valley water board's voluntary compliance efforts, at a minimum, and is a significant departure from the North Coast approach.

As one relevant example, under section 28 of the North Coast regulations, the executive officer's decision on a water quality certification application "shall become conditions of any federal license or permit for the project." Under section 29, the General Order "will provide Clean Water Act section 401 certification for the federal permit required for that project. The Central Valley approach is directly opposite to the North Coast approach and should be reviewed for inter-region consistency.

24. We disagree with the proposed finding that the Central Valley board's program of permitting existing cannabis cultivation sites is categorically exempt under CEQA Guidelines Sec. 15307. Regulations that provide for spot enforcement, or no enforcement, are "unusual" on their face and provide no assurance of protection. The most severe impacts are associated with large-scale growing operations, which will fall outside the reach of the Central Valley permitting process for the sole reason that such grow sites are prohibited locally. **The water board's efforts to protect water quality should not be blocked or frustrated by a chaotic mix of local ordinances that continue to be in flux.**

Other Regulatory Concerns

25. As was noted by a cultivator at the public outreach meeting in Rancho Cordova, the list of pesticides on Attachment D is not exhaustive, and their use may be contraindicated under certain climatic conditions. We would ask Attachment D to be periodically updated by staff, in coordination with the Department of Pesticide Regulation, without the necessity of amending the General Order.

We would further ask the Board to consider using Attachment D, and other educational materials developed by staff, as part of a region-wide outreach effort by staff that includes, at a minimum, all of the counties where cannabis cultivation is banned or limited by local ordinance. While such efforts may fall outside the scope of the General Order permit process, we view public education as being absolutely critical to reducing water-quality impacts in areas where permits are not yet available.

30. The General Order is largely silent on how the proposed rules will protect municipal and domestic water supplies, especially in "ban" cities and counties where agency permits will not be made available. In previous meetings, staff has explained that the water board's authority over municipal water systems is limited by statute, or that such systems are covered by other General Orders. Even so, it remains unclear how the proposed General Order will address the water-quality impacts caused by widespread indoor cannabis cultivation, which creates discharges to septic systems and municipal water systems.

The Initial Study requested above can and should address impacts associated with indoor cultivation, and further addressed in any Mitigated Negative Declaration prepared for board review and adoption.

Public Notice

32. We would like to praise the Central Valley staff for their outreach efforts to cannabis cultivators and to other stakeholders. Staff has been very cordial and responsive to comments and concerns.

However, we must point out those outreach efforts have been relatively unsuccessful as a whole. The Fresno event was sparsely attended, and our organization must shoulder some of the blame for that. Especially in the "ban" counties where law enforcement is very robust, it can be very difficult to reach cannabis growers or get them to participate in government meetings, seminars or other public events. There was better attendance at the Rancho Cordova hearing, but a number of cannabis advocacy groups were conspicuous by their absence. Input from law enforcement and agricultural concerns was limited, and it's fair to say those concerns vary substantially from those expressed by cannabis cultivators.

The relative lack of notice should not derail consideration of the proposed General Order in October. However, it is instructive as other Regional Water Boards begin to develop their own regulations. Because of the unique legal and cultural issues surrounding cannabis cultivation, non-traditional approaches to public noticing may be required to get full input from the stakeholders most affected. Those approaches could include evening meetings, display (not just legal) advertising in newspapers, radio spots and/or public service announcements. Such efforts may require added financial resources.

Site Access: All Cannabis Cultivators

6. This one-liner is insufficient. In general, providing reasonable access is not burdensome if conducted for the sole purpose of determining compliance with the General Order. In practice, however, such access will more typically entail the use of multi-agency task forces, such as the Watershed Enforcement Team, or the use of peace officers from local agencies or Fish and Wildlife. For the protection of growers and water board personnel, property-inspection warrants are recommended.

10. The 100-foot buffer requirement from surface water varies from the 200-foot buffer adopted by the North Coast board. We don't object to the smaller buffer but note its effect on inter-region consistency.

11. This also should be reviewed for inter-region consistency.

19. The proposed BMPs vary substantially from those adopted by the North Coast board. This is important not just for purposes of achieving inter-region consistency, but also because issuance of permits is contingent upon cannabis growers' understanding and adherence to the BMPs.

In that light, the General Order should allow for BMPs to be updated for both clarity and consistency. As to clarity, the Central Valley iteration of the BMPs are more "user-friendly" and informative.

20. The tiers vary from those adopted in the North Coast. The maximum slope for Tier I is 35% on the North Coast, but 30% for the Central Valley region. The 200-foot buffer called out here in the Central Valley order may be internally inconsistent with the 100-foot buffer mentioned in item 10.

Tier 2 is limited to cannabis activities that occur on 50% or less of the parcel, another departure from the North Coast region. It is unclear how the 50% requirement is related to water-quality issues. In contrast, the North Coast uses defined cultivation areas of 5,000 square feet and 10,000 square feet to assign Tier 2 and Tier 2* (star) designations. This is the more reasonable approach. It is the total area devoted to cannabis cultivation that creates potential impacts, not the percentage of parcel size. The percentage of parcel size should not be used as the sole basis to assign a Tier 3 classification, either.

For reference, there are two bills pending in the Legislature that would license commercial cannabis cultivation in separate classes defined by cultivation type and area. The proposed maximum area for outdoor cultivation is 44,000 square feet, with additional license classes based on maximum cultivation areas of 22,000 square feet, 10,000 square feet and 5,000 square feet. The state would limit the number of the largest license types, but the point is that an unknown number of large farms will exist.

Requiring farms to be situated on parcels where at least 50% of land is not cultivated is unreasonable.

Tier classifications are very important. Arguably, they are the most important tool contained within the regulations to prioritize enforcement activities and also to gain voluntary compliance by growers. They should be reviewed for inter-region consistency and tied to cultivation areas and slope, not parcel size.

24. Tier 2 growers are required to submit an annual report under the North Coast rules. Under the Central Valley rules, they also must submit to two on-site inspections, which can be costly (\$500 minimum each) and for which there is no current access to third-party inspectors. Gaining voluntary compliance will be difficult enough without adding multiple deadlines and inspection costs. Closer alignment with the North Coast reporting process for Tier 2 parcels is indicated here.

Enforcement. The North Coast regs describe "compliance assistance" and "self-certification" processes that would be equally helpful in the Central Valley region, if not more so. Certainly, the Central Valley water board has the right to pursue all available legal remedies, including civil injunctions and Administrative Civil Liabilities (ACLs), but a Notice of Violation is also required.

Sometimes less is more. If environmental protection is the true goal, lowering the boom on the worst offenders is only part of the solution. Public outreach and education may be the larger part, especially in the "ban" counties where permits will not be made available. If the Central Valley water board, and its staff, are perceived as just another law enforcement agency, gaining trust and cooperation from cannabis growers will become quite difficult. We were very encouraged to see recognition of this problem in the North Coast region, and the adoption of procedures designed to address it. We strongly recommend the Central Valley region take similar measures to build trust and encourage compliance.

In that same light, we also urge the board to consider the plight of non-cultivating landowners who could be subject to sanction for violations caused by their tenants. (Vallico Park, State Water Board WQO 86-18.) We have seen ample evidence of this principle in action in Fresno County, where landowners are often fined tens or hundreds of thousands of dollars for violations of the county's cultivation ban, regardless of whether they actually caused or contributed to the violation. A summary of these actions can be viewed at <http://fresnocannabis.org/fresno-county/cannabis-fine-appeals/>.

Because landowners represent the "deep pockets" in any enforcement action, and because of the Vallico Park decision cited above, it is reasonable to assume that property owners will face the lion's share of legal exposure when unwitting or unscrupulous tenants fail to pay penalties for discharge violations. It is also reasonable to assume that many of the problems observed within the Central Valley region arise from tenant growers rather than landowners. The proposed penalties may seek to stem illicit discharges, but they very likely will miss the actual target when applied to non-resident landowners. We would very much appreciate the board directing enforcement staff to develop factors of mitigation and aggravation that can be weighed before imposing fines on non-growing property owners for violations.

Thank you for your consideration of these comments.

Sincerely,

Michael S. Green, president
Fresno Cannabis Association
