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Public Comment
Cannabis General Order
Deadline: 9/6/17 by 12 noon

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COUNTY OF MENDOCINO
BOARD OF SUPERVISORS
501 Low Gap Road • Room 1010
Ukiah, California 95482



September 6, 2017

Ms. Felicia Marcus, Chair
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

RE: Comment Letter – Cannabis General Order

Dear Ms. Marcus,

I am the 5th District Supervisor for the County of Mendocino representing my constituents within the County and in the North Coast Regional Water Board Region 1.

In this letter I will address the current status of Mendocino County as a small-scale production county, advocate for regional autonomy (or “grandfathering”), and make some specific comments with regard to the proposed order.

A. Current Status as a County of Small-Scale Producers

By the limitations set forth by the County cultivation ordinance (10,000 square foot maximum canopy size), all permitted farmers in Mendocino County are “Small Farmers” falling within the Tier 1 status of state levels (Tier 1 = 2,000 to 43,560 square feet).

Due to this severe size restriction, Mendocino County cultivators begin the process of permitting and compliance at an economic disadvantage, thus making them especially sensitive to the costs of compliance.

This proposed Order does not provide a viable option for most small farmers. If implemented as proposed, it will result in devastating economic impacts for northern California counties including Mendocino.

B. Allow Regional Autonomy or Grandfathering

The existing Order in the North Coast region is adequate for protecting water resources. North Coast cultivators have been encouraged to get to the “front of the line” with regulatory planning and permitting. Over the past two years, investment has been made in property-wide plans in consultation with professionals and agency staff. The State Order disregards these plans and investments and resets the standards without regard to the agreements already in place.

If cultivators don't find a way to adapt to the new system they will remain in the black market with attendant crime, environmental problems, and lack of tax base. By approving regulations that disregard previous compliance activities and replaces them with new and extensive requirements, the State Water Board is inadvertently encouraging the black market and hence the continuation of environmental degradation.

The new State Order needs to have a mechanism for incorporating farms already enrolled in the Regional Order and must allow farmers to continue operating with their established Water Resources Protection Plans and timelines for remediation.

If the State of California is to benefit from cannabis farmers being responsible for cleaning up past impacts from timber harvest, ranching, mining, and other industries, with small farms that are at the bottom end of the Tier designation, they will need reasonable timelines, an easy process that can be addressed by farmer's themselves (without the high cost of hiring professionals), and simple forms and procedures. This is in the best interest of the public trust as well as the region's economic stability.

We request that you do one of the following to address the issues presented above:

- a) Allow each region to develop its own program or opt to use the new State Order. Thus the North Coast Region may use their existing Order and cannabis farmers can continue on their compliance track, or
- b) Allow farmers that have enrolled with a Regional Board prior to the start of the State Order to continue to work under the existing order, and thus be "grandfathered in".

C. Surface Water Forbearance

The General Order Instream Flow Requirements provide that Cannabis Cultivators shall not divert surface water for cannabis cultivation activities any time from April 1 through October 31, unless water is diverted from storage in compliance with Narrative Flow Requirement 4.

We have two primary concerns with this requirement:

1. The requirement is a "one-size-fits-all" that does not appear to take into account local factors such as size of watershed, density of cannabis cultivation, size of cultivation, or the specific impacts of a given cultivation.
 2. The forbearance period should not apply to existing appropriative rights holders who seek to convert all or a portion of their existing agriculture to cannabis.
1. The forbearance requirement is inflexible and agnostic to local factors.

The Cannabis Cultivation Policy Staff Report ("Staff Report") states that increased diversion during normal irrigation months "greatly affects the quantity and quality of water available, negatively impacts designated beneficial uses, and threatens the survival of endangered salmon, steelhead, and other aquatic life." While this is no doubt true in many cases, it is not true where sufficient water is available to satisfy both irrigation and public trust needs. The Staff Report even acknowledges that while these impacts "may occur" from current and anticipated increased levels of cannabis cultivation, they are not certain.

Applying the aggressive forbearance period universally will certainly provide important protections for fish and wildlife, yet such a rigid forbearance rule will also cause unnecessary significant economic hardship, including eliminating otherwise viable cultivation operations. It may also result in more negative impact to the environment.

Many cultivators cannot install storage facilities sufficient to sustain cultivation for such an extended period (April 1 to November). Further, in many cases, the work to install storage facilities will have a greater negative impact on the environment than would the diversion.

Pursuant to Fish and Game Code sections 1602 and 1603, all cultivators who divert surface water for their operations are already required to obtain permission from CDFW through the LSA program. The LSA program provides CDFW with a powerful tool to control the amount, rate, and timing of any diversion to protect environmental values. Plus, CDFW can tailor the requirements for each LSA to the specific environmental needs of each site.

We recommend that the forbearance period not be written into regulations, but be determined on a case-by-case basis through CDFW consultation under the LSA program.

2. An appropriative water right should not be subject to forbearance under the General Order.

The General Orders states:

“All water diversions for cannabis cultivation from a surface stream, groundwater diversions from a subterranean stream flowing through a known and definite channel, or other surface water body are subject to the surface water forbearance period and instream flow Requirements...”

This rule applies to both new SIURs, pre-existing appropriative and pre-1914 rights. Applying this rule to pre-existing rights holders is unreasonable and will cause unnecessary economic hardship, including eliminating otherwise viable cultivation operations. It may also result in negative impacts to the environment.

The Staff Report justifies its recommendation for universal forbearance by reasoning that increased diversions during low flow periods “greatly affects the quantity and quality of water available, negatively impacts designated beneficial uses, and threatens the survival of endangered salmon, steelhead, and other aquatic life.” While this is generally the case, it does not apply to those who have pre-existing water rights. Pre-existing water right holders are bound by the terms of their licenses, which define the time, rate, and extent of their diversions. Any increase in diversion would represent a violation of the terms of their license and render the diverter subject to enforcement or revocation.

Forcing a water right holder to institute forbearance on diversions for cannabis will also result in the absurd situation where they are entitled to continue to divert through low flow periods for purposes such as conventional crops or cattle but must forbear on the portion of their right that is used only for cannabis. If they choose not to cultivate, they could continue to divert the full amount of their right with no forbearance.

Many water rights in the state are designed to satisfy irrigation needs during the summer months. The forbearance period would make these rights unusable for cannabis, essentially depriving cultivators of a property right with no scientifically shown public trust benefit.

Would-be cultivators with pre-existing rights must construct storage ponds and potentially seek additional water rights with the resulting financial and environmental impacts without actually addressing the Staff Report’s concerns regarding increased diversions.

As a legal crop, cannabis irrigation is a reasonable and beneficial use of water. Treating it differently from other crops in the context of water rights, where its cultivation will not increase the demand on water resources, is arbitrary and capricious, will have significant economic impacts on both property owners and government, and will not provide environmental benefits.

We strongly recommend that pre-existing appropriative and pre-1914 rights be treated as exceptions to the forbearance rule.

D. Other Concerns

1. Setbacks

While the riparian corridor minimums are protective, and there is a process for a compliance schedule for achieving the minimums, there is no process for variance which would allow for alternative setback if warranted (e.g., hydrologic divides, dry farming, long established land uses).

2. Timeline

The lack of flexibility to achieve the protections beyond the means identified in Attachment A will result in a significant portion of north coast growers not being able to qualify for coverage. The existing cultivators pursuing legal cultivation will be squeezed out after significant investment over the past two years.

3. Qualified Professionals

Qualified professionals are required in numerous instances and those should be carefully reviewed to determine if necessary considering the cost. Shifting from the Regional Order which facilitates "self-enrollment" to the State Order creates an incredibly complex and technical approach that will require the hiring of costly consultants.

I appreciate your consideration of these matters. We share the goal of encouraging as many cultivators as possible to become part of a regulated system. In our enthusiasm to protect the environment, and water resources in particular, we must keep in mind that the decades-old cannabis industry is moving from a totally unregulated environment to a fairly heavily regulated environment. This transition will take time and careful thought but if it is successful, the benefits will be widespread.

Sincerely yours,



Dan Hamburg
5th District Supervisor

cc: Ms. Chantal Simonpietri
Ms. Anna Birkas
Ms. Sarah Dukett