

From: [Anna Birkas](#)
To: [commentletters](#)
Subject: Comments for Cannabis Order
Date: Tuesday, September 5, 2017 9:29:06 PM



September 5th, 2017

RE: State Water Resource Control Board Cannabis Policy

Dear State Water Resources Control Board and others,

We are writing as concerned professionals and stakeholders from Mendocino County and surrounding regions working and representing clients mainly in California's North Coast Region. Between us we have visited and assisted with compliance related issues for hundreds of cannabis farms. We have an in-depth understanding of the real impacts and concerns surrounding water usage in the cannabis industry.

In this letter, we will first look at: 1) the current situation on the ground and discuss the potential effects of the order on North Coast cannabis cultivators. 2) consider specific elements within the order that we believe should be modified and give suggestions to how that can be accomplished.

1. The cannabis industry in our region is dominated by small scale cultivators, with cultivation sites between 2,000 to 10,000 square feet. The existing NCRWQCB Order puts cultivators with sites from 2,000 to 5,000 square feet, and who meet all standard conditions of the Order, into a first tier, with reduced enrollment fees and reporting requirements. Operations above 5,000sq/ft, and those sites requiring remediation, pay higher fees and require more extensive reporting. We believe that placing craft scale operations in the same tier with operations up to one acre in size, and requiring the same enrollment fees creates an unfair economy of scale for craft cultivators and may force many out of business. WE believe that a separate tier for craft scale operations be created for the General Order, and assuming those operations meet the standard conditions of the Order, they should pay a reduced fee and have less stringent reporting requirements.

The cannabis industry has been the primary economic driver in Mendocino County for decades, providing jobs, revenue to the County Government, and relative affluence and economic stability in a post-timber industry era. The revenue created by the Cannabis Industry far surpasses all other economic sectors combined in the county and the greater region, and

the loss of that economy would have devastating consequences for communities in the area. While we firmly believe that strong regulations are needed to protect the environment and the public trust, we also believe that the consequences of losing the cannabis industry as an economic driver in the region would inflict greater long term damage to our watersheds as cultivators either choose to remain in the black market or are priced out of the developing legal market in California.

We believe the existing Order in the North Coast region is adequate for protecting water resources. While the Order is strict and some site may not be able to comply, over 3,500 farms have already enrolled in the program in the North Coast Region. The clear majority of farms enrolling in the program have improvements to make on their land to meet the standard conditions of the order. Many operators will have to invest many tens of the thousands of dollars to comply, and that includes remediation of legacy environmental damage on their property. We have found that cultivators and landowners are eager to repair their watersheds, if the cost for doing so is within reach, and they can develop a compliance schedule that is economically feasible.

Cultivators that have enrolled in the NCRWQCB Order have designed their operations around the specific standard conditions and limitations put forth by the Order. While the draft General Order is generally in line with the NCRWQCB order, there are several changes that will have drastic impacts on North Coast cultivators currently enrolled with the Regional Board. We believe that to create one standard for over 3,500 cultivators and then rewrite that standard two years into program create an unreasonable economic hardship for cannabis cultivators. We believe many will be forced out of business and many will return to the unregulated market as a result, and that this will have the effect of negating the prescribed timeline for site remediation's generated under the NCRWQCB Order.

The property-wide requirements unique to the North Coast region already put most of these farmers at an economic disadvantage. If the state of California would like to capitalize on cannabis cultivators being responsible for remediating legacy impacts from timber harvest, ranching, mining, and other industries, with craft scale operations, they will need to allow extensive timelines, a streamlined process that can be addressed by farmer's themselves (without the extensive costs of 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.

<!--[if !supportLineBreakNewLine]-->

<!--[endif]-->

<!--[if !supportLists]-->A. <!--[endif]-->Allow each WQCB region, if they choose, to develop their own Cannabis Order, tailored to their specific hydrologic basins and addressing water resource issues specific to each region. Regional offices who are

currently administering their Orders would be allowed to continue, and regional offices outside the pilot project areas could either develop their own orders or opt into the State General Order.

<!--[if !supportLists]-->B. <!--[endif]-->Allow farmers that have enrolled with a Regional Board prior to the start of the Statewide Order, may continue to work under the existing order, and thus be “grandfathered in.

--[if !supportLists]-->A) <!--[endif]-->
<!--[if !supportLineBreakNewLine]-->
<!--[endif]-->

--[if !supportLists]-->1) <!--[endif]-->In addition to requesting the above allowances, we have specific comments about the Order. These or on the topics of:

<!--[if !supportLists]-->A) <!--[endif]-->Surface Water Forbearance

<!--[if !supportLists]-->B) <!--[endif]-->Groundwater Forbearance

<!--[if !supportLists]-->C) <!--[endif]-->Setbacks

<!--[if !supportLists]-->D) <!--[endif]-->Timeline

<!--[if !supportLists]-->E) <!--[endif]-->Licensure

<!--[if !supportLists]-->A) <!--[endif]-->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:

--[if !supportLists]-->1. <!--[endif]-->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.

--[if !supportLists]-->2. <!--[endif]-->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.

<!--[if !supportLists]-->2. <!--[endif]-->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 waterbody are subject to the surface water forbearance period and instream flow Requirements...”

This rule applies to both new SIURs and pre-existing appropriative and pre-1914 rights. Applying this rule to pre-existing rights holders is not only unreasonable, it will cause unnecessary significant economic hardship, including eliminating otherwise viable cultivation operations. It may also result in more negative impact to the environment.

The Staff Report justifies its recommendation for universal forbearance on the conclusion 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 the low flow periods for conventional 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 justifiable public trust benefit.

Would be cultivators with pre-existing rights must construct storage, and potentially seek additional water rights with the resulting financial and environmental impacts – without 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 pre-existing 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 are treated as exceptions to the forbearance rule.

<!--[if !supportLists]-->B) <!--[endif]-->Groundwater Forbearance

The General Order treats groundwater under the influence of surface water as surface water, with regard to forbearance and permitting; and groundwater not under the influence may require forbearance if the SWRCB deems necessary. There is a lack of detail in the staff report on both issues.

It is generally recognized that all water sources are hydrologically connected, but that connectivity works on a different timescale than surface water. Hydrologically connected aquifers may influence streamflow the same season as the withdrawal, and thus have significant impacts, or they may have a seasonally minimal impact, contributing on a longer timescale, or not at all.

The Staff Report says little about scientific justification for groundwater that is influenced by surface water contributing to base flows. The SWRCB uses the New England Aquatic Base Flow (ABF) methodology to determine when groundwater forbearance will apply. There are both issues with using this method and it does not answer the connectivity question, which so seems relevant.

The New England Base Flow Method, used to determine need for groundwater forbearance, does not address connectivity, is not appropriate for heavily allocated watershed nor for rivers with dams, and was based on data collected in New England. This may result in groundwater forbearance without understanding whether it will increase stream flow, inadequate groundwater forbearance, or an inappropriate forbearance schedule.

This Policy does little to promote greater performance from cannabis growers, such as considering groundwater recharge by best management practices for stormwater and that landowners can implement to sink and store water in the soil layer and aquifer.

This Methodology for developing numeric instream flow requirements is not appropriate for calculating base flow for all watershed in California and the argument that the SWB makes does nothing to address the groundwater-surface water temporal relationship.

It is the SWRCB's responsibility to do adequate research prior to implementing policy. determine how much overpumping is significant with regard to instream flow impacts, and then prescribe a watershed wide reduction in use for groundwater under the influence of surface water, that applies to all water rights holders, not just cannabis.

We recommend that the SWRCB expand their methodology for implementing groundwater forbearance, address connectivity, and use performance based BMPs for stormwater. An example of such BMPs are described in the Mendocino County Resource Conservation District's publication titled: "Watershed Best Management Practices for Cannabis Growers and Rural Gardeners" is an excellent example of ways in which this order could go further to address groundwater recharge.

<!--[if !supportLists]-->C) <!--[endif]-->Setbacks

The garden set backs are unnecessarily rigid and will unnecessarily impact cultivators, especially those that have developed their infrastructure around the North Coast Order. Additionally, the 150 foot setback from ponds, springs, wetlands, and seeps is unreasonable.

The General Order says that if you have an LSA then you may get approval from the Deputy Director to reduce setbacks in line with that agreement. While this provides an alternative, it is costly and unnecessarily arduous.

The setbacks should be reduced to NCRWQCB Order standards, and an LSA and/or Regional Water Board approval should be allowed to further reduce them.

Springs, wetlands and seeps should have a 50' setback consistent with Army Corp of Engineer setbacks. There is no reason to treat cannabis farmers differently than other

farmers and developers.

The term “Seep” is undefined and ambiguous, and requires a large setback. How is the term “seep” differentiated from a spring? In the North Coast region, when the ground is saturated, everything seeps. For example, Hortonian overland flow, or water coming out of a gofer hole, should not be misconstrued as a “seep”, or the entire region would be disqualified.

These setbacks will result in unnecessary economic hardship for cultivators. Some will need to redesign and relocate their infrastructure, costing many tens of thousands of dollars. Some will no longer have a viable location to continue farming, and thus their properties may go into foreclosure.

Please use the setbacks from the NCRWQCB order, and allow Regional Boards and LSAs to further reduce them.

<!--[if !supportLists]-->D) <!--[endif]-->Timeline

For the regions where property wide upgrades will be required, most cultivators will need a multi-year timeline to be able to afford the cost of compliance. The North Coast order prioritize sites based on water quality impacts, requiring the farmer to do the easy and high impact sites first, and allowing more time for low impact difficult sites. A timeline should be an assumed part of the process, without requiring that dischargers request a timeline from the Deputy Director.

By not being able to spread the cost out over time, many farmers will not be able to afford the cost of compliance, resulting in either going out of business, or being pushed back into the black market. This will result in greater environmental damage and could trigger an economic downturn for counties like Mendocino that have relied on the revenue from cannabis for the clear majority of out-of-County income.

Our region has a shortage of professionals, due to our low population and high number of cultivators. Most professionals have waiting lists and are not taking on new clients. Agencies are also behind. Most instream projects require waiting for the following dry season, often a year away, before permits are ready for work.

Please revert to the North Coast Regional Board's timeline process, of five years, with a potential of extension for difficult sites. Please allow the Regional Board's to develop and implement timelines. When property wide upgrades are required cultivators should be allowed a simple, relatively local and automatic timeline process.

<!--[if !supportLists]-->E) <!--[endif]-->Licensure

There are two licenses that should be added to the General Order: the General Engineering Contractor's A License, and the Professional Hydrologist, AID (American Institute of Hydrology) license.

The General Order says that all grading and earthworks shall be done by a state licensed C-12 Earthworks and Paving contractor. The CSLBs General A contractor's license should be included as it is often more appropriate for many earthworks jobs, such as: Irrigation, drainage, water power, water supply, flood control, inland waterways, dams, hydroelectric projects, levees, river control, railroads, highways, streets, roads, tunnels, sewage disposal systems, bridges, parks, playgrounds, recreation works, industrial plants, mines, land leveling and earthmoving projects, excavating, grading, trenching, paving, surface work, cement and concrete works. This license this should be added to the Limitations on Earthmoving section.

A Site Erosion and Sediment Control Plan must be written by a qualified professional. This list of professionals includes geologists, engineers, and foresters. It should also include AIH certified hydrologists who are trained and licensed in erosion control and sediment reduction.

By specifying that such work be done by a limited set of licensed professionals, and excluding other professionals licensed to do that work, a disservice is being done both to

the cultivators, who have a shortage of people qualified to do the work, and the professionals who have trained to be qualified to do such work.

We recommend that the General Order state that the work is required to be done by contractors and professionals with appropriate licensure, but to avoid limiting this unnecessarily.

If these changes are not made, the north coast will experience economic hardship, craft farms will be pushed back into the black market, and large corporations will have the opportunity to create the branding for most legal cannabis products, exacerbating the national problem of concentration of wealth.

The State Board can make a greater impact with performance based requirements that are pro-active and cost effect than they can with the proposed prescriptive approach. Allowing for a performance based approach will result in an increase in enrollment, rather than with prescriptive, one-size fits all measures that have potentially devastating economic impacts, and may even result in a greater degradation of the public trust that the State is trying to protect. Requiring farmers to comply with hyper rigid guidelines, that do not have the scientific or legal backing to support their necessity, will result in a failure to protect both the public trust and economic hardship for many rural counties.

Sincerely,

Anna Birkas