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State Water Resources Control Board  
Attn: Jeanine Townsend  
1001 I Street, 24<sup>th</sup> Floor  
Sacramento, CA 95814

Greetings,

My name is Tom Ballanco. I am part of a collective that has been cultivating medicinal cannabis in Trinity County, CA for more than ten years and I intend to apply for a commercial cannabis license as soon as the program becomes operational. In October 2015, I submitted the first Notice of Intent to enroll in the North Coast Regional Water Quality Control Board ("NCRWQCB") Order R1-2015-0023.

Our cannabis cultivation operation currently presents what I would characterize, and I think the State Water Resources Control Board ("SWRCB") would agree, as a Moderate Risk to Water Quality. In some ways we present greater risks than other cultivation operations, for example, we divert water under riparian water rights from an anadromous stream and have some of our cultivation on slopes between 30 – 50 % grade. In other ways, we present less risk, we have only ever used organic gardening techniques incorporating integrated pest management, all of our gardens are mulched and drip irrigated and we routinely consult with a systems ecologist with an eye towards restoring and protecting our native forest ecosystem.

Our operation is not the best example of low impact cannabis cultivation, nor is it the worst example of greed driven excess. I think we fall somewhere in the middle, which hopefully presents these comments from the perspective of an average cannabis cultivation operation in the Emerald Triangle. While my comments are intended to apply to the statewide Policy in general, they are obviously informed by my direct personal experience. It is not my intention to comment exclusively on how the proposed Policy effects me specifically, but rather to comment of cannabis cultivation in general. Where our operation illustrates specific concerns, I will make reference.

In addition to my experience cultivating cannabis in Trinity County, as an attorney I have worked on cannabis legalization and legislation for more than 25 years. I have observed hundreds of cannabis cultivation operations throughout California, specifically in Policy Regions 1, 2, 5-9, 13 & 14. Additionally, I have worked with industrial hemp cultivation projects of several acres and larger in Kentucky, Hawaii, California, Canada and the Pine Ridge Indian Reservation. Understanding that industrial hemp is a distinct crop that is specifically exempted from the Policy and General Order, certain aspects of the cannabis plant remain consistent, specifically water use, nitrogen requirements and integrated pest management.

At the outset, I would like to congratulate the SWRCB for acting so swiftly to craft a cogent, thorough and largely internally consistent Policy and General Order. Embarking on the effort to create and adopt a statewide cultivation policy for a state as large and diverse as California in the frequently shifting legislative climate is a monumental task indeed. The SWRCB is at the forefront of the regulatory process amongst all the other state agencies so tasked and I commend the Board Members and, especially, the SWRCB Staff for preparing the proposed Policy and General Order.

I have organized my comments into two sections, the first are General Comments about certain policy determinations and objectives addressing the interplay between Regulation & Enforcement, Water Use & Conservation, Tier Designation & Risk Determination and Alternative Compliance Procedures & Feasibility. Next are Specific Comments about Policy Attachment A followed by my Conclusion.

## **GENERAL COMMENTS**

### **Regulation vs. Enforcement**

Certainly much of the rationale behind the Policy and the General Order anticipates that the newly created regulatory protocols will guide the rampant cannabis cultivation towards more sustainable practices through a clear path of voluntary compliance. While this is the ideal scenario, the SWRCB cannot afford to underestimate the resources and associated costs it will need to dedicate to enforcement.

Two factors militate in the direction of enforcement requiring greater resources than regulation. First is the experience gleaned from the North Coast Region. NCRWQCB Order R1-2015-0023 was implemented in August, 2015 and enrollment for anyone cultivating more than 2,000 sq. ft of cannabis in the North Coast Region was required no later than February 15, 2016. During public workshops, NCRWQCB Staff used a calculated estimate of approximately 40,000 cannabis cultivation sites (larger than 2,000 sq. ft.) in Region 1. [I do not have a citation for this data, but I am confident it can be verified by NCRWQCB Staff.]

Currently, two years after the Region 1 Order was published, and nearly 20 months after enrollment became mandatory, less than 10% of the estimated 40,000 cultivators are enrolled.

Second, is the detailed analysis of projected legal cannabis production and consumption in California in the post-2018 world provided in the Department of Finance (“DOF”) Standardized Regulatory Impact Assessment (“SRIA”) for Medical Cannabis Cultivation Program Regulations. While the draft regulations underpinning the SRIA have been pulled back, the market analysis is still informative. On page 26 of that document, the DOF concludes that total cannabis production in California for 2016 was at least 13.5 million pounds, of which, 60% was grown Outdoors and 24% with Mixed Light techniques (p 28). The remaining 16% was produced Indoors, which is not currently within the purview of the draft General Order or Policy. Using these figures, approximately 11.3 million pounds of cannabis was produced in California in 2016 using Outdoor and Mixed Light cultivation techniques.

On page 39, the SRIA estimates that total, legal cannabis consumption in California will be 1.25 million pounds in 2018. Applying the production ratios above, one would expect California cannabis demand to require 1.05 million pounds of cannabis from Outdoor or Mixed Light cultivation operations. Assuming static statewide production from 2016, we are again left with a figure of approximately 10%. This time reflecting the amount of cannabis produced in California that will be required to meet the statewide demand. The remaining 90% of production is destined for the interstate and/or international black market.

Based on these two factors, the SWB is well suited to design its regulatory approach in anticipation that 90% of the existing cannabis cultivation sites will require enforcement, rather than being led down the path of regulatory compliance. While this may seem like an insurmountable task, one of the integral components of a strategy to reduce illicit cannabis cultivation must be the seamless and immediate establishment of a legally regulated cultivation industry that coincides with statewide commercial cannabis legalization in 2018.

Legal cultivation is the best way to exert economic pressure on the black market. Once licensed cultivators are able to offer a readily available product that is less expensive, more consistent and of higher quality than their black market counterparts, the demand for black market cannabis in California will be substantially reduced. Also, bright line distinctions between licensed and unlicensed cultivation operations will make enforcement strategies easier to implement.

As I am sure the Watershed Enforcement Team can confirm, nearly every cannabis cultivation site in California sports at least some documentation purporting to cover the operation under the auspices of Prop 215 or S.B. 420. Without exceptional luck on the part of law enforcement, or stupidity on the part of the cultivator, it is exceeding difficult to prove a case for intent to distribute. Still

the DOF calculations in the SRIA tell us that at least 90% of this cannabis is leaving California. The licensing regime will remove the uncertainty inherent in differentiating between licit and illicit cannabis cultivation and despite reduced criminal penalties, the fine structures will add further economic pressure to the black market profit margin, already in steep decline.

Not only will licensed cannabis cultivation service the demand in California more efficiently than the black market, but local licensing fees and taxes will help fund local law enforcement and compliance strategies. In many cases, such as in Trinity County, these monies will put environmental remediation within the economic reach of rural governments whose budgets have never been up to the task of effective cannabis enforcement.

Acknowledging that only a small minority, likely around 10%, of existing cannabis cultivation operations will make any effort towards regulatory compliance, the SWRCB can strike the appropriate balance between stringent regulations and effective, well-funded enforcement to achieve the goal of reducing the threat to water quality presented by cannabis cultivation and associated activities.

While substantial enforcement will certainly be needed, it is likely that many existing cultivators will simply give up their illicit cultivation as their financial risks increase and their potential income decreases. Meanwhile, the regulatory policy must be simultaneously protective and practicably attainable by the 2018 growing season to be most effective.

In designing its regulatory policy and general order, the SWRCB must temper the tendency to intuit that commercial cannabis legalization will result in increased cannabis cultivation, similar to the effects of Proposition 215 and S.B. 420. Instead, legalization will undoubtedly result in fewer, more efficient and well-regulated cannabis cultivation operations. Those cultivators, unfortunately in the great majority, who choose not to comply with licensing and regulations will be readily identified and distinguished from their legal counterparts and will be the appropriate targets of enforcement.

## **Water Use and Conservation**

The dichotomy in the opposite approaches described above is most pronounced in the Policy and General Order's approach to Water Use and Conservation.

The excessive diversion of surface water for unregulated cannabis cultivation is having clearly identifiable environmental impacts and the Legislature has prioritized mitigation of these impacts by making commercial cannabis licensing

contingent on water use that is protective of instream flows. [See for example, B & P Code Sec. 19332.2(d)<sup>1</sup>]

Cannabis is not a particularly water intensive crop. Anecdotal evidence from the cultivation community, as well as data from large scale cultivation in Canada and Kentucky, place cannabis' water consumption somewhere on the spectrum between tomatoes and corn. The problem presented in California, though almost exclusively in the North Coast Region, is not from the cultivation of cannabis itself, but rather from the excessive number of cultivators in very concentrated and environmentally sensitive areas.

As further illustration of water use, consider, from the SRIA discussed in the previous section, that the annual legal commercial cannabis market in California is projected to demand 1.05 million pounds of cannabis cultivated by Outdoor or Mixed Light licensees.

I know from personal experience, and could help source supporting data, that 1 acre foot of water should produce at least 500 pounds of cannabis annually using Outdoor or Mixed Light cultivation. Efficient use of water conservation measures should push that number closer to 1,000 pounds.<sup>2</sup> Assuming that every Outdoor and Mixed Light cultivator obtained all of the water they use from surface diversions, the legal commercial cannabis market in California demands the annual use of only 2,100 acre-feet of water throughout the state.

Consider that just the tax revenue raised by the state cultivation tax, applied to all commercial cannabis cultivation, of \$9.25/oz or \$148/lb, yields \$155,400,000 from the use of 2,100 acre-feet of water. That is \$74,000 in annual tax revenue for every acre-foot of water used in Outdoor or Mixed Light commercial cannabis cultivation. This does not even consider any economic return to the cultivators, local economy or other taxes collected at the distribution, manufacturing or retail level. Can any other use of water rival that economic utility?

I acknowledge that the survival of the Coho salmon and the yellow-legged frog have priceless value. Still, as the State's arbiter of efficient water use policy, the SWRCB must consider the economic utility of water used for commercial cannabis cultivation relative to other beneficial uses of water for agriculture. It would make more sense to restrict every use of water (except instream flows) other than commercial cannabis cultivation and offset the restrictions with economic incentives from the annual tax revenue. At the very least, the Policy should allow

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<sup>1</sup> B & P Code Sec. 19332.2(d) "The CDFR shall include in any license for cultivation requirements for compliance with applicable principles, guidelines, and requirements established under Sec. 13149 of the Water Code."

<sup>2</sup> In fact, I am routinely inspired by a cultivator in the Klamath Region, who I know personally, that can only store 12,500 gallons of water for use during his entire season, yet he consistently produces 100 pounds of high quality cannabis.

some kind of water trading scheme where I could pay the vineyard downstream \$5,000 to forego the use of 1 acre-foot of water that I could use.

As it stands now, my only option under the draft Policy would be to hire a truck to deliver water, which, on balance, cannot be considered an environmentally efficient exercise.

The 2015 study by Bauer, et. als. (Impacts of Surface Water Diversion for Marijuana Cultivation in Four Northwestern California Watersheds, hereafter “Bauer”) is the touchstone for impact analysis from cannabis related surface water diversion. Certainly this study informs both the SWRCB Policy and the General Order itself, as it was part of the presentation made to the Board at the August 2, Workshop, it is cited in the Policy and it is referenced in the Staff Report’s Overview of Cannabis Cultivation Impacts on page 26 (the document is mistakenly cited there as “CDFW 2015”).

The Bauer study used Google Earth imagery from August 2011, July 2012 and August 2012 to calculate the number of cannabis plants being cultivated in four watersheds in Humboldt and Mendocino Counties. The authors then calculated the likely water use requirements for the plant counts they recorded and compared those usage requirements to the annual 7-day low flow in each of the streams. In 3 out of 4 of the studied watersheds, the calculated water demand for cannabis exceeded the entirety of the annual 7-day low flow of the streams.

A close look at the numbers in light of the discussion above is interesting. Figure 7 of the Bauer study lists the average calculated daily use of all the parcels cultivating cannabis in each of the four watersheds.<sup>3</sup> Using these values, and assuming a 180-day growing season, the four watersheds in the Bauer study demand the annual use of approximately 350 acre feet of water for cannabis cultivation.

Contrasting this demand with the projected water use demand above of 2,100 acre feet for the entire state (assuming that every Outdoor or Mixed Light licensee used only surface water) means that the four small watersheds in the Bauer study demand 17% of all the water that would be needed for all licensed cultivation statewide. Again this demonstrates the need for a Policy emphasizing the distinction between legal and illegal cannabis cultivation.

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<sup>3</sup> Bauer, et. als. Fig 7. Frequency distribution of the water demand in liters per day (LPD) required per parcel for marijuana cultivation for each study watershed. (a) Upper Redwood Creek watershed, 79 parcels with marijuana cultivation, average water use 6622 LPD, (b) Salmon Creek watershed, 189 parcels with marijuana cultivation, average water use 3620 LPD, (c) Redwood Creek South watershed, 187 parcels with marijuana cultivation, average water use 3308 LPD, (d) Outlet Creek watershed 441 parcels with marijuana cultivation, average 1642 LPD.

Nevertheless, Bauer is a dramatic study, based on sound scientific principles, that has been influential in crafting cannabis cultivation policy since its publication in March of 2015. The most relevant of these policies to me personally, and I think to the SWRCB, is the NCRWQCB Order adopted on August 13, 2015.

I do not dispute the SWRCB analysis finding that the Policy and General Order are categorically exempt from the California Environmental Quality Act (“CEQA”). The Region 5 Board also relied on valid CEQA exemptions when enacting its Order in October 2015. The NCRWQCB stands alone as the only agency in the state to complete its CEQA process attendant to issuing its regulations. That the Bauer study is part of the record of decision in the NCRWQCB’s Mitigated Negative Declaration is particularly significant.

The Bauer study involved watersheds located exclusively in Region 1 and, despite not being subjected to notice and comment itself, was incorporated into the NCRWQCB’s Initial Study and Mitigated Negative Declaration which, along with the Order, was adopted at the height of the drought. In contrast to the draft Policy, the NCRWQCB Order does not prohibit the use of surface water, but instead provides an economic incentive (lower Tier designation) for voluntary forbearance. Despite allowing the use of surface water (pursuant to all requirements imposed by SWRCB & CDFW), the NCRWQCB Order still states, after completing its CEQA review, that, “Compliance with Order conditions will ensure that no significant environmental impact to water quality occurs from an activity covered under this Order.” [R1-2015-0023 at III. C p 27.]

Certainly one of the most contentious and, to regulators, the most frustrating aspects of water rights law is the doctrine of riparian water rights. I am reminded of a quote that was already ancient history when I first read it in law school 25 years ago, “In the opinion of most engineers, the system of appropriation of water is better adapted to satisfy the needs of the people of our western states than is the riparian rights system.” [Bingham, Joseph “Some Suggestions Concerning the California Law of Riparian Rights” 22 Cal. Law Rev. 3 (1934) at 252.]

Bingham was certainly prophetic, positing that, “The hope of engineers—a comprehensive, scientific plan of development and conservation, with an adjustment of uses in some order of economic merit unhampered by technical vested rights of little public advantage—is still a pious hope only.” [Id. at 251-2.] Perhaps we are closer to achieving that pious hope today, but the doctrine of riparian water rights remains with us in California, as it has since the time before statehood.

Were I not currently exercising riparian water rights to cultivate cannabis, I like to think that I would still be a strong advocate for the continued protection of riparian rights. The fact is, I am currently so engaged, so my comments on this subject may be discounted accordingly.

If I could identify the aspect of the Policy/General Order that causes me, and similarly situated cultivators, the most concern it is unquestionably the mandatory forbearance period. Leaving aside the semantic discontent such terminology inflames in my legal mind, forbearance being defined as the voluntary choice to not exercise a legal right, “mandatory forbearance” irritates me as much as those ubiquitous signs that promise “trespass with permission only.”

I think the SWRCB’s interpretation of SB 837, particularly the language in Water Code Sec. 13149(a)(1)(A)<sup>4</sup> as indicating that the Legislature intended the SWRCB to prohibit all diversions of surface water, throughout the entire state, for 7 ½ months out of the year and to extinguish the use of riparian water rights for commercial cannabis cultivation is overbroad and misplaced. While it is always a risky endeavor to attempt to divine legislative intent, in this instance an exploration is necessary.

I submit that if the Legislature had intended such a radical alteration of long established water law, it would have done so explicitly. In fact, there are numerous provisions of SB 837 where the Legislature seems to evidence exactly the opposite intent. In B & P Code Sec. 19332.2(b)(2 & 5)<sup>5</sup>, use of water sourced from riparian water rights for commercial cannabis cultivation is specifically considered. Sec. 19332.2(c)(2 & 4) specifies the same requirements for licenses issued after December 31, 2019.

In contrast, Water Code Sec. 1525 (b)(10)<sup>6</sup> demonstrates where the Legislature did, with clear intent, make a significant departure from traditional

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<sup>4</sup> Water Code Sec. 13149(a)(1)(A) “The board, in consultation with CDFW, shall adopt principles and guidelines for diversion and use of water for cannabis cultivation in areas where cannabis cultivation may have the potential to substantially affect instream flows. The principles and guidelines...may include...limits on diversion....”

<sup>5</sup> B & P Code Sec. 19332.2(b) “An application for a license issued by the (C DFA) before January 1, 2020 shall include one of the following:

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(2) A copy of a statement of water diversion and use, filed with the SWRCB before July 1, 2017, that covers the diversion and specifies the amount of water used for cannabis cultivation.

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(5) Documentation, submitted to the SWRCB before July 1, 2017, establishing that the diversion is authorized under a riparian right and that no diversion occurred after January 1, 2010, and before January 1, 2017.”

<sup>6</sup> Water Code Sec. 1525(b) “Each person, or entity, who files any of the following shall pay a fee according to a fee schedule adopted by the board:

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(10) A statement of water diversion and use pursuant to Part 5.1 (commencing with Sec. 5100) that reports that water was used for cannabis cultivation.”



riparian water rights doctrine, by authorizing, for the first time in my experience, the SWRCB to collect a fee for filing a Statement of Diversion and Use, where that water was used for cannabis cultivation. In delineating the list of documents for which the SWRCB is authorized to collect a fee, a “registration of appropriation for a ...small irrigation use...” is included at 1525(b)(2). Certainly the Legislature contemplated that both types of documents could be filed, not the hard, fast rule that the draft Policy would impose where riparian rights holders could only use water diverted and stored pursuant to an SIUR. .

None of this is to say that SB 837 did not direct the SWRCB, with specificity, to extend its administration of water rights law to commercial cannabis cultivation. However, I believe SB 837 contemplated that the most appropriate means to protect instream flows in watersheds where they may be endangered by excessive diversions due to commercial cannabis cultivation is by placing limitations on the number of unique identifiers authorized in the area as provided in H & S Code Sec. 11362.777(e)(1)<sup>7</sup>

Returning to the Bauer study as an illustration. Let’s assume 20 of the 189 parcels in Salmon Creek submit license applications for Outdoor or Mixed Light cultivation. B & P Code Sec. 19332.2 requires that they identify their water source and, if they are asserting riparian rights, that they have a Statement of Diversion and Use indicating cannabis cultivation on file for 2016. The SWRCB now has real data, specific to the watershed, identifying the water demand for cannabis cultivation, based on recorded monthly use for 2016. If it appears, in the judgment of SWRCB, that the 20 licensees’ water use requirements will be detrimental to instream flows, then SWRCB can inform CDFW that the number of unique identifiers issued for licensees in Salmon Creek should be limited to the point that instream flow is protected.

There is no question that this process places additional demands on SWRCB Staff, but that is precisely the reason that Water Code Sec. 1525 provides for the collection of filing fees.

### **Tier Designation, Risk Determination and Riparian Setback**

The proposed Tier Designation based on disturbed area seems to be a logical and effective method and the considerations for determining total disturbed area are appropriate.

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<sup>7</sup> H & S Code Sec. 11362.777(e)(1) “The department, in consultation with, but not limited to, the Bureau of Medical Cannabis Regulation (sic), the SWRCB, and the CDFW, shall implement a unique identification program for medical cannabis. In implementing the program, the department shall consider issues, including, but not limited to, water use and environmental impacts. In implementing the program, the department shall ensure compliance with Sec. 19332.2 of the B & P Code.”

The proposed Risk Determination is also appropriately based on readily understood factors related to slope and proximity to riparian areas. Enhanced reporting requirements attendant to increased Risk are also reasonable. However, designating every location with any portion of the disturbed area within the riparian setbacks as High Risk is excessive and places an extraordinary burden on cultivators already enrolled in the NCRWQCB Order.

Many of us are operating at riparian setback distances that are acceptable under that Order, but would place us into the High Risk designation under the draft Policy. This cannot be the SWRCB's intent, especially where there is no demonstrable threat to water quality sufficient to justify the imposition of a mandatory withdrawal pursuant to a Disturbed Area Stabilization Plan.

Changing the Minimum Riparian Setback based on Risk Determination presents a problem, especially for those of us located in Trinity County and much of the rest of the Klamath and North Coast Regions where the natural terrain is sloped and there are numerous watercourses, particularly Class IIIs. This is an instance where my personal situation provides a specific example.

Our property in the mountains of Trinity County features four non-contiguous cultivation areas. Our oldest cultivation area is an established organic garden that is located on ground with 3% slope and is 180 feet from a Class I watercourse. It is ringed with native vegetation in every direction, requires the least water and least nitrogen input and returns the highest yield. It presents little, if any, actual threat to water quality, despite its proximity to the Class I stream.

More than 800 linear feet away, on our south-facing hillside, is our fourth and newest cultivation area, with natural slopes greater than 30% but less than 50%. There is no surface watercourse within 500 feet of this cultivation area. Every direction is covered with dense Manzanita chaparral. If not for the access road, it would take decades, if not centuries, to transport any runoff or sediment from this cultivation area to a surface watercourse.

I do not dispute the enhanced Risk Determination for my entire site based on the slope of my fourth cultivation area, nor do I dispute the additional monitoring and reporting requirements that come along with such a determination. My problem is with the draft Policy's shifting Minimum Riparian Setback. My newest garden on the hill in no way affects the threat to water quality presented by my oldest garden 180 feet from the stream.

I think a monitoring and reporting requirement that acknowledges and addresses these factors, such as the Water Resource Protection Plan I prepared based on my Tier 2 enrollment in the NCRWQCB Order, is reasonable and appropriate.

I would reverse the Risk Designation Summary in Table 1 of the draft Policy and recommend that the SWRCB adopt the distances in the NCRWQCB's Order<sup>8</sup> as the standard Riparian Setbacks for Moderate Risk Determination. The draft Policy's "Moderate Risk" Minimum Riparian Setbacks should be incorporated into the threshold for Low Risk Determination.

In other words, if no portion of an enrollee's disturbed area is on a slope greater than 30% **and** they are more than 200 feet from a Class I, 150 feet from a Class II or 100 feet from a Class III, then they should be designated Low Risk.

If an enrollee has any disturbed area on a slope greater than 30% and less than 50% **or** they are between 100 – 200 feet from a Class I, between 100 – 150 feet from a Class II, or between 50 – 100 feet from a Class III, then they should be designated as Moderate Risk. Had the NCRWQCB Order not been adopted after completing its CEQA review, I would feel less confident about making this suggestion.

I will address the Variance provisions in the next section.

### **Alternative Compliance Procedures**

To SWRCB Staff's credit, the draft Policy does include a number of alternative compliance procedures for many of its most challenging requirements. Especially notable is the Local Cooperative Solutions alternative to the mandatory forbearance requirement. An exception that seems almost tailor made for my situation.

In this case, however, my personal example is likely not illustrative of many other cultivators. We are fortunate to be located in a watershed that, due largely to its topography and remote location, has not been inundated with cannabis cultivation. Our creek, Indian Creek (HUC-12: 180102110704) is a USGS gaged (Gage # 11525670) anadromous stream that drains directly to the Trinity River with only 8 riparian parcels along its entire length. Only 3 of those parcels cultivate cannabis and all of us are enrolled in the NCRWQCB Order, we are all engaged in local licensing with the county and each of us has an LSA Agreement with CDFW that covers our diversions.

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<sup>8</sup> R1-2015-0023 I. A. 3. a. at p 16 - 17: "For Tier 1 Dischargers, cultivation areas or associated facilities shall not be within 200 feet of surface waters. While 200 foot buffers are preferred for Tier 2 sites, at minimum, cultivation areas and associated facilities shall not be located or occur within 100 feet of any Class I or II watercourse or within 50 feet of any Class III watercourse or wetlands. The Regional Water Board or its Executive Officer may apply additional or alternative conditions on enrollment, including site-specific riparian buffers and other BMPs beyond those identified in water resource protection plans to ensure water quality protection.

If the draft Policy and General Order were adopted without change, then we would immediately engage CDFW in discussions aimed at proposing a local cooperative solution to the Deputy Director that I would marshal through the process personally, at no legal cost, other than my own time.

Here I have to draw a distinction. While I am an admittedly average cannabis farmer, as an attorney with 20 years in the practice of environmental and cannabis related law, I am exceptionally well suited to reading, processing and understanding laws and regulations. Very few cannabis cultivators have such an affinity and without it, may find themselves regulated out of business before they are even aware that anything happened.

Likewise, I think most cultivators are located in neighborhoods or watersheds with less than 100% commitment to the regulatory process. Using our Salmon Creek example from earlier. If 20 out of 189 cultivators in that watershed intend to get licenses, how could they make a case for a local cooperative solution when the majority of their neighbors are not cooperative?

Without a workable and approved local cooperative solution, cannabis cultivators who divert surface water and have been filing their annual Statements of Diversion and Use will be left with few, very expensive, options. Namely, they can either drill a well that is hopefully not a subterranean stream or otherwise hydraulically connected to surface water, a challenging undertaking in many parts of the Region, including mine.

If the draft Policy and General Order are adopted on October 19, there will be no time for diverters, particularly those exercising riparian water rights, to develop sufficient storage facilities even if it were feasible. This is the one area of the draft Policy where I actually found internal inconsistency.

The draft Policy and Staff Report both advocate minimizing land disturbance, particularly road building and grading, yet the storage demands imposed by the mandatory forbearance period require just those disturbances. Cannabis cultivators who currently divert water and cannot drill a productive well by April 1, 2018 will either have to purchase, site and install tanks or bladders (which require secondary containment) capable of holding hundreds of thousands of gallons of water; somehow develop offstream reservoirs in the winter season; or, more likely than not, arrange for the delivery, by truck, of water throughout the growing season at tremendous economic, not to mention environmental, cost.

All of this brings us back to the original premise that a viable, legal cannabis cultivation industry must be online by the 2018 growing season in order to service the demand previously served by the black/grey market.

Conservation of agency resources is also a valid concern, especially given the high level of approval that local cooperative solutions will require. The same is true for Variances of the Minimum Riparian Setbacks discussed above.

If the Minimum Riparian Setbacks in the draft Policy are retained then the Variance process must be sufficiently flexible as to be meaningful. Returning to my example of the stable, organic garden 180 feet from the Class I stream. If the procedure to get a variance proves impractical or impossible within the time constraints, then I will be forced to move that garden and may be placed into High Risk designation until I do so. Meaning that I will have to hire a “qualified professional” and undoubtedly have to bring in equipment to tear up a perfectly stable garden and surrounding native vegetation so that I can move it 20 feet farther back from the stream to accommodate a linear measurement that has more to do with uniform standards than actual threat to water quality.

The language from the NCRWQCB Order regarding “site-specific riparian buffers” (referenced in fn. 8) should be incorporated as the standard for Variances to the Minimum Riparian Setbacks.

### **SPECIFIC COMMENTS**

These comments relate to draft Policy Attachment A and correspond to the Section Numbers in that document:

#### **Section 1 - General Requirements and Prohibitions**

**8.** A locally prepared CEQA document seems to be the best method to address concerns about sensitive plant and wildlife species and communities and, where available, should substitute for the need to hire a qualified biologist.

**13.** Advance notice, preferably at least 24 hours, would be less disruptive to cultivation operations and ensure that senior staff are present and available.

**17 – 20.** Protection of cultural resources seems to be beyond the scope of the SWRCB’s responsibilities. B & P Code Sec. 19332(c) designates CDFA as the lead agency for CEQA purposes. Protection of cultural resources is better suited to the lead agency and its CEQA documents as well as any locally prepared CEQA document.

**23.** This is an excellent decision. I strongly support the prohibition of monofilament netting it is a hazard to terrestrial and aquatic wildlife.

**30.** Is the date “July 1, 2017” correct?

#### **Section 2 – Requirements Related to Water Diversions and Waste Discharge for Cannabis Cultivation**

**1.** This requirement creates a hardship in many rural communities, particularly in the Klamath and North Coast Regions, where state-licensed C-12 Earthwork and Paving contractors are difficult to find. Including Licensed Timber Operators in this category would provide greater access.

15. What is meant by “storm event”? Is there a 24 hour precipitation threshold?
27. The requirement to have water bars and rolling dips designed by a “qualified professional” is excessive. Licensed cultivators and/or landowners must be permitted to construct water bars immediately upon identifying a need. Rolling dips should also be considered within the purview of the licensed cultivator/landowner or, at the most, an LTO.
62. This is a good approach to soil disposal sites.
84. The requirement for daily diversion records is unreasonably excessive when balanced against the quality of the data it could reveal. Cannabis cultivators should be required to maintain monthly records like other small diverters. Protections related to fish screening and maximum instantaneous diversion rate should render the monthly recording requirement sufficient.
101. This requirement is unreasonably expensive and excessive. Monthly records of water used for irrigation should be sufficient for any instream flow or other environmental considerations.
115. This is an excellent requirement and will help mitigate excessive and potentially detrimental fertilization methods.

### **Section 3 – Numeric and Narrative Instream Flow Requirements & Section 4 – Watershed Compliance Gage Assignments**

My comments to these Sections are covered in my General Comments except as to the flow gage monitoring requirement. Many cultivation locations in the Klamath and North Coast Regions lack internet or cellular service, making flow gage monitoring locally impracticable.

### **Section 5 – Planning and Reporting**

I believe the Site Erosion and Sediment Control Plan that most cannabis cultivators in the Klamath and North Coast Regions will have to prepare should be a document capable of being prepared by the cultivators themselves. Not only are “qualified professionals” expensive, they are difficult to retain, few in number and often require several hours of compensated travel time to reach the remote destinations in the Regions. Allowing cannabis cultivators to prepare their own Site Erosion and Sediment Control Plans engages them in the process and ensures they have the necessary understanding to implement the plan without having to call a “qualified professional” each time they are confronted with changed, or unforeseen, circumstances.

## CONCLUSION

I believe the best strategy for the SWRCB is to ensure that the Regional Boards, especially those with current Orders in effect, retain enough flexibility within the context of the Policy and General Order, to develop and implement, timely and locally appropriate compliance strategies that are both protective of water quality and instream flow considerations and cognizant of the precarious economic realities facing the communities they serve.

In my case, and the case of all those similarly situated in Region 1, which is to say, those of us currently enrolled under the NCRWQCB Order. I would urge the SWRCB to allow our enrollments to continue under the terms and conditions of that Order for its original five-year duration. This would both allow cultivators to continue to implement their Water Resource Protection Plans that many of us have been operating under for over a year and still meet the direction in Water Code Sec. 13149(b)(1) as it, by definition, "does not involve relaxation of existing streamflow standards."

Thank you for your attention and consideration of my comments and thank you again to SWRCB Staff for the time already invested, and that still to come, in this effort. If I can provide any further information or answer any questions please contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'Thomas J. Ballanco', with a long horizontal stroke extending to the right.

Thomas J. Ballanco