September 6, 2017

Ms. Felicia Marcus, Chair
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

RE: Comment Letter – Cannabis General Order

Dear Ms. Marcus,

I am writing as an individual working as an environmental consultant and water lawyer in the cannabis industry in Northern California, and a resident of Mendocino County located within North Coast Regional Water Board Region 1.

The proposed state-wide Order in its draft form is very concerning to me, and I believe will have large-scale negative effects on the economic viability of the small-scale cannabis cultivation in Northern California. In addition, the switch from a Regional program to a state-wide program is a "bait and switch" maneuver eroding trust developed between cultivators and regulators in Region 1, disregarding existing and prior made investments towards compliance, and does not serve to better product water quality in the North Coast.

In this letter I will request that you: A) Allow Grandfathering of Currently-enrolled Region 1 Cultivators, B) Develop a Cottage-Scale Compliance Track, and C) Consider Additional Specific Comments on the Proposed Order.

A. <u>Allow Grandfathering of Currently-Enrolled Region 1 Cultivators</u>

The prior investments made towards compliance by North Coast farmers need to be honored and validated by allowing existing enrollees in the North Coast program to continue working within their developed Water Resources Protection Plans. I request that you allow farmers that have enrolled with a Regional Board prior to the start of the Statewide Order to continue to work under the existing order, and thus be "grandfathered in".

The existing Order in the North Coast region is adequate at protecting water resources. North Coast cultivators have been encouraged to get to the "front of the line" with regulatory planning and permitting. Over the past at least two years, investment has been made in property-wide plans with consultation with professionals and agency staff. The state-wide general order disregards those plans and investments and resets the standards without regard to the investment and agreements to date. The investments will need to be made anew to meet the new standards. The cost of having to re-do their infrastructure would be extensive and is unreasonable to ask.

If cultivators don't fit then they will stay in the black market, and the black market will persist along with crime and lack of tax base for funding public health and safety. By approving legislation that disregards previous compliant activities and replaces them with new onerous requirements, the State Water Board is fueling the black market and hence ineffective at addressing water quality protection. Simply the fact that prior investment is essentially inconsequential under the new Order, and the fact that the new

requirements are significantly different than the previous Regional Order, will result in the majority of good actors not being able to fit into the new program.

The new State Order needs to have a mechanism for incorporating farms already enrolled in the Regional Order and allow farmers to continue operating with their established Water Resources Protection Plans and timelines for remediation.

If the State of California would like to capitalize on cannabis farmers being responsible for cleaning up past impacts from timber harvest, ranching, mining, and other industries, with small farms that are at the bottom end of the Tier designation, they will need extensive timelines, an easy 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.

I request that you allow farmers that have enrolled with a Regional Board prior to the start of the Statewide Order to continue to work under the existing order, and thus be "grandfathered in".

B. <u>Need for Viable Compliance Route for Small-scale farmers (under 10k square feet)</u>

By the limitations set by County cultivation ordinances, all permitted farmers in Mendocino County are "Small Farmers" with garden areas of 2,000 to 10,000 square feet, falling within the Tier 1 status of the state levels (Tier 1 = 2,000 to 43,560 square feet). And, within that Tier 1 status, all Mendocino County farmers are relegated to the bottom 20% of that bracket.

Therefore, Mendocino County cultivators begin the process of permitting and compliance at an economic disadvantage because they are limited to the amount of area, and hence product they can produce. This makes them especially sensitive to the costs of compliance.

This order does not provide a viable compliance option for most small farmers due to the cost. If implemented as is it will result in devastating economic impacts for our and other northern California counties. ***Please consider developing a subset within Tier 1 that develops a compliance track for cottage farmers with disturbed areas of under 10,000 square feet that is attainable and affordable, and does not require 'Qualified Professionals' development of the various plans.***

C. <u>Surface Water Forbearance</u>

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.

I 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 is 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.

I 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.

I strongly recommend that pre-existing appropriative and pre-1914 rights are treated as exceptions to the forbearance rule.

D) Other Specific Comments

1. Setbacks
While the riparian protection minimums are protective, and there is a process for a compliance schedule for achieving the minimums, there is no process for variance which would allow for alternative setback if warranted (e.g., hydrologic divides, dry farming, long established land uses).

2. Timeline
The lack of flexibility to achieve the protections beyond the means identified in Attachment A will result in a significant portion of north coast growers not qualifying for coverage. The existing cultivators that are pursuing legal cultivation will be squeezed out after significant investment over the past two years.

3. Qualified Professionals
Qualified professionals are required in numerous instances and those should be carefully reviewed to determine if necessary considering the cost. By shifting from the Regional Order which facilitates "self-enrollment" without the need for qualified professional participation at most stages, the State Order in essence creates an incredibly complex and technical approach that requires costly consultants to perform.

Thank you for your thoughtful consideration of these and all public comments submitted regarding the Draft Order.

Sincerely,
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