

Via e-mail

September 6, 2017



State Water Resources Control Board
commentletters@waterboards.ca.gov

**RE: Hicks Law Comments on State Water Resources Control Board Draft General Order:
Principles and Guidelines for Cannabis Cultivation**

Dear State Water Board,

Hicks Law is writing as concerned professionals working mainly in the North Coast region with cannabis cultivators. We have many significant concerns regarding the Draft Principles and Guidelines, and in our discussions with other professionals and stakeholders throughout the region, understand that many comments are being submitted to address some of these concerns. As water law specialists, we felt it was important for us to identify a few of the problems we see in the Draft Principles and Guidelines that specifically impact existing water rights and reasonable and beneficial water use generally.

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 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 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 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 be treated as exceptions to the forbearance rule.

3. Groundwater Forbearance

The General Order states that groundwater not under the direct influence of surface water may require forbearance if the SWRCB deems necessary. This represents a historic change of water policy in the state, and yet such a dramatic shift is supported by a glaring lack of detail, legal, or scientific justification by Staff. Requiring forbearance in the absence of clear hydrological justification could lead to a takings claim.

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 their impacts may occur months, or years later, if 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. This method is agnostic to the temporal connectivity issue, which should be most relevant.

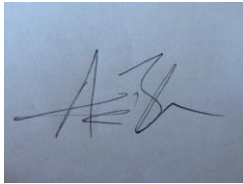
The New England Base Flow Method, used to determine need for groundwater forbearance, does not address connectivity, is not appropriate for heavily allocated watershed nor for rivers with dams. It is also based on data collected in New England, with a very different topography and hydrogeology from most areas in California. The New England Method’s blind use by the SWRCB may result in groundwater forbearance without any understanding of whether, to what degree, or when that forbearance will even increase stream flow.

4. Expansion of Jurisdiction

Finally, we want to raise again the issue of State Board jurisdiction over historically non-jurisdictional water sources such as disconnected springs, groundwater wells, wetlands, or

offstream ponds. Hicks Law submitted a letter to the Board on October 7, 2016 explaining our concerns. The Board responded on March 27, 2017 without directly answering any of our questions or comments, which we documented in a follow up letter to the Board dated April 4, 2017. We attach these letters for your review.

Sincerely,

A handwritten signature in black ink on a light blue background. The signature is stylized and appears to read 'A. Baker'.

Aaron Baker

THOMAS D. HICKS
ATTORNEY AT LAW

BY EMAIL ONLY

October 7, 2016

State Water Resources Control Board
Division of Water Rights
Cannabis Interim Flow Unit
P.O. Box 2000
Sacramento, CA 95812-2000
cannabisWR@waterboards.ca.gov

**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 415.309.2098 or Aaron Baker at 707.329.6957 if you have any questions.

Sincerely,



Thomas Hicks

State Water Resources Control Board

MAR 27 2017

Mr. Thomas D. Hicks
Attorney at Law
35 Temescal Terrace
San Francisco, CA 94118

CANNABIS CULTIVATION AND WATER RIGHTS INTERIM PRINCIPLES AND GUIDELINES, STATE OF CALIFORNIA JURISDICTION OVER FULLY CONTAINED SPRINGS

Dear Mr. Hicks:

Thank you for your comment letter and interest in the State Water Resources Control Board's (State Water Board) effort to develop a policy for water quality control to establish interim principles and guidelines for cannabis cultivation. The primary focus of your letter was in regards to the State Water Board's interpretation of Water Code section 13149(a)(2). Specifically, you question the State Water Board's assertion that the principles and guidelines will apply to all springs, wetlands, and aquatic habitats, including "fully contained springs." In general, a spring tributary to a stream is part of the stream, and the law of water rights applies to the spring (e.g., *Gutierrez v. Wege* (1905) 145 Cal. 730, 734.). Additionally, you requested that the State Water Board provide you with the most current information that we have available on the various topics discussed in Comment 3. Your questions and our responses are provided below.

a. *Total Impact*

i. *Total number of landowners or real property parcels in North Coast counties.*

The State Water Board is responsible for water rights, water quality, and drinking water. The State Water Board does not track land ownership outside of these functions. You may want to consider contacting each county's assessor's office or subscribing to an online resource, such as ParcelQuest.

ii. *Total number of landowners or parcels in North Coast that will potentially be impacted by the new principles and guidelines.*

As of February 1, 2017, there are 953 cannabis cultivators enrolled in the North Coast Regional Water Quality Control Board's (North Coast Region) Waiver of Waste Discharge for Cannabis Cultivation (Order No. 2015-0023) and 544 applications in process. More information on the North Coast Region's cannabis program is available at:

http://www.waterboards.ca.gov/northcoast/water_issues/programs/cannabis/

An additional source of general information on commercial cannabis cultivation is the California Department of Food and Agriculture's voluntary survey results on medical commercial cannabis cultivation and license types by county.

The survey was conducted in August 2016 and the results are available at:

<https://static.cdfa.ca.gov/MCCP/document/2016%20Licensing%20Survey%20Results.pdf>

The interim principles and guidelines will apply to all owners, operators, tenants, or lessees of any property associated with cannabis cultivation. As previously stated, the State Water Board does not track parcel information independently from its water resources programs, and therefore cannot specify the total number of parcels in the North Coast associated with cannabis cultivation.

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.*

According to a record search of the Division of Water Rights Electronic Water Rights Information Management System (eWRIMS) database there are approximately 14,912 appropriative, riparian, and pre-1914 appropriative water right records that include irrigation as a use type. The data are not readily searchable by surface water only and includes diversions from subterranean streams, which may or may not be hydrologically connected, and springs which may or may not be "fully contained." The eWRIMS data are publically available and interested parties may conduct a detailed assessment of each water right source. The eWRIMS database is available online at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/ewrims/

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.*

The eWRIMS database is not currently searchable for cannabis cultivation. Questions regarding cannabis cultivation were added to the annual reporting forms on January 1, 2017. The North Coast Region is collecting general water source information from applicants who enroll in the Waiver of Waste Discharge for Cannabis Cultivation.

The information collected is currently only viewable online on an application by application basis and has not been collectively analyzed.

Better information will be available in the future as a result of ongoing efforts related to collecting data through water rights reporting, the cannabis cultivation waste discharge requirement program, and the California Department of Food and Agriculture commercial cultivation licensing program.

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.*

Based on an eWRIMS database search, the face value of appropriative, riparian, and pre-1914 appropriative water rights that include a beneficial use of irrigation is approximately 102,446,863 acre-feet per year. However, this value does not necessarily reflect actual surface water use for irrigation in any given year. Additionally, riparian claims are not assigned a face value. The appropriative water rights system is built on the premise that water may not be available in all years. Permits recognize that water may only be available in the wettest years and that more recent permitted rights may be curtailed if conditions are dry and there is insufficient water to meet more senior water rights. Additionally, this value does not include riparian or pre-1914 claims of right used for irrigation. Riparian, pre-1914, and appropriative water right holders are required to submit water use information. The State Water Board will have better water use information in the future as recently enacted measurement standards take effect. The new standards began for larger diversions in January 2017. More information on the new measurement requirements is available here:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/measurement_regulation/

Reported riparian and pre-1914 water use can be downloaded in spreadsheet form, but has not been analyzed or processed at the state level. The State Water Board has not conducted an analysis of estimated actual water use per year throughout the state. The State Water Board did conduct water availability analyses and demand for some watersheds throughout the state for drought related work in 2014 and 2015. Information related to those analyses is located here:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/

As previously mentioned, the State Water Board cannot determine the amount of water used for irrigation by diverters who have not filed a water right.

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.*

Please see the response above to c. *Cannabis Farming*. The North Coast Region is collecting general water use information from applicants who enroll in the Waiver of Waste Discharge for Cannabis Cultivation. The information collected is currently only viewable on an application by application basis and has not been collectively analyzed.

As mentioned above, better information will be available in the future from data collected through water rights reporting, the cannabis cultivation waste discharge requirement program, and the California Department of Food and Agriculture commercial cultivation licensing program. I hope this helps answer some of your questions.

We can discuss additional questions related to the interim principles and guidelines for cannabis cultivation at our meeting in April. If questions or comments arise before then I can be contacted via e-mail at Daniel.Schultz@waterboards.ca.gov or at (916) 323-9392. Written correspondence or inquiries should be addressed as follows: State Water Resources Control Board, Division of Water Rights, Attn: Daniel Schultz, P.O. Box 2000, Sacramento, CA 95812-2000.

Sincerely,



Daniel Schultz, Supervisor
Cannabis Interim Flows Unit
Division of Water Rights

PRIVILEGED & CONFIDENTIAL
MEMORANDUM

To: File
From: Hicks Law
Date: April 4, 2017
Re: **State of California Jurisdiction over Fully Contained Springs**

On October 7, 2016, Hicks Law submitted a comment letter to the State Water Resources Control Board (Water Board) asking for clarification and justification for the expansion of state jurisdiction to historically non-jurisdictional water sources such as fully contained springs.

On March 27, 2017, Hicks Law received a response from the Water Board. While the response addressed some of the questions raised in the comment letter, it did not respond to several important issues Hicks Law raised in its original letter. Most critically, it did not respond to the issue of extending state jurisdiction over historically non-jurisdictional property rights to fully-contained springs, off-stream ponds, and wetlands.

Original Comments to Water Board

Hicks Law provided the following comments to the Water Board in its October 7 letter:

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.

Response: none.

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.

Response: The Water Board cited the case *Gutierrez v. Wege* (1905) 145 Cal. 730, 734, to support the claim that “a spring tributary to a stream is part of the stream, and the law of water rights applies to the spring.” However, the applicability of the law of water rights to tributary springs was never in question. What concerns Hicks Law and others is the justification for the state to apply the law of water to non-tributary springs. To this issue, the Water Board provided no response.

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

1. Total Impact

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

Response: The Water Board attempted to provide or identify the data it has on these issues, however, what is clear from their response is that data that demonstrates actual impact of water use from non-jurisdictional sources does not yet exist.

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.

Response: none.

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.

Response: none.

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?

Response: none.

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.

Response: none.

Conclusion

The individual and collective jurisdiction of the State Board, DFW, and other state agencies over fully contained springs was 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. However, Hicks Law has not received a satisfactory answer.

Hicks Law, Water Board and DFW staff, and other professionals from the environmental science community are planning a sit down meeting to discuss these and related issues April 7 in Arcata.

PLEASE CONTACT HICKS LAW FOR MORE INFORMATION: 415.309.2098