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State Water Resources Control Board  
Attention: Jeanine Townsend  
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Comments sent via email to:  
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November 25, 2018

RE: Proposed Updates to the Cannabis Cultivation<sup>[LSEP]</sup> Policy

Honorable Water Resources Control Board Members:

I had the pleasure of providing in-person comments at the State Water Board workshop in Sacramento on October 16, 2018. I drove 4 ½ hours to be present at the Workshop. At the time, Board members requested that I also submit written comments. I am doing so here. Unfortunately, in the time since the hearing, CDFA issued a statement that the cutoff deadline for new temporary state cultivation licenses was being moved up by a full month from December 31, 2018 to December 1, 2018! The resulting crush of work to fit in all new temporary license applicants has been horrendous. As a result, the more detailed comments that I had intended to write were just not possible for me to pull off given the absolute CDFA deadline and its ramifications for scores of applicants.

On the positive side, your request to have Staff coordinate with me certainly resulted in a very positive initial impact when this new deadline was announced: Immediately after my public comments, numerous Water Board staff approached me and shared contact information with me. In addition, a few days later, Mr. Kevin Porzio had left me a voicemail. The following week, when the announcement was made, I immediately contacted Mr. Porzio about my concern that applicants' enrollment in the Water Quality program were not being processed quickly enough in our region. Not only did Mr. Porzio look up the information specific to my region and recognize that there had been more of a backlog than he had been specifically aware of, but he immediately reached out to the regional Staff to not only trouble shoot the existing backlog, but also to try to come up with a plan for the crush of applications that were about to come in and that would need processing and issuance of the NOAs in sufficient time for the applicant to apply for the temporary cultivation license with CDFA before 12/1.

Another positive piece of feedback (before going onto my comments on the Proposed Updates to the Cannabis Cultivation Policy), is that numerous members of the Regional office (Santa Rosa) staff have been incredibly responsive and helpful regarding the processing of the NOAs and also with respect to trying to answer more Tribal Land buffer questions that have arisen. Specifically, Ms. Tonya Weiper has been doing a heroic job of processing the NOAs as soon as she can humanly do so. Mr. Wes Stokes and Conner McIntee, have been also doing their best to field questions and assist in getting accurate information to me and to applicants. I am giving shout-outs specifically to these staff members because I recognize how everyone is under tremendous pressure with the massive amount of work that is generated by all of the new laws and regulations and I appreciate their efforts to help us navigate these challenging times. With that said, some of my comments below, as indicated in my testimony on 10/16, have to do with the need for more



technical assistance for applicants AFTER they have registered. I try to spread the information that I gather as far and wide as I can so that more than just my clients benefit. However, there really needs to be additional resources for applicants directly along the way since not everyone can afford to hire a lawyer or a scientific consultant. As stated in my public comments, I mostly advocate for small, rural farmers who are being squeezed at every level and are hanging on by a thread, if they have not already thrown in the towel. As a result, my entire goal of the advocacy I perform is to improve on-the-ground conditions as a result of the implementation of policy and regulations, which most often negatively and disproportionately impact the small rural operator.

As stated in my public comments on 10/16, I am NOT a scientist and do not purport to have the kind of technical background that would help inform specific details of the policies being proposed (both those existing and those that are changing). However, I do have nearly 30 years of experience dealing with cannabis cultivation, land use, regulations and statutes. I also assist upwards of 150 cultivators directly and through my policy advocacy (that I do not charge anyone for), many hundreds more. I am on numerous Mendocino County Working Groups related to cannabis permitting and licensing. I am active in State licensing issues and give regular legal seminars on cannabis related laws and regulations. Despite my disclaimer about not being a scientist, over the past few years, I have had to learn a lot about water discharge, water flow, and even about what factors go into determining whether a well is going to be considered a groundwater source or surface water (a very different determination by CDFW than the Water Board Division of water Rights). As such, my comments are not entirely uninformed on the technical components. However, they do focus on the PRACTICAL IMPACT that these policies have on the ability for cannabis cultivators to apply and maintain compliance with all of the rules. Specifically, I am gravely concerned that we have accidentally created a negative incentive for good actors to come into the light and to hang in throughout these tumultuous times while regulations and policies are still being changed and every agency in the universe seem to want to take a pound of flesh from every cultivator. Please bear in mind that my comments and suggestions are specifically born out of my experience with small, rural cultivators that are trying to do the right thing.

1. While resource protection is an extremely important goal, we must understand whether the policies or implementation of the policies actually achieves that goal and whether it is at the expense of disenfranchising good actors.
  - a. We cannot require the good actors to bear the burden of fixing all past ills regardless of whether the actions of that actor resulted in the ill or not. Often small cultivators obtained property that had already been logged or otherwise improved without regard to current resource protection standards. Many of the policies of all of the resource protection agencies in the State, create a negative incentive for folks who want to do the right thing to come forward so they can be regulated. Penalties for acts of others, remediation and maintenance requirements that are extremely expensive, require expensive professional assistance, and do not give enough time for implementation are replete throughout the regulations and policies that apply to cannabis cultivators. Please remember that the SWRCB Cannabis Cultivation Policy is only one of many that the cultivator must adhere to. Again, resource protection is an important and necessary goal. However, where possible, regulations and policy must be reviewed to see if unintentionally the policy is discouraging folks from doing



the right thing. More time, more technical assistance (throughout the process, not just for enrollment), and positive incentive programs should be adopted and implemented. The failure to provide more time and adequate technical assistance, grant funding for professional support, and positive incentives, result in some of the very best actors, true stewards of the earth, being pushed out because they just cannot handle the financial and technical burdens without more help. As these good actors are forced to abandon their endeavors, we are left with fewer regulated properties and only the wealthiest cultivators left. Often in rural counties like Mendocino County, that means economic as cultural devastation for communities. The impact is even more devastating when one factors in the reality that Mendocino County only has SMALL cultivators. The Small designation for a state license is 10,000 square feet of cultivation and currently, Mendocino County allows for a maximum cultivation of 10,000 square feet of flowering cannabis and 12,000 sq. ft. for Nursery cultivation of seed or immature plants..

- b. The separate requirements of each agency, without careful coordination or thoughtful integration so that inconsistencies and confusion are reduced, create exponential burdens on the small rural cultivator. An example would be the fact that CDFW and the Water Board Division of Water Rights do not always agree about whether a well is a groundwater source or a surface water source. I personally think that the Water Board has a much more sensible approach to the analysis and has even come up with a separate method of dealing with surface water that does not flow off the property, but the reality for a cultivator is that if the Water Board told them their well is not jurisdictional, but later CDFW says it is (during the review of the required LSA application), then all of a sudden, an applicant would have to go back and apply for a water right and perhaps storage rights. Of course, many of the deadlines for doing so to gain priority have passed. It is only recently that through the portal there may be some eluding to the fact that the well might require a water right, but even then, it is not clear what that means as a practical matter for the applicant (that they should apply right away and not wait, or that they missed the opportunity to apply, or whatever the situation is). I have clients who were under the Pilot Program of the NCRWQCB and who were told that their well or ephemeral spring were non-jurisdictional, only to find out two years later through CDFW that it was considered to be surface water and would require a water right. In the mean time, they missed all of the different water right registration deadlines that the Water Board issued over the past year and few months.
2. Review Policies For Disparate Impact Throughout The State: I implore you to review the policies in a manner that actively seeks to protect and incentivize small, rural farmers who have no history of bad acts.
    - a. Please critically assess the presumptions upon which these policies have been promulgated. Do not use statewide presumptions when looking at small rural farmers. For example, the quantity of water used by a cannabis cultivator varies dramatically depending on an enormous host of factors. Basing policy on presumptions of use applicable to inefficient and wasteful actors rather than those that are conscientious creates a disincentive for water conservation. Likewise, basing policy on water use presumptions that are more in line with drier more barren land rather than considering the climate zones and the cultivation style (outdoor vs.,



mixed light vs. indoor) and the type of irrigation techniques employed, disproportionately negatively impacts those that are using growing techniques and irrigation methods that are appropriate for their climate. The current statewide presumptions are based on the worst-case scenario regardless of the good acts of the cultivator to conserve or to utilize methods more appropriate for their climate.

- b. Please acknowledge the practical limitations of small rural farmers to access qualified professionals in a timely and affordable manner. While it makes sense that only qualified professionals should design certain features such as ponds or slide remediation, many of the applications, registrations, reporting forms, and compliance documents are not possible for a small rural farmer to complete without professional assistance. I know it is hard to step outside of the terminology and programs that you all are so familiar with, but trust me, as an outsider, without a science background, it is a lot more complicated and confusing than you might think. Also, please remember that many small farmers are farming, complying with computer Track and Trace programs required by the licensing agencies, marketing, possibly transporting, and bookkeeping for their small farm. Often they are also chief bottle washer. As a result, either because a particular project mandates using a qualified professional, or because the process is overwhelming, small rural farmers must hire outside consultants and technical advisors. This is in addition to any engineers or design professionals they might have to hire.
  - i. Provide technical assistance after enrollment. I think the water Board has been doing a pretty good job of assisting folks with enrollment, especially in the Water Rights Division, but even more recently in the Portal registration. There has been a lot more outreach and technical support to come out of the dark. However, unfortunately, once they register, often, that is it. Except for the website and some email blasts that occasionally warn of deadlines, there really is not much help for someone to navigate the entire process long the way. Even when staff is being extremely helpful on the phone or by email, understandably, there is just no way to address the site specific information that might be relevant and there is no attempt to address cross-jurisdictional issues like conflicts in definition or process between CDFW and the Water Board. Please fund hands-on workshops (not just for enrollment but post-enrollment activity) as well as issue technical assistance grants for applicants that might need on-site assistance.
  - ii. Please create incentives for good actors. In addition to reviewing policies to remove inadvertent negative incentives, please consider creating two types of incentives for those that are trying to do the right thing: Policy reward/incentive and monetary incentives. Policy incentives might take the form of allowing longer time periods to comply with certain requirements if all requirements are in fact being addressed; or lessening some requirements, even for a short time, if the applicant is otherwise in compliance or implementing best practices. Water conservation could also be a basis for a policy incentive. Monetary incentives can take the form of either a discount in fees (application or annual reporting) or a credit toward a future fee (annual report or additional project, etc.). Incentives should especially be given to good actors who are trying to address the ills of actors that came before them.



3. Better coordination between different departments and outside agencies is imperative. Within the Water Board, a reduction of redundancy of information, inconsistencies, and varying formats to provide the exact same information should be effectuated. I applaud the streamlined portal to combine the issues of water rights and water quality, but there remains a massive disconnect between the information needed for different purposes and the number of different applications and reporting forms. The coordination with outside agencies should include CDFW, CalFire, and CDFA. I realize that the Water Board does not have control over any of those other agencies, but additional communication and request from the legislature to create a Task Force or Committee with representatives of each agency, would be a start.

Some specific technical comments are:

1. Attachment A, Item 11, Page 4: Please redefine “cultivation site” to only include drying, curing, grading, and trimming IF there is an impact to water quality or availability as a result of those activities (such as a NEW land disturbance). Many small cultivators are not creating any new land disturbance when conducting those activities and are utilizing existing structures. The impact of inclusion of those activities, regardless of whether they are having any actual impact on water quality or availability severely and negatively impacts the small operator.
2. Attachment A, Item 1, Page 16: Please edit this provision to remove the compulsion to adhere to all federal laws and regulations, since there is no way for a cannabis cultivator to do so. Please also consider altering the language to account for the fact that most cultivators are existing and cannot comply with the applicable laws, regulations and permitting “[p]rior to commencing any cannabis cultivation activities...”
3. Attachment A, Item 19, Page 20: As stated in my testimony, while I appreciate the revision after having put tribes in an untenable position in the prior version, I am concerned that as currently proposed, (p.21, 2<sup>nd</sup> to last paragraph), a cultivator could go through enormous effort and expense to comply with all of the requirements and rules and that without warning they could have the permission revoked without due process and without having violated any term or condition of the initial grant. During the Workshop on 10/16, Staff addressed this and stated that would not happen and that was not what was intended. I would greatly appreciate it if the language can clarify that the reference to the right of the tribe to withdraw consent, referred to the withdrawal on the silence to the request and that any withdrawal of permission already granted to an applicant must provide due process before revocation would be affected.
4. Attachment A, Item 38, Page 28: Please clarify that Mixed Light cultivation is included in the in the conditional exemption for Indoor so long as the structure meets the same criteria. Many cultivators are attempting to reduce their carbon footprint and are using indoor type structures with skylights and light tubes. Also, please consider a modification to the wastewater tank and licensed hauling provisions to the extent that recycled or rehabilitated water should be able to be used in the cultivation without the need to demonstrate waste water collection and licensed hauling. For small cultivators (Mendocino County Indoor cultivators are either less than 500 square feet or up to 2500 square feet) cannot afford the hauling fees. The licensed wastewater haulers require a minimum charge even if the



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amount of wastewater is minimal. So far, no permitted wastewater treatment facility that provides wastewater treatment in Mendocino County is willing to accept cannabis wastewater.

The next few years will be an especially turbulent time for small rural cultivators. Most that have not already thrown in the towel will be fighting for continued survival. The lower price they currently receive for their product, the compliance expenses of the regulations imposed by more than a dozen separate agencies, the cultivation taxes at the local (mandatory minimums regardless of whether they make a single sale) and state levels, the inability to sell directly to retailers or consumers, and the market uncertainty, especially for small, craft farmers, create very dramatically negative results for even tiny policy requirements that are unnecessary or overly burdensome. Please understand that in many cases, not reviewing the policies for inadvertent disparate impact and not actively removing impediments for small rural farmers to be able to do the right thing and continue to be responsible stewards of the land, can constitute the preverbal last straw that broke the camel's back.

Thank-you for your careful consideration of these issues and for the opportunity to work with you and staff in ensuring resource protection without helping to put the nail in the coffin of small rural cannabis farmers. I am happy to work on these issues with any one of you or your staff. In addition to being an attorney, I have been a Director of a large nonprofit that received federal, state and local funding in the amounts of \$12 million/year and was responsible for all oversight and compliance for that agency. In that work, I oversaw the dispersing of funding to 20 community-based agencies. I developed many processes and procedures to more efficiently implement the program goals in conjunction with the regulatory requirements. As a result, I am well suited to help an agency such as yours evaluate policies that balance the need for strict resource control with practical implementation standards that do not accidentally turn good actors away.

Respectfully,

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