

State Water Resources Control Board

**Responses to Comments on Proposed
Updates to the Cannabis Policy,
Cannabis Policy Staff Report, and
Cannabis Cultivation General Order**

ADDENDUM

APRIL 2019

TRIBAL CONSULTATION

AUGUSTINE BAND OF CAHUILLA INDIANS

“At this time we are unaware of specific cultural resources that may be affected by the proposed project. We encourage you to contact other Native American Tribes and individuals within the immediate vicinity of the project site that may have specific information concerning cultural resources that may be located in the area. We also encourage you to contract with a monitor who is qualified in Native American cultural resources identification and who is able to be present onsite full-time during the pre-construction and construction phase of the project. Please notify us immediately should you discover any cultural resources during the development of this project.”

RESPONSE

The State Water Board provided notice of the Cannabis Policy Updates to all tribes in California identified by the Native American Heritage Commission. As outlined in Attachment A, Requirement 19 of the Cannabis Policy, prior to acting on a cannabis cultivator’s request to cultivate on or within 600 feet of tribal lands, the Water Boards will notify the governing body of any affected California Native American tribe or the governing body’s authorized representative. Attachment A contains additional requirements specifically focused on the protection of tribal and cultural resources. If any buried archeological materials or indicators are uncovered or discovered during any cannabis cultivation activities, all ground-disturbing activities shall immediately cease within 100 feet of the find and the cannabis cultivator must notify the appropriate entities, including any potentially culturally affiliated California Native American tribes.

ELK VALLEY RANCHERIA

“Finally, to the extent that a cultivator’s compliance with the Cannabis Cultivation General Order to ensure that such activities do not adversely affect the quality and beneficial use of state waters requires the consent of a tribe or the exercise of tribal jurisdiction, the Tribe requests that: 1) the State Water Board not decline or approve a cultivator’s application for that reason alone; and 2) the State Water Board and the cultivator work cooperatively with the Tribe (i.e., tribal authority) to consult and determine a mutually beneficial outcome consistent with tribal jurisdiction and socioeconomic needs as well as protection of tribal cultural resources.”

RESPONSE

Conditions 18 and 19 of the Attachment A, Section 1 of the Cannabis Policy were written specifically to prevent trespass on tribal lands and also clearly define the process for a cannabis cultivator to request authorization to cultivate cannabis on or within 600 feet of tribal lands. Condition 20 in the same section provides the State Water Board with the flexibility to consult with tribes to address cultivation sites with cultural resources on or within 600 feet. Condition 21 of the same section directs the cannabis cultivator to perform or request a records search of tribal archeological and cultural resources, but again allows the State Water Board to consult and work with the tribe to address site-specific conditions regarding tribal resources. These four conditions in the Cannabis Policy ensure that a cannabis cultivator will not be automatically approved or denied when cultivation would occur on or within 600 feet of tribal lands. In such instances, consultation is envisioned as a viable option for tribes and cultivators to agree on solutions that meet their mutual needs.

GROUNDWATER REGULATION

CHARLES KATHERMAN

“Likewise, it makes no sense to apply specific surface water regulations, such as a restriction of 10 gallons per minute (gpm) for surface water extraction and a Dry Season Forbearance Period, to the regulation of subsurface extraction. The diversion of subsurface water should have it's own specific regulations/rules independent of that for surface water diversion; particularly when subsurface diversion can be proven to have minimal impacts to water quality, aquatic habitat, riparian habitat, wetlands, surface flow and springs.”

RESPONSE

The State Water Board is not proposing to apply specific surface water regulations to the regulation of subsurface extraction. Diversions from groundwater can have negative impacts on the quantity and quality of groundwater aquifers, as well as surface water supplies, if not properly managed. The legalization of cannabis cultivation could lead to an increase in groundwater diversions.

To address potential impacts of groundwater diversions on surface flow, the Cannabis Policy includes a provision that allows the State Water Board to require a forbearance period or other measures for cannabis groundwater diversions in areas where such restrictions are necessary to protect instream flows. To evaluate these potential groundwater impacts, the State Water Board established aquatic base flows. Such areas may include watersheds with: high surface water-groundwater connectivity; large numbers of cannabis groundwater diversions; and groundwater diversions in close proximity to streams.

WINTERIZATION

SAM RODRIGUEZ

“As we shared with you all when we last met, our most serious concerns stem from oversight agencies developing new rules impacting farmers who for years always followed existing farming guidelines for non-cannabis agricultural crops. There's a natural order for planting, toiling and nurturing cannabis farming and we are afraid that these new rules will have unintentional negative impacts on current procedures and hurt our bottom-line operations to compete in the marketplace.”

“In preparation for our call this morning, here are some of the issues for discussion.

- *restriction of operating heavy equipment during the winter period*
- *restrictive winter dates for Santa Barbara County Nov thru April*
- *impedes a second crop of cannabis for planting*
- *slope designations too cumbersome*
- *(Northern Santa Barbara County is fairly unique where relative flat farms prosper side by side with a variety of crops - including Cannabis, Vegetables, Citrus and Grapes. Farmers have always had flexibility to apply sustainable water run-off protections. Humboldt, Trinity and Mendocino farming landscape vastly different in every way.)*

We are also fairly confident that more than 50 cannabis farmers in the region have similar concerns and worries.”

RESPONSE

Please see the response (copied below) to the Winterization comments in the February 2019 Response to Comments on Proposed Updates to the Cannabis Policy, Cannabis Policy Staff Report, and Cannabis Cultivation General Order.

The State Water Board revised Attachment A, Requirements 127 and 128, to clarify the winterization requirements and address the commenters concerns and recommendations. The proposed revisions address the use of heavy equipment (e.g., agricultural equipment) for routine cannabis cultivation soil preparation or planting. The proposed revisions allow the Regional Water Board Executive Officer (or designee) to authorize use of heavy equipment for routine cannabis cultivation soil preparation or planting through approval of a site management plan. Such authorization may only be granted if all soil preparation and planting activities occur outside of the riparian setbacks and on slopes less than five percent (e.g., valley floor). Additionally, the slope stabilization requirement was revised to allow the Regional Water Board Executive Officer (or designee) to authorize alternative methods and spacing for linear sediment controls (e.g., silt fences, wattles, etc.) through approval of the site management plan. On January 10, 2019, the State Water Board released a Notice of Opportunity for Public Comment Concerning Winterization Revisions to Proposed Updates to the Cannabis Policy and Staff Report. The comment period closed on January 25, 2019. No comments were received on the proposed winterization revisions.

TRIBAL BUFFER EXEMPTION

ROUND VALLEY INDIAN TRIBES, ERICA MCMILIN, ATTORNEY

There Should be a Parallel Exception to the Riparian Setback Exemption if the Tribe determines an Exemption Would Not Protect Water Quality. The proposed updates include an exception to the riparian setback exemption if the Regional Water Board's Executive Officer determines an exemption would not protect water quality. The SWCRB should add the following exception to the Tribal Buffer Exemption for indoor cultivators: "The tribal buffer exemption shall not apply if the Tribe's Tribal Council or other Authorized Representative determines that an exemption from the tribal buffers is not sufficiently protective of water quality."

RESPONSE

The tribal buffer is intended to protect tribal cultural resources, not water quality. The exemptions for certain indoor cultivation sites that meet the conditions in Attachment A, Requirement 19 of the Cannabis Policy are protective of tribal resources because they are limited to urban sites. The indoor exemptions are generally designed for sites in developed areas, with established infrastructure, where the threat to tribal resources is low.

INDOOR CUTLIVATION

ROUND VALLEY INDIAN TRIBES, ERICA MCMILIN, ATTORNEY

At Minimum, Tribes Should Receive Notice of All Existing and Proposed Indoor Cannabis Cultivation Structures That Would Qualify Under the Exemption. At a minimum, the SWCRB should notify the Tribes of all cannabis cultivation, whether indoor or outdoor, on and within 600 feet of tribal land in order for the Tribe to effectively protect its water supply and natural resources. The Tribes are a sovereign government that are responsible for the safety and well-being of its people and must be informed of what is happening on tribal land. Finally, cannabis is still illegal under federal law. Therefore, the Tribes must be aware of all cannabis cultivation -- indoor or outdoor -- occurring on tribal land."

RESPONSE

As outlined in Attachment A, Requirement 19 of the Cannabis Policy, prior to acting on a cannabis cultivator's request to cultivate on or within 600 feet of tribal lands, the Water Boards will notify the governing body of any affected California Native American tribe or the governing body's authorized representative. However, if a cultivation site qualifies for an exemption from the tribal buffer, as outlined in the Cannabis Policy, there would be no regulatory nexus.

The indoor tribal buffer exemption is limited to indoor cultivation sites located on non-tribal land within the 600-foot buffer of tribal lands and does not apply to any cultivation sites located on tribal lands. In addition, the Cannabis Policy specifies that it does not amend or interpret tribal law or tribal jurisdiction in any way.

INDOOR CULTIVATION – SITE SPECIFIC WDR

DIEDRE BROWER (VERBAL COMMENTS AT STATE WATER BOARD WORKSHOP)

“Also, wanted to discuss the indoor construction, if it was after Oct 1 my understanding was that you could get an individual site-specific discharge plan, just outside of the order [Cannabis General Order].”

RESPONSE

Indoor cannabis cultivation structures constructed after October 1, 2018 are exempt from the riparian setback and tribal buffer if the indoor cannabis cultivation structure:

- i. has a building permit or other similar authorization issued by a federally recognized Indian tribe on file with the county, city, local jurisdiction, or federally recognized Indian tribe, as applicable, and construction started on or after October 1, 2018;
- ii. has a valid certificate of occupancy or amended certificate of occupancy for indoor cannabis cultivation; and
- iii. is connected to and discharges any industrial wastewater to a permitted wastewater treatment collection system and the facility accepts cannabis cultivation wastewater. If the permitted wastewater treatment collection system and facility that the structure is connected to does not accept cannabis cultivation wastewater, the structure may still qualify for the riparian setback and tribal buffer exemptions if the structure discharges any industrial wastewater directly to an appropriately designed and connected storage tank located outside of the riparian setback, and the discharge is properly disposed of by a permitted wastewater hauler at a permitted wastewater treatment facility that accepts cannabis cultivation wastewater.

The riparian setback exemption shall not apply if the Regional Water Board's Executive Officer determines that an exemption from the riparian setbacks is not protective of water quality.

Additionally, the Cannabis Policy allows the Regional Water Board to adopt site-specific WDRs for a cannabis cultivator with requirements that are inconsistent with the riparian setback requirements if the Executive Officer determines that the site-specific WDRs contain sufficient requirements to be protective of water quality.