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BY EMAIL ONLY

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State Water Resources Control Board
Division of Water Rights
Cannabis Interim Flow Unit
P.O. Box 2000
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**Re: Cannabis Cultivation and Water Rights
Interim Principles and Guidelines
State of California Jurisdiction over Fully Contained Springs**

State Board,

Hicks Law represents multiple landowners and works with many technical consulting experts across several North Coast counties. We appreciate the opportunity to provide these written public comments to the State Water Resources Control Board's (State Board) Cannabis Cultivation and Water Rights' Interim Principles and Guidelines.

Most generally, Hicks Law strongly encourages the State Board and other state agencies to avoid inconsistency with existing real property and water laws when developing the "principles and guidelines" pursuant to the Medical Cannabis Regulation and Safety Act (MCRSA or SB 837).

The primary focus of these comments is Section 104 of SB 837, which authorizes the State Board and the California Department of Fish and Wildlife (DFW) to develop "principles and guidelines" to take "measures to protect springs, wetlands, and aquatic habitats from negative impacts of cannabis cultivation." (MCRSA, Sec. 104, which creates Water Code § 13149.)

Hicks Law requests that the State Board consider these comments, and suggests the State Board convene a sit down meeting with Hicks Law and other professional consultants at the earliest opportunity to resolve the legal and technical issues raised by the State's assertion of new jurisdiction over fully contained springs.

1. Clear Definitions

At recent workshops, the State Board has signaled its intent to extend its jurisdiction over **all** springs that are being used by cannabis growers, including fully contained springs, which are currently considered non-jurisdictional.

As written, it appears Section 104 is meant to more narrowly apply to springs that are currently subject to state jurisdiction, such as springs that visibly flow off the surface of a landowner's property into a defined channel. This standard is fairly easy to apply and can be made by visual assessment and the professional judgment of a consultant during a site inspection.

Hicks Law and others have talked with staff at both the DFW and the State Board, which have confirmed that the determination of whether a spring is jurisdictional or not is made on a case-by-case basis. Yet, at the same time, there is no other consistent objective criteria for making this jurisdictional determination beyond what is presumably found in statute and case law, e.g. a non-jurisdictional spring does not flow off the landowner's property in a surface or underground channel.

The new guidelines and principles might lend new clarity as to whether a spring is jurisdictional or not or they might create a difference of opinion between landowners and their consultants and the State. There is a genuine risk of abuse of State power in making a one size fits all determination to expedite decision making or to conserve resources. It is not appropriate for the State to expect landowners to pay for consultants and testing to maintain a right that can be substantiated by sight. The potential of new State-created ambiguity undermines the existing certainty and security of water use that landowners acquired with their land.

Equally in need of definition are the terms "wetland" and "aquatic habitat." An expansive reading of these terms could extend state jurisdiction to nearly all water that falls to or emerges from the ground, and could conceivably be used to claim jurisdiction over rain-fed ponds, seeps, gullies, swales, and gutters (among others) that are clearly not anywhere near or hydrologically connected to a river, stream, or creek.

At scale, across thousands of properties potentially impacted, an imprecise regulation can and will lead to inconsistent and even arbitrary application, confounding an already complex and complicated array of water laws, regulations, principles, and guidelines. A vague over extension of jurisdiction can and will generate *otherwise avoidable* economic impacts on thousands of northern California landowners and cannabis growers.

Comment One: The State Board and DFW are asked to articulate a principle or guideline that provides a clear and objective standard for property owners and their consultants to follow with respect to jurisdictional vs. non-jurisdictional springs, wetlands, and aquatic habitat.

2. Conflict with Existing Law

Springs with no outlet, or in which the water is fully contained on a single tract of land ("fully contained springs"), are considered to be the property of the landowner, who "owns the water as completely as he does the soil."

Fully contained springs have not previously been considered subject to state regulatory jurisdiction, and an analysis of SB 837 and other existing authorities does not provide a satisfactory explanation as to how state jurisdiction could be extended to such water sources without infringing on well-established property rights.

Comment Two: If the State Board and DFW intend to expand their jurisdiction over currently non-jurisdictional springs and water sources, both are asked to explain their statutory or other legal authority supporting this expansion.

3. Impacts of Proposed Jurisdictional Expansion

Many North Coast and California property owners rely upon springs for their domestic and farming water needs. New levels of State jurisdiction over fully contained springs would likely result in seasonal forbearance periods, meaning these springs could no longer be used during the irrigation season.

Such forbearance would necessitate an increase in water storage during the wet winter storm season, which would in turn trigger the need to file a Small Domestic Use permit, a Small Irrigation registration, or appropriative water right application with the State Board.

Applying for any new permit, registration, or appropriative right, even the proposed Small Irrigation Registrations, is not a guarantee to secure a lawful source of water. Where the state determines there is insufficient water in a watershed to meet all other needs, including senior water rights holders and environmental values, new appropriative rights will not be available. Many cannabis farmers will likely be forced to cease farming on their land.

It is foreseeable that over-extension of the State Board's jurisdiction will potentially force some, who otherwise might have a vested legal entitlement to use fully contained springs, to stop farming. The economic impact would represent not only a loss of livelihood for the farmer, but also a significant loss of property value.

Traditional non-jurisdictional alternative water supply solutions, such as rain catchment ponds and non-hydrologically connected groundwater wells, might also be subject to a similar expansion of state. Even should they remain viable options, they are both expensive and higher risk alternatives to springs.

If an appropriative right or Small Irrigation Registration is obtained, the property owner would need to bear the significant cost of constructing the water storage solution, such as winter storm flow tanks or off-channel ponds. Region wide, the economic costs borne by farmers will be massive and likely force an additional increment of farmers to stop growing. Indirectly, the State will cause more farmers to seek municipal or other water supplies.

Extending state regulatory jurisdiction over fully contained spring waters might result in a total regional impact in the hundreds of millions of dollars in infrastructure expenses and aggregate reduced fair market value of properties with no legal entitlement to alternative water sources.

Upon further scientific consideration, Hicks Law contends the environmental benefits of regulating fully contained springs is likely to be negligible when compared to the economic impact.

Comment Three: The State Board and other agencies are asked to provide their most current information related to the following:

- a. Total Impact
 - i. Total number of landowners or real property parcels in North Coast counties;
 - ii. Total number of landowners or parcels in North Coast that will potentially be impacted by the new principles and guidelines;
- b. Farming in General
 - i. Total number of landowners and parcels that rely on surface flow as the basis of water supply for their farming operations.
 - ii. Total number of landowners and parcels that rely on hydrologically connected groundwater as the basis of water supply for their farming operations.
 - iii. Total number of landowners and parcels that rely on fully contained springs as the basis of water supply for their farming operations.
- c. Cannabis Farming
 - i. Total number of landowners and parcels that rely on surface flow as the basis of water supply for their farming operations.
 - ii. Total number of landowners and parcels that rely on hydrologically connected groundwater as the basis of water supply for their farming operations.
 - iii. Total number of landowners and parcels that rely on fully contained springs as the basis of water supply for their farming operations.
- d. Farming Water
 - i. Total estimated amount of water (gallons and/or acre feet) diverted from surface streams pursuant to riparian or appropriative rights.
 - ii. Total estimated amount of water (gallons and/or acre feet) pumped from hydrologically connected groundwater.
 - iii. Total estimated amount of water (gallons and/or acre feet) drawn from fully contained springs.
- e. Cannabis Water
 - i. Total estimated amount of water (gallons and/or acre feet) diverted from surface streams pursuant to riparian or appropriative rights for cannabis.
 - ii. Total estimated amount of water (gallons and/or acre feet) pumped from hydrologically connected groundwater for cannabis.

- iii. Total estimated amount of water (gallons and/or acre feet) drawn from fully contained springs for cannabis.

4. Existing Law of Springs

Springs with no outlet, or in which the water is fully contained on a single tract of land, are considered to be the property of the landowner, who “owns the water as completely as he does the soil.” (*Simons v. Inyo Cerro Gordo Co.*, 48 Cal.App. 524, 542 (1920).) The right to water from a fully contained spring is distinct from other water rights such as surface and hydrologically connected groundwater riparian to surface flow.

Comment Four: The State Board is asked to clarify to what extent that it interprets any existing or new authorities to expressly override the existing law of fully contained springs.

5. Statement of Water Diversion and Use

The California Water Code expressly distinguishes springs from other water sources. Sections 5100 et seq., which define the state Statement of Water Diversion and Use program, and which are expressly referenced in SB 837 Sec. 33, suggest that fully contained springs are distinct from other water sources and their use does not carry the same kinds of requirements found with other water uses.

Section 5100 defines a diversion as the “taking water by gravity or pumping from a surface stream or subterranean stream flowing through a known and definite channel, or other body of surface water...”. This list notably leaves out fully contained springs, which do not flow through surface or subterranean streams.

Section 5101 is even more explicit. It makes an express exception for diversions “(a) [f]rom a spring that does not flow off the property...”. Implicit in § 5101 is the recognition that the right to water from fully contained springs is unique.

The Water Code also expressly allows the use of artesian wells (which are tapped springs) for use in irrigation and to fill storage ponds *without an appropriative right*: “Nothing in this article prevents the running of artesian water into an artificial pond or storage-reservoir, if the water is used thereafter for a beneficial use.” (Water Code § 303.)

Comment Five: The State Board is asked to address the apparent jurisdictional exemption for fully contained springs from filing Statements of Water Diversion and Use found in the same legislation that it cites as a basis of extension of authority over all springs.

6. Department of Fish and Wildlife

The Department of Fish and Wildlife also has broad reaching authority over water use in the state. All diversions, including riparian diversions, are subject to the notice requirements of the Lake and Streambed Alteration program (LSA). (Fish and Game Code § 1602). Where such diversions are found to present a potential significant adverse effect on environmental values, DFW imposes restrictions and requirements that the diverter must meet in order to divert. (Fish and Game Code § 1603.)

While the Fish and Game Code clearly gives DFW broad authority, again the language “any river, stream, or lake” leaves out fully contained springs. (See also 14 CCR § 720.)

Comment Six: The State Board and DFW are asked to clarify whether a fully contained spring is now administratively considered the same as a river, stream, or lake and requires a LSA?

7. Water Quality

The statutes from the water code that address water permitting and use (§ 1200 et seq.) limit State Board permitting authority to non-riparian water “flowing in any natural channel...”. Even if California’s Porter Cologne water quality law defines the “Waters of the state” as: “any surface water or groundwater, including saline waters, within the boundaries of the state” (Water Code § 13050(e)), to the extent that “waters of the state” can be interpreted more broadly in the water quality area than in water permitting and use, the water quality concern is expressly directed at discharges into, dredging, and filling of such waters, not diversion and use.

The State Board is currently undertaking a rulemaking for its “Procedures for Discharges of Dredged or Fill Material to Waters of the State” (“Procedures”). Recognizing that “there is no single accepted definition of wetlands at the state level,” the Board has released a draft definition. Unfortunately, the draft definition of wetland is not very definitive:

“... in some cases, the Water Boards must determine whether a particular feature is a water of the state on a case-by-case basis. The definition of wetland does not modify or expand the jurisdiction or otherwise affect the statutory or regulatory authorities of the Water Boards.”

Not only does the definition leave open the question of whether a “*particular feature is a water of the state,*” the Procedures are intended to address issues resulting from dredge and fill of these wetland areas, not diversions.

The potential impacts of diversions have presumably not been considered as part of the analysis during the Procedures rulemaking process.

Furthermore, the “definition of wetland *does not modify or expand the jurisdiction* or otherwise affect the statutory or regulatory authorities of the Water Boards.” (Emphasis added.) If the State Board should seek to use this definition as the basis for an expansion of state jurisdiction over diversions from fully contained springs (or ponds), doing so would seem to contradict the intent of the law.

Comment Seven: The State and Regional Board are asked to clarify how an individual can make an independent determination as to whether their fully contained spring is or is not a “water of the state” for purposes of water diversion pursuant to water quality jurisdiction.

Conclusion

The individual and collective jurisdiction of the State Board, DFW, and other state agencies over fully contained springs is formally questioned. The assertion of this new jurisdiction will potentially effectuate a regulatory taking of a significant portion of the fair market value of regional properties. Land is significantly more valuable with a legal right to use water than without.

Hicks Law requests that the State Board consider these comments, and suggests the State Board convene a sit down meeting with Hicks Law and other professional consultants at the earliest opportunity to resolve the legal and technical issues raised by the State’s assertion of new jurisdiction over fully contained springs.

Please call me directly at [REDACTED] or Aaron Baker at [REDACTED] if you have any questions.

Sincerely,

A handwritten signature in blue ink that reads "Thomas Hicks". The signature is written in a cursive, flowing style.

Thomas Hicks