



September 6, 2017

*Via email only*

State Water Resources Control Board  
Attn: Jeanine Townsend  
commentletters@waterboards.ca.gov

**Re: Comment Letter – Draft Cannabis Cultivation Policy and Staff Report**

Dear Ms. Townsend,

The Santa Clara Valley Audubon Society and the Citizens Committee to Complete the Refuge appreciate this opportunity comment on Draft Cannabis Cultivation Policy, Principles and Guidelines for Cannabis Cultivation (Draft Policy) and its requirements and also the analysis of the associated Staff Report.

Members of our organizations care deeply about our State's creeks, wetlands and riparian ecosystems as well as downstream protection of our wetlands, lakes and estuaries. Our members enjoy California's rich, native, biological resources – fish, birds, plants and all wildlife - that share our varied landscapes. We submit comments here to safeguard our watersheds and waterways and the biota they support from degradation by any inappropriate cannabis cultivation actions that might erode, cause sedimentation, pollute or significantly disrupt the biological integrity of riparian and wetland habitats or push species towards extinction.

We think of a recent enforcement action in the coastal range on the San Francisco Peninsula, where law enforcement, the California Department of Fish and Wildlife (CDFW), and others made arrests and destroyed a very large, hidden and illegal cannabis operation within an open space preserve. Such unregulated operations destroy local ecosystems. We are hopeful that the State sets standards, such as through this Policy, for legal cannabis cultivation operations that convey the highest level of protection of watersheds, waterways, water supplies and treasured natural resources.

Unfortunately, we are very concerned about aspects of the Draft Policy, and the Staff Report, as we will describe in comments that follow.

## General Comments of Concern

1. Clean Water Act (CWA) and California Department of Fish and Wildlife (CDFW) permits: Several times the Policy and the Guidelines state that there is a need for CWA 404/401 permits and CDFW permits for new fill. Unfortunately, the staff report discusses the 404<sup>f</sup> exemptions while not giving context clarifying the extent for which new fill associated with stream crossings at new or rehabilitated access roads may be eligible for those exemptions. Nor do the Draft Policy terms or the Staff Report state that actions at new creek crossings or for rehabilitation of existing crossings require permits under CWA 404/401 and CDFW Lake and Stream Alteration agreement (LSA). We are very concerned that this omission may be interpreted as a sweeping, wide-net exemption and may inadvertently be used to cover stream crossings by new or enhanced access roads in farms, ranches, forests and open space areas. Such overreaching, unintended exemptions can have ripple effects in wildlife impacts, e.g. violations of the Federal and State Endangered Species Acts. We ask for clear guidelines that state unequivocally that construction of new creek crossings and enhancements to existing creek crossings with fill must require permits under CWA Sections 404 and 401, and CDFW Lake and Streambed Alteration agreements.
2. Roads and Total Disturbed Area: In the Policy, Total Disturbed Acres are used to determine the appropriate tier for a cultivation operation. However Definition 11, Attachment A states that land disturbance includes “all activities whatsoever associated with developing or modifying land for cannabis cultivation related activities or access.” Does that include land disturbed during the construction of access roads and other infrastructure? Does it include land disturbed as incursion in a riparian corridor? It should and Definition 11 should say so.
3. Certification: To avoid confusion and misinterpretation, the term “Certification” should unambiguously and crisply mean “CWA Section 401 Water Quality Certification” and should be defined as such in the Acronyms and Abbreviations section. If some actions associated with the Cannabis Cultivation Policy require other types of certifications, the other certifications should be termed uniquely and specifically described.
4. Federal CWA Permits: In *Section 1 – General Requirements and Prohibitions, General Requirement 1* the Policy states that the State Water Board or Regional Water Board may allow impacts to waters of the U.S.<sup>2</sup>, even if a federal agency has not granted a permit for impacts to federal waters. We believe that Water Quality Control Board (State and/or regional) should not allow a Cannabis Cultivation project to impact any waters of the U.S unless the Army Corps of Engineers (ACE) permits it. Moreover, we believe that the Water Board does not have legal authority to allow an impact to a water of the U.S. in cases where ACE has not issued a permit for that impact. We are aware that federal law does not recognize legal cannabis cultivation. Nonetheless, we maintain that the State cannot provide

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<sup>1</sup> The text in the Staff Report does not specifically identify the exemptions as “404(f)” exemptions, but the listed exemptions seem to be the 404(f) exempt activities.

<sup>2</sup> The statement proclaims, “If the CWA permit cannot be obtained, the cannabis cultivator shall contact the appropriate Regional Water Board or State Water Board prior to commencing any cultivation activities”

approval to cannabis cultivation projects if that approval violates the Clean Water Act nor do we find it tolerable that a State policy suggests it is possible. The statements in the Draft Policy and Staff Report must be crystal clear on this issue.

5. California Environmental Quality Act (CEQA): The statement that “This Policy meets the requirements of Water Code section 13149(b)(1) and is categorically exempt from the provisions of the California Environmental Quality Act (CEQA) pursuant to California Code of Regulations, title 14, section 15308” (Page 6, Cannabis Cultivation Policy Overview) is of great concern to us. Given the potential for wide range environmental and waterway degradation, we simply cannot agree that the voters of the state intended to categorically exempt all cultivations and associated infrastructure from the California Environmental Quality Act. It seems to us that the footnote at the end of this sentence contradicts the categorical exemption: “California Code of Regulation section 15308. Actions by Regulatory Agencies for Protection of the Environment. Class 8 consists of actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption.” We believe that the Policy and Guidelines should be re-written to clearly state that any actions or projects with potential impacts to Waters of the State and/or federal or state endangered and threatened species will require CEQA review.
6. Protection of endangered and threatened species: The policy as presented (General Requirement 4) describes the applicant’s responsibility in regards to special status species plants and wildlife under state and federal law but lacks guidelines that present steps that would initiate consultation with NMFS, USFWS and CDFW. While it does make the cultivator responsible for “meeting all requirements under the California ESA and the federal ESA” it lacks a statement of the initiating actions and timing of consultation with the wildlife agencies that would be needed to fulfill the applicant’s permit requirements.

Usually, a CWA 404 permit application requires a Biological Opinion from the federal wildlife agencies. If there is no 404 process, the Policy should specify the alternative initiation process with the federal agencies, as appropriate, perhaps utilizing findings identified under CEQA impact analysis. But if new areas of cultivation, new roads and road crossings in riparian corridors and other sensitive biotic habitats are exempt from CWA Section 404 permits and from CEQA, other triggers or indicators and criteria must be developed.

This specific guidance is necessary as, without the trigger of a 404 permit or CEQA for a Section 7 consultation or possibly other verifiable documentation that special status species may be present on a site, the only other way to receive a federal Biological Opinion would be through a Habitat Conservation Plan (Section 10 of the federal Endangered Species Act). This type of consultation usually involves many stakeholders, is often very costly, and normally can take several years, far too burdensome for purposes of a single cannabis cultivation operation.

The Policy and Guidelines should be revised to clearly state how take of listed species will be prevented, and to identify triggers and process for initiation of all appropriate wildlife consultations. Just as the State cannot afford to allow impacts to Waters of the United States under this Policy, nor can it afford to allow take of listed species. Doing so is unthinkable.

7. Definition of High Risk Sites. (Policy Implementation and Compliance, Application Process and Fees, page 17): Sites that pose a higher threat to water quality are defined as sites that disturb a larger area, located on a steeper slope, or located close to a surface water body. The Policy on page 17 suggests that such sites “require a greater level of regulatory oversight, which translates to higher costs to achieve water quality protection. High risk sites (any portion of the disturbed area is located within the riparian setback requirements), with the exception of activities authorized by CDFW with a Lake or Streambed Alteration Agreement or under a Clean Water Act section 401/section 404 permit (e.g. watercourse crossing, installation of diversion works), will be assessed the high-risk fee until the activities comply with the riparian setback Requirements.” The Policy, including Table 1, p. 14 of the Staff Report, seems to exempt stream crossings and other potential activities from the activities that require a riparian setback. Roads, bridges and creek crossings have adverse impacts to streams and their riparian ecosystems – both short term impacts during construction and long term impacts of use (non-point pollution, shading, noise, disruption of wildlife corridors, to name a few). Therefore, we ask that all activities that include permanent or temporary intrusions into the riparian setback such as would require CWA 401 and 404 permits as well as CDFW Lake and Streambed Alteration agreements be defined as “High Risk”

8. Land Disturbance definition provides.

“...land areas where natural conditions have been modified in a way that may result in an increase in turbidity in water discharged from the site. Disturbed land includes areas where natural plant growth has been removed whether by physical, animal, or chemical means, or natural grade has been modified for any purpose. Land disturbance includes all activities whatsoever associated with developing or modifying land for cannabis cultivation related activities or access. Land disturbance activities include, but are not limited to, construction of roads, buildings, water storage areas; excavation, grading, and site clearing. Disturbed land includes cultivation areas, storage areas where soil or soil amendments (e.g., potting soil, compost, or biosolids) are located.” (Attachment A: Requirements for Cannabis Cultivation. Overview, Definitions, Definition 11).

As expressed above, we are concerned because this definition covers “all activities whatsoever” including access and construction of access roads, yet the Policy exempts roads that receive CWA Section 404/401 permits from being included in areas treated as disturbed land in riparian setbacks. We are opposed to this exclusion. Construction and enhancement of access roads should not be exempted by the Policy and Guidelines.

## Comments on Sections of the Draft Policy

### 9. Section 1 – General Requirements and Prohibitions

- General Requirement 1 provides, “If the CWA permit cannot be obtained, the cannabis cultivator shall contact the appropriate Regional Water Board or State Water Board prior to commencing any cultivation activities”. As stated in comment 3 above, we are extremely concerned with the implication that the State Water Board or a Regional Water Board may allow an impact to a water of the U.S., even if the Corps does not grant a permit for such impacts. The State should not provide cultivation projects with approval to violate the Clean Water Act.
- General Requirement 3 direct cultivators to consult with CDFW to determine if a Lake and Streambed Alteration Agreement (LSA Agreement) only for activities that may:
  - divert or obstruct the natural flow of any river, stream, or lake;
  - change or use any material from the bed, channel, or bank of any river, stream, or lake; or
  - deposit debris, waste, or other materials that could pass into any river stream or lake.

We believe a fourth bullet is needed to cover stream crossings that include new culverts and bents within the channel. This will help reduce impacts to wildlife linkages and to aquatic and riparian species.

- General Requirement 4 proposes to protect all listed species of plants and animals (State and Federal) and requires the cannabis cultivator to meet all requirements under the California ESA and the federal ESA. As discussed above, the language of this requirement does not provide triggers to show how consultation with NMFS or USFWS will be initiated for activities that do not require CWA Section 404/401 permits or even CEQA. The text should be revised to clearly describe the procedures that will be used to initiate consultations with NMFS and/or USFWS for all activities with the possibility to cause take of a federally listed species. Further, CEQA should be required for cultivation projects that have the potential to cause take of a state listed species.
- General Requirement 29 provides, “In timberland areas, unless authorized by CAL FIRE or the Regional Water Board Executive Director, Cannabis cultivators shall not remove trees within 150 feet of fish bearing water bodies or 100 feet of aquatic habitat for non-fish aquatic species (e.g., aquatic insects). (Public Resources Code section 4526.)”. It is not clear whether this requirement applies to access roads – we believe that it should and should be stated in the Policy as such.
- General Requirement 31 asks for self-certification of compliance. This is of great concern to us because it does not provide a way to verify that cultivators are correctly following the Guidelines. Many of the issues we brought up previously in this letter address ambiguities related to needed permits and triggers to initiation of consultation with government agencies. If construction projects are exempt from CEQA and CWA Section 404(f), it will be impossible to determine whether or not the cultivator performed work in stream channels without obtaining necessary CWA 404/401 permits or CDFW Lake and

Stream Alteration Agreements. If permit oversight through existing Water Board enforcement processes are not mentioned but are considered adequate, please describe how they will work with this Policy.

10. Cannabis General Water Quality Certification.

The language of Term No. 3 would be greatly improved by a list of activities in surface waters that will require water quality certification (for example, culverts at stream crossings, bents for bridges that are located within the stream channel, diversion structures). Furthermore, this term should clarify that activities requiring water quality certification also require CEQA review, and that new stream crossings would require a CDFW Lake and Streambed Alteration Agreement.

11. Section 2 – Requirements Related to Water Diversions and Waste Discharge for Cannabis Cultivation. Limitations on Earthmoving.

- Term 4 implies that CWA section 404 permit, CDFW LSA Agreement, or WDRs issued by the State Water Board or Regional Water Board are likely to authorize the operation of vehicles or equipment within a riparian setback. In fact, these permits usually prohibit “fuel, clean, maintain, repair, or store vehicles or equipment within the riparian setbacks or within waters of the state”. Term 4 should be modified to prohibit such activities, and to clarify instead that the construction of access roads (including over culverts and bridges) that will be used by a vehicles or equipment does require a CWA section 404 permit, a CDFW LSA Agreement, or WDRs issued by the State Water Board or Regional Water Board.
- Term 5 asks for road construction to be designed by a “qualified professional” and suggests that cultivators “shall conduct all road design, land development, and construction activities in compliance with the California Forest Practices Act and any state, county, city, or local requirements, as applicable”. State Water Board or Regional Water Board staff always review and comment on designs for creek crossings before they are constructed, and their review should be considered applicable. LSA is also applicable for creek crossings. This Term should be tightened to require review of designs of creek crossings by State Water Board or Regional Water Board staff. In addition, the proper design of a stable culvert that will not trigger erosion, headcuts or scour pools requires design by an experienced, professional fluvial geomorphologist. Please revise Term 15 to require that stream crossing and culvert designs must be prepared by experienced fluvial geomorphologists, and reviewed by State Water Board or Regional Water Board staff and By CDFW.

12. Section 2 – Requirements Related to Water Diversions and Waste Discharge for Cannabis Cultivation. Private Road/Land Development.

- Term 16 requires cultivators to obtain all required permits and approvals prior to the construction of any road constructed for cannabis cultivation activities. Permits may include section 404/401 CWA permits, Regional Water Board WDRs (when applicable), CDFW LSA Agreement, and county or local agency permits. Please add text to this term to clarify that roads constructed for cannabis cultivation activities are not covered by the CWA Section 404(f) exemption for road and forest roads.

- Term 17 directs cultivators to the Forest Practice Rules and the Road Handbook. Use of these rules for road construction is insufficient to ensure that a road crossing avoids and minimizes impacts to waters of the State to the maximum extent practicable. This is why State Water Board or Regional Water Board staff regularly reviews and comments on designs for creek crossings before they are constructed. As commented above (comment 11, Term 5), Please revise Term 17 to require review of designs of creek crossings by State Water Board or Regional Water Board staff, require that culvert designs be prepared by experienced fluvial geomorphologists, and direct cultivators to seek LSA from CDFW.

13. Section 2 – Requirements Related to Water Diversions and Waste Discharge for Cannabis Cultivation. Water Course Crossings.

Terms 54 and 57 provide design specifications for culverts and stream crossings. These specifications are incomplete. Proper design of culverts also requires that the culvert conform to the existing channel gradient and that the culvert minimize reductions in stream sinuosity. Again, the design of a stable culvert that will cause erosion or flooding, and will not trigger headcuts or scour pools requires design by an experienced fluvial geomorphologist. Please revise Terms 54 and 57 to require that culvert designs be prepared by experienced fluvial geomorphologists and that culvert designs be reviewed by State Board or Regional Water Board staff before they are constructed.

14. Section 2 – Requirements Related to Water Diversions and Waste Discharge for Cannabis Cultivation. Riparian and Wetland Protection and Management.

Term 65 states: “Cannabis cultivators shall maintain existing, naturally occurring, riparian vegetative cover (e.g., trees, shrubs, and grasses) in aquatic habitat areas *to the maximum extent possible* to maintain riparian areas for streambank stabilization, erosion control, stream shading and temperature control, sediment and chemical filtration, aquatic life support, wildlife support, and to minimize waste discharge.” (emphasis added) This language implies that it is potentially permissible to remove all trees, shrubs and grasses in riparian areas. It definitely does not provide adequate protection nor sufficiently constrain impacts to riparian vegetation and to endangered and threatened species. Please revise Term 65 to require the cultivator to detail what is “possible” and why, limit the percentage of on-site riparian vegetation that may be impacted for a cultivation project and require appropriate mitigation for impacts to riparian vegetation.

15. Draft Cannabis Cultivation Staff Report (July 7, 2017)

- Page 34 includes a discussion of Discharges of dredged or fill material to waters of the US which are regulated by the Army Corps under section 404 of the Clean Water Act and a water quality certification under section 401 of the Clean Water Act. Additionally, the text provides examples of exempt activities such as normal farming, ranching and silviculture activities; maintenance of currently serviceable structures such as dikes, dams, levees, bridge abutments or approaches, and transportation structures; construction

or maintenance of irrigation ditches, or maintenance of drainage ditches; and construction of farm roads or forest roads in compliance with applicable best management practices. Converting a wetland to a non-wetland or conversion from one wetland use to another is not exempt. Dischargers, including cannabis cultivators, proposing non-exempt discharges of dredged or fill material are required to obtain a section 404 permit from the Army Corps.

We ask for a tightening of the language to clarify that work associated with access roads for cannabis cultivation *is not covered* by the 404(f) exemptions from federal regulation, and is subject to CWA Section 404/401 permits.

- Page 34 also includes additional discussion of how Cannabis General Order provides exemptions from several Water Quality Orders (2004-0004-DWQ, 2003-0017-DWQ and any or any successor order). It states, “Cannabis cultivators that require a section 401 water quality certification may either seek coverage under the Cannabis General Water Quality Certification or apply to the State Water Board or applicable Regional Water Board for a site-specific water quality certification”. We are greatly concerned because the proposed Cannabis General Water Quality Certification appears to require less extensive review of project designs than is required for projects that obtain individual water quality certifications from the Regional Water Boards. Impacts to streams associated with new bridges or culverts for access roads can significantly destabilize creeks, resulting in erosion, headcutting, bank failures, and the creation of barriers to fish passage and wildlife movement. In order to protect the geomorphic integrity and habitat value of streams, all requests for Certification for new culverts or bridges should require review and approval by State Water Board or Regional Water Board staff, before the stream crossings are constructed.
- Page 35 appears to be an attempt to remedy the liberal exemption provided to Cannabis cultivators by stating, “The General Water Quality Certification contained in the Policy does not apply to activities that will: 1) result in significant unavoidable environmental impacts including permanent impacts to wetlands and other waters from dredge and fill activities, and/or violation of water quality standards; 2) result in the potential direct or indirect take of any listed species; or 3) expose people and/or structures to potential adverse effects from flooding, landslides or soil erosion”. In the absence of CEQA and CWA review, and with overreaching exemptions from CWA review by the State Water Board or Regional Water Board, how would a cultivator determine whether or not his project would impose significant unavoidable environmental impacts? The Guidelines should be revised to clearly prohibit coverage for activities that would be considered significant and unavoidable impacts, “result in the potential direct or indirect take of any listed species” and expose people to potential flooding, landslides or soil erosion.
- Page 37 again directs cultivators to engage “qualified Professionals and licensed earthwork and paving contractors” to design, locate, construct, and inspect roads to reduce the impacts of road construction and use. Again, please provide more specific direction to require that all new culverts and bridges over streams be designed by experienced fluvial geomorphologists. Engineers without a background in fluvial



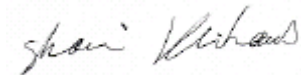
geomorphology are more likely to design crossings that result in destabilized stream channels.

In closing we ask that the Water Board use these comments to improve the Policy and to so ensure that environmental protections are sustained. We recognize that this Policy would be simpler to construct if Federal and State law were aligned as regards cannabis cultivation. But as the situation is otherwise and the Water Board must be in line with State law, a Cannabis Cultivation Policy needs to find the alternatives that will continue to protect California's watersheds, wetlands and wildlife and do not over-ride the Clean Water Act.

Sincerely,



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