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April 18, 2021

By Electronic Mail

Mendocino County Board of
Supervisors
bos@mendocinocounty.org

**RE: Commercial Cannabis Cultivation Ordinance (April 19, 2021 Board Meeting
Agenda Items 3(a) & 3(b))A**

Dear Mendocino County Board of Supervisors:

We are legal counsel to Willits Environmental Center (“WEC”), writing on their behalf to inform you of the enormous hidden costs of the proposed Commercial Cannabis Activity Land Use Development Ordinance (“CCAO”) currently scheduled for hearing on April 19, 2021. WEC is a member-supported, non-profit organization that has been protecting the natural landscapes and native species of Mendocino County and surrounding areas since 1990. WEC has grave concerns about the escalation in environmental impacts that the proposed ordinance will cause, especially in light of the implementation of the existing Cannabis Cultivation Ordinance codified in Chapters 10A.17 and 20.242 (“2017 Ordinance”).

In apparent short-sighted haste and to avoid investing in an appropriate environmental analysis at the front end, the County has elected to use an exemption from CEQA for CCAO which will create an impossible burden for small commercial applicants as well as overworked staff and under-resourced regulators and law enforcement. Worse, because provisions of the CCAO modify the 2017 Ordinance, and because the assumptions of scope of impact of the mitigated negative declaration (“MND”) for the 2017 Ordinance will now be hopelessly inaccurate, if the CCAO is adopted, either the County or Phase 1 applications must perform additional CEQA analysis on a project-by-project basis before approving even existing Phase 1 applications, a process that may well bring the County to its knees. The addition of tens of thousands of acres of cannabis cultivation in the Rangeland District is also inconsistent with the General Plan, and with the Board’s obligations to preserve resources held in trust for the people of the county.

In short, this is a classic case of pennywise, pound foolish.

I. Adoption of the CCAO will multiply the County's CEQA Burdens

A. Regulation of by-right, non-commercial cultivation cannot qualify for the Business & Professions Code CEQA exemption.

The CEQA exemption in Business & Professions Code, section 26055, subdivision (h), exclusively applies to regulations that both impose later a “discretionary” process and govern “commercial cannabis activity.” Section 13 of the CCAO and the Staff Report offer no other justification for foregoing CEQA. Yet, the CCAO also regulates indoor and outdoor cultivation of medical and adult-use cannabis, which are allowed by-right without any further permitting process and are not commercial activity. (County Code, § 22.18.030(B), (C).) Specifically, the CCAO revises this non-CEQA-exempt activity in at least the following ways:

- Reduces the required adult-use and medical cannabis cultivation setbacks. Neighboring occupied residential structures can now be 100 feet away instead of 200 feet and separately-owned parcels can be 50 feet instead of 100 feet. (Planning Commission Staff Report, p.3; proposed section 22.18.030(G)(2), (4).)
- Eliminates the existing requirement in County Code Section 10A.17.040(J), which is applicable to adult-use and medical cultivation, that “pesticides and concentrated fertilizers, amendments, and similar materials shall be stored in a locked, hard-faced enclosure to prevent unauthorized entry by humans, to exclude large animals that may be attracted by odors, and to ensure that they will not enter or be released into surface or ground waters” and that fuel must be stored to avoid spillage. (Planning Commission Staff Report, pp.2,4.)

Halving setbacks for indoor growing on smaller, residential lots in particular will make cultivation lawful in many areas where it is currently illegal. Numerous members of the public submitted written comments to the Board of Supervisors on January 25, 2021, that cultivation in residential areas would have significant negative consequences.

The scope of these provisions must be examined; staff apparently have done no analysis of how many more lots will satisfy the new conditions for cultivating up to 200 square feet of cannabis and where those lots are located. The County's 2016 Medical Marijuana Cultivation Regulation ordinance (“2016 Ordinance”) findings declared:

Marijuana that is grown indoors may require excessive use of electricity, which may overload standard electrical systems creating an unreasonable risk of fire. If indoor grow lighting systems are powered by diesel generators, improper maintenance of the generators and fuel lines and improper storage of diesel fuel and waste oil may create an unreasonable risk of fire.

(County Code, § 9.31.030(J).)

This finding was issued before legalization expanded the potential grower population manyfold. The Staff Report does not contain any evaluation of the significance of fire, electricity, greenhouse

gas emission, pesticide, water and odor-related impacts of increased adult-use and medical cannabis cultivation. Moreover, the Sheriff has declared a lack of enforcement resources and expects an increase in illegal cultivation under the guise of adult-use, the impacts of which must be considered as well.¹ These significant changes to current regulations are not exempt from CEQA under the Business & Professions Code and must be addressed in a new or updated CEQA analysis.

B. Phase 3 Applicants and County Staff will be burdened with very expensive, time-consuming, and unpredictable environmental impact analyses.

Proposed Chapter 22.18 offers the superficially tantalizing prospect of avoiding CEQA by invoking an exemption found in Business and Professions Code section 26055, subdivision (h). Upon deeper examination, this provision just kicks the can down the road—over-burdening County Staff and applicants.

The crux of the problem is that under the proposed CCAO, “*each site* will be reviewed individually for compliance with the California Environmental Quality Act (CEQA).” (Planning Commission Staff Report, p.2 (emphasis added).) At present, Phase I applicants and county staff are guided by the County-CDFA negotiated checklist to confirm CEQA compliance; a similar process can be arranged with CDFA for Phase 3 under existing Chapter 20.242 based on the MND. A glance at the existing detailed CEQA checklist required by CDFA demonstrates that this would *monumentally* expand the level of individual, project-level analysis required of each applicant, and the review of that analysis by Staff. (See 14 Cal. Code Regs., Appendix G, attached as **Exhibit A**.) Under state law all potentially significant environmental impacts of commercial cannabis projects must either be mitigated or considered in detail through an EIR. (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928.) With no ordinance-level EIR to tier to, this obligation will have to be fulfilled for *each and every individual project*.

So, by way of example, frustration is frequently cited with the current ordinance’s requirement for potential consultation with the California Department of Fish and Wildlife and site-specific analysis of sensitive habitats or species, which some applicants complain is unpredictable and burdensome. (See County Code, § 10A.17.100(A)(2).) The CCAO would not fix this. To the contrary, this type of more demanding and less predictable site-specific environmental review would now be required across multiple issues: greenhouse gas emissions, energy use, water use, pesticides, odor, light, noise, and the list goes on. This is both because discretionary review is inherently unpredictable and CEQA regulations require that the County, as lead agency, consult with several responsible or trustee agencies for *each* individual negative declaration or EIR. (14 Cal. Code Regs., § 21080.3.) While the County’s consultation requirement can be satisfied by not receiving any response from responsible or trustee agencies within 30 days, this will not

¹ At the January 25, 2021, Board of Supervisors’ meeting, Sheriff Kendall explained that he estimates there are over one million plants in Covelo alone and there is only one, often-diverted, officer assigned there. The Sheriff declared that deputies do not intervene to stop unlawful residential cultivation unless there are additional aggravating factors, such gang involvement. Therefore, he said, “It’s kind of a moot point to even discuss that when we don’t even have the personnel to deal with it.” (https://mendocino.granicus.com/MediaPlayer.php?view_id=2&clip_id=226 (37:00).)

satisfy the County's own obligation to determine and evaluate the potential impacts of each individual permit. (Id., § 21080.1.)

The County has not apparently consulted with CDFA about the functionality of implementing the CCAO. CDFA guidance states: "The best way for local CEQA Lead Agencies to ensure that an environmental document being prepared for a project will meet CDFA's needs when it acts as a Responsible Agency, is to provide CDFA with *several opportunities* to consult with the Lead Agency." (CDFA, *CEQA Practice Recommendations from CDFA for Cannabis Licensing – General Recommendations*, p. 3 (May 13, 2019) ("CDFA Memo") (emphasis added), attached as **Exhibit B**.) We have reviewed communications between the County and CDFA and cannot find any communication providing the draft CCAO to CDFA for review or any written communication discussing any aspect of the change from a ministerial to discretionary review process. In fact, the only inquiry germane to the ordinance appeared to be a single question of the legality of using hauled water for cultivation.²

Instead of the County regulating Phase 3 under the existing ordinance for which the MND already considered its impacts, or preparing a *single* CEQA document evaluating direct and cumulative impacts of all new cannabis cultivation beyond the level anticipated by the MND to which individual projects could tier with minimal additional or unique analysis, under the CCAO *each and every* Phase 3 application will generate a new CEQA review. (CDFA Memo, p.5.) And *each of those* will need multiple consultations with the CDFA to ensure compliance with state law. No time or effort is ultimately saved, and the County has insufficient staff to properly process hundreds or thousands of EIRs or negative declarations, which means gridlock is ensured.

A related issue is the non-existence of established thresholds of significance. Under CDFA guidance, technical studies and expert opinions will be required to establish that a project does not have a significant impact. (CDFA Memo, p.4.) Each permit will need specific, non-uniform, site-specific mitigation because no thresholds of significance have been established for the CCAO generally. These thresholds will need to incorporate and anticipate not just direct impacts but indirect and cumulative impacts as well, including from future cultivation allowed by the CCAO, as well as the operation of farm tours, processing, and other activities that are now

² The CalCannabis Cultivation Licensing Division Director cautioned that "when a county or the state is analyzing a cultivation project for impacts prior to approving an annual license, the issues you describe [e.g., the impacts on roads, greenhouse gas emissions, and water for everyday needs] must be accounted for. If the proposed project uses a water hauler and impacts to roads, water sources, and GHG emissions are identified, a mitigation or condition could be implemented." (E-mail communication from Richard Parrott to John Haschak, March 3, 2021, attached as **Exhibit C**.) Without an environmental analysis of the ordinance to tier to, this analysis will have to be comprehensive project-by-project.

proposed to be allowed, in some instances apparently on a ministerial basis as tack-ons to cultivation licenses under the proposed cannabis facilities ordinance.³

To be valid, mitigation must be realistically enforceable. (Pub. Rec. Code, § 21081.6, subd. (b); *Fed'n of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal. App. 4th 1252, 1262 (requiring that mitigation measures actually be funded and implemented).) The County has an abysmal enforcement history when it comes to cannabis cultivation.⁴ It will be difficult to show that project-specific mitigation is enforceable and funded in this context, especially given the variability the broadly discretionary program will inject into not only the CCAO, but also applicants not yet fully processed under the 2017 Ordinance. (See discussion below.) Every site will have unique obligations.

The demanding, yet transparent detail of the 2017 Ordinance tracks the MND. There is no such road map for applicants, planning staff, or enforcement officers under the CCAO process, even for very small projects. In the event that the Planning Department does produce “a guidance document” (proposed section 22.18.060), it will have to end up looking very similar to the details of the current ordinance. The presence of a “guidance document” which is not itself subjected to CEQA review, will not insulate the County from a CEQA challenge for each individual permit issued.

In addition to time, the proposed ordinance will expand the collective *cost* of permitting by orders of magnitude. The money that Supervisors worried the County would have to spend on a program-level CEQA analysis will now be borne by applicants hiring biologists, hydrologists, engineers, and CEQA consultants. And the County will *still* spend millions of dollars reviewing and conferring over the applications this effort produces. It is the County that has the duty to comply with CEQA and can be sued over each project determination.

And if error is made, applicants will also face the additional cost of indemnifying the County for defending complex CEQA suits, including potentially the fees and costs incurred by the challenging party should they prevail.⁵ (County Code, § 10A.17.100(B).) This alone may be enough to dissuade the small growers whom the County has previously tried to protect, or cause them financial ruin. The CCAO opens up rural Mendocino County to massive corporate growers

³ Activities allowed by the proposed facilities ordinance (Agenda Item 3(a)), whether discretionary or ministerial, will cause impacts to the environment and must be considered through the lens of a general plan amendment to the extent they will allow uses that would not have been permitted as of right or conditionally in the locations where they would not be possible if one or both of the ordinances under consideration are adopted.

Further, staff propose reliance on the General Rule CEQA exemption. (14 Cal.Code Regs., § 15061, subd. (b)(3).) This is wildly inappropriate. Under this exemption, a lead agency may find a project exempt from CEQA only if “it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.” (14 Cal Code Regs §15061(b)(3).) This determination must be supported by record evidence. (*Muzzy Ranch Co. v Solano County Airport Land Use Comm'n* (2007) 41 C4th 372.) The record contains no such evidence. Anyway, the exemption is not appropriate for adoption of a land use ordinance, which by definition anticipates future development. (*Rominger v County of Colusa* (2014) 229 CA4th 690, overruled in part on other grounds by *Union of Med. Marijuana Patients, Inc. v City of San Diego* (2019) 7 C5th 117.)

⁴ See above, note 1.

⁵ If the applicant is financially unable to indemnify the County, then the County will have to foot the bill.

whose deep pockets and anticipated return on multi-acre farms make the financial gamble imposed by the proposed discretionary ordinance worthwhile. Smaller growers do not have these resources and many will be forced to choose among terrible options: risk the discretionary process, quit, or remain on the black market. (See Bodwitch, et al, *Barriers to Compliance in Cannabis Agriculture*, (Dec. 2020), attached as **Exhibit D.**)

At the end of the day, the fundamental problem with the current ordinance is not actually the ordinance, but the lack of staff resources to competently process applications and take enforcement action. The CCAO does not solve this problem. Instead, it places *greater* burdens on staff.

C. Phase 1 applicants will now also need to do site-specific CEQA.

The CCAO misleadingly claims to allow existing Phase 1 applicants to complete processing of their non-discretionary permits under existing Chapter 10A.17 (CCAO, § 2.) In actuality, the CCAO will force each remaining Phase 1 applicant to complete an individualized CEQA review to justify the sufficiency of mitigations in light of the new impacts authorized by the CCAO.

The determination in the 2017 MND that certain activities were below the level of “significance” was based on the 2017 Ordinance’s cap on water use, wildlife disruption, soil and water pollution, traffic, light pollution, greenhouse gas emissions, and the extent of site disturbance, and other limitations on cumulative impacts from current and future operations. The CCAO blows the ceiling off these limits, greatly expanding the impact of cannabis cultivation in the County and rendering the MND largely meaningless.

Under the existing ordinance, other than nursery production, cultivation area maximum is capped at 10,000 square feet per parcel. (County Code, § 20.242.060.) New commercial cannabis cultivation is banned in the Rangeland (RL) District, which constitutes roughly one-third of the County at over 700,000 acres. (Id.) The CCAO will open the RL District to new cultivation and, by means of a single footnote in Appendix A, increases allowable cultivated area to up to 10% of parcels over 10 acres in the Agricultural (AG), RL, and Upland Residential (UR) Districts. A simple example highlights the enormity of this change. The *minimum* parcel size in the RL District is 160 acres (County Code, § 20.060.030), allowing an unprecedented 16 acres of cannabis cultivation, or *697 times* as much cultivated area on this minimum lot as would be permitted by the 2017 Ordinance. The CCAO also allows Phase 3 cultivation with trucked water without specific watershed analysis, depleting watersheds already in use for Phase 1 cultivation. (CCAO, § 5.)

Area Subject to New 10% Allowance under the CCAO

<i>Zone</i>	<i>Approx. County Total</i>
Rangeland	738,500 ac.
Agriculture	60,000 ac.
Upland Residential	109,000 ac.

As recognized in the MND and numerous studies, widespread, commercial cannabis cultivation without careful regulation results in massive environmental impacts ranging from traffic to solid waste to harm to wildlife. (WEC will also submit comments from the Center for Biological Diversity and others to the Bureau of Cannabis Control in 2017 discussing in greater detail the impacts of cultivation and the impacts of its legalization; the 2017 Center for Biological Diversity comments are incorporated herein by reference.)

As noted in the findings to the 2017 Ordinance:

The State Water Resources Control Board, the North Coast Regional Water Quality Control Board, and the State Department of Fish and Wildlife have documented a dramatic increase in the number of marijuana cultivation sites, corresponding increases in impacts to water supply and water quality, including the discharge of sediments, pesticides, fertilizers, petroleum hydrocarbons, trash and human waste. These impacts result from the widespread unpermitted, unmitigated, and unregulated impacts of land grading, road development, vegetation removal, timber clearance, erosion of disturbed surfaces and stream banks, stream diversion for irrigation, temporary human occupancy without proper sanitary or waste disposal facilities and threaten the survival of endangered fish species. In addition, the actions of some marijuana growers, either directly or through irresponsible practices, result in the killing of wildlife, including the endangered Pacific Fisher. (County Code, § 9.31.030(Q).)

Moreover, larger operations of the scale to be allowed under the CCAO in the AG, RL and UR Districts, generate qualitatively more intensive impacts than small-scale cultivation. They have fundamentally different infrastructure demands and are more likely to result in increased vehicle traffic, road grading, heavy machinery use, and construction of laborer housing, warehouses and workspaces for on-site processing. Moreover, these impacts will occur in the more rural, ecologically sensitive oak woodlands, grasslands and chaparral of the RL District where presently there are few roads or other infrastructure. Added activity in the RL District also pose new and unstudied fire risk, potentially taxing County resources beyond their capacity. (See Attorney General letters, attached as **Exhibit E**, discussing the need to consider the ecological impacts of development at the end of narrow, rural, remote roads difficult to access in the case of wildfire.)

Clearly, the CCAO constitutes a “substantial change” to cannabis cultivation impacts in the County, and the “involvement of new significant, environmental effects or a substantial increase in the severity of previously identified significant effects.” (14 Cal. Code Regs., § 15162.) As a result, the CCAO will invalidate the 2017 CEQA review by substantially changing the context within which the 2017 Ordinance’s impacts were considered and undermining every aspect of the impacts analysis. As a result, the County must revisit its analysis of the impacts of the 2017

Ordinance and supplement the MND, prepare an EIR, or require each applicant still in the Phase 1 process to do site-specific CEQA to remedy the gaping insufficiencies that the CCAO will cause in the prior analysis. (See CDFA Memo, p.6.)

II. The CCAO is inconsistent with the County's General Plan

General Plans are statements of development policies. (Gov. Code, § 65302.) They consist of objectives, principles, standards, and plan proposals. (Id.) Projects have to be consistent with the General Plan. (Gov. Code, § 66473.5.) Mendocino County's General Plan requires, among other things:

- That stream corridors and riparian habitat be protected (Policy RM-1);
- That the County have a Riparian System Management plan to facilitate protection and enhancement of aquatic habitat (Action Item RM-4.1.);
- The County must affirmatively protect water Resources (Policy RM-11);
- The County must affirmatively plan for management of water resources (Policy RM-12);
- Existing users of water are given priority over new uses (Policy RM-14);
- Development cannot be allowed absent proof of capability of the available water supply (Policy RM17);
- The county must avoid fragmentation of its natural landscape (Policy RM-24; 25, 30);
- Land and natural resources must be used in a “environmentally sound and sustainable manner” (Policy RM-26);
- Wildlife corridors must be identified and maintained (Action Item RM-27.1); and
- Adoption of an ordinance, as a “discretionary public project” requires specific actions be taken to protect species (Policy RM-28).

A. Cannabis cultivation Should not be Allowed in Range Land.

Lands zoned RL in the County are not well-suited to cannabis cultivation. These areas are dry, streams are already taxed and the land particularly vulnerable to wildfire. (See materials presented by the Department of Fish and Wildlife Services to the Board of Supervisors on April 12, 2021, which are already in the record; see also **Exhibit F**, Bauer S, Olson J, Cockrill A, van Hattem M, Miller L, et al. (2015) Impacts of Surface Water Diversions for Marijuana Cultivation on Aquatic Habitat in Four Northwestern California Watersheds. PLoS ONE 10(3): e0120016. doi:10.1371/journal.pone.0120016; **Exhibit G**, North Coast Regional Water Quality Control Board Investigative Order No. R1-2019-0023 (Revised) (Dec. 12, 2020)(“ The North Coast Region is inundated with cannabis cultivation in headwaters and main river systems, with active,

developed sites in steep and rugged terrain. Cultivation and related activities throughout the North Coast Region have resulted in significant waste discharges and losses of instream flows associated with improper development of rural landscapes on privately-owned parcels, and the diversion of springs and streams, to the cumulative detriment of the Regional Water Board's designated beneficial uses of water").) The creation of RL District is intended to protect natural and water resources from "fire, pollution, erosion, and other detrimental effects." (County Code, § 20.060.005.) Mendocino General Plan, Policy DE-17, Intent, 3-76, provides that the RL District is to "protect these lands from the pressures of development" and preserve them for "uses determined to be related to and compatible with ranching, conservation, processing and development of natural resources . . ." Massive cannabis cultivation (potentially cultivating over 73,000 acres, not including related infrastructure) is incompatible with the General Plan designation.

Bringing intensive agricultural, construction, and processing workers to the sparsely-populated RL areas dramatically magnifies fire risk. Human activity, such equipment, vehicles, campfires and cigarettes, are the overwhelming cause of wildfires in California. (See **Exhibit H**, W. Cornwall, *Overwhelming Cause of California Wildfires: Humans*, National Geographic (May 17, 2014).) Moreover, the proposed facilities ordinance will allow sites to provide farm tours to consumers of cannabis (see, proposed Code, § 20.243.040(D)(7)), a product that is routinely lit on fire with matches and smoked.

Moreover, these remote, rural areas are especially challenging to monitor and protect. While other types of farming are generally in decline, the greenrush is in full swing. One study estimates that each cannabis plant requires 900 gallons of water per year, nearly twice the water use of grapes. (Bauer, et al., Exhibit F.) The massive black market, continuing federal legal obstacles, extensive illegal cannabis cultivation, boom-bust risk from the sudden explosion of the legal cannabis market, entrepreneurial culture of new entrants to the industry, and minimal enforcement raises the distinct risk that cannabis cultivations will give rise to unpermitted activities with more prevalence than would occur in other agricultural settings.⁶ The County has not been able to successfully regulate cannabis cultivation in other zones yet, so it is inappropriate to stretch thin resources further by opening three quarters of a million additional acres to cultivation.

B. The General Plan Must Be Updated

Cannabis does not fall within the definition of "agriculture" under state law and would not have been included within the County's use of the term when the General Plan was last updated in 2009. In fact, the General Plan does not discuss cannabis cultivation at all. It instead puts wine grapes, with a value of \$75,348,300, at the top of a list of "Mendocino County Leading Farm Commodities, 2007." (General Plan, Table 4.2-1.) Based on CDFR tax data, approximately \$1.3 billion of legal cannabis was sold at the wholesale level in California in 2019. (D. Sumner, et al., *Cannabis in California*, p. 291 (2020), attached as **Exhibit I**.) The North Coast Region of

⁶ Illegal, incremental impacts that add to that deteriorating scenario must be considered as potentially cumulative significant impacts. (See e.g., *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal. App. 4th 1019, 1026; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 718.)

California⁷ accounts for over one-third (~\$430 million) of the state's total production, with Mendocino County the largest or second largest contributor. (Id., p. 284.) A quick look at these figures demonstrates that legal cannabis is the County's most valuable crop.⁸ Before establishing a program across the County allowing large scale cultivation for the first time, with numerous substantial attendant impacts discussed herein, the General Plan must be updated.⁹

III. Adoption of the CCAO Raises Numerous Issues of Compliance with State Resource Laws for which There is No Exemption.

A. Laws Protecting Plants and Animals.

The County risks violation of the Endangered Species Act by issuing permits that cause injury to species by or authorizing activities that result in harm, including habitat loss. (16 U.S.C. § 1538(a)(1); *Babbitt v Sweet Home Chapter* (1995) 515 US 687; *Strahan v Coxe* (1st Cir 1997) 127 F.3d 155.) Cultivation threatens "take" of endangered species, including fishers, marbled murrelets, northern spotted owls, and salmonid species, through habitat fragmentation, light and sound pollution, and pesticide use. (See **Exhibit K**, Rich, et. al, *Anthropogenic Noise: Potential Influences on Wildlife and Applications to Cannabis Cultivation*, Cal. Fish & Wildlife, Cannabis Special Issue 108-119 (2020); see also April 12, 2021 presentations of CDFW (already in record); Exhibit F, Exhibit G.) For instance, in addition to the impacts discussed elsewhere in these comments, numerous species are placed at risk by the particular use of anticoagulant pesticides in cannabis cultivation. (See **Exhibits L-1, L-2, L-3, L-4** comments submitted by Center For Biological Diversity and attachments; see also **Exhibit M**, Gabriel, et. al, *Anticoagulant Rodenticides on our Public and Community Lands: Spatial Distribution of Exposure and Poisoning of a Rare Forest Carnivore* (2012).)

B. California Laws Protecting Water Resources

The California Constitution "requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented." (Cal. Const., Art. X, § 2.) Water diversion, sedimentation, and pesticide, fertilizer and chemical pollution already threaten the County's waterways. (See Exhibit G.) New burdens imposed by industrial-scale cultivation in the drier regions of the County is unreasonable. Moreover, both the Eel and the Russian Rivers are already designated as "impaired" pursuant to Section 303 of the Clean Water Act due to excess sedimentation and temperature increase that threaten salmon and steelhead populations, as well as other species.

The Eel River is also designated as a Wild and Scenic River under federal and state law. (Pub. Rec. Code, § 5093.54, subdiv. (d), (f).) The Eel River must be "preserved in [its] free-flowing

⁷ Comprised of Del Norte, Humboldt, Lake, Marin, Mendocino, Napa and Sonoma.

⁸ Researchers estimate that the legal cannabis market only accounts for roughly one third of total production. (Sumner, et. al, p. 285.)

⁹ Sonoma County is presently in the process of updating its general plan, in part because it did not include cannabis within its definition of agriculture. (See, Draft Proposed Amendments to the Agricultural Resources Element of the Sonoma County General Plan, ORD20-0005 (March 18, 2021), attached as **Exhibit J**.)

state, together with [its] immediate environments, for the benefit and enjoyment of the people of the state.” (Id., § 5093.50.) It is illegal to divert water from the Eel River for cultivation purposes, except for local domestic supply, and with a finding of no adverse impact on the free-flowing condition and natural character of the river and segment. (Id., § 5093.55.) Expanding cultivation in the area of the Eel River without robust protections and enforcement will result in illegal diversion of the River.

The County must also consider its obligations under the common law public trust doctrine. Per the Public Trust Doctrine, California owns all “‘navigable’ waterways and the lands lying beneath them ‘as trustee of a public trust for the benefit of the people.’” (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 434.)¹⁰ As the state is the trustee of the water and land in question, state agencies, as actors of the state, serve as functional trustees. “Although the state as sovereign is primarily responsible for administration of the trust, the county, as a subdivision of the state, shares responsibility for administering the public trust and ‘may not approve of destructive activities without giving due regard to the preservation of those resources.’” (*Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1370, fn. 19.) This duty to protect the public trust extends to both surface waters and groundwaters that may impact surface water flow. (*Envtl. Law Found. v. State Water Res. Control Bd.* (2018) 26 Cal. App. 5th 844, 869.)

It has already been established by the CDFW that cannabis cultivation activities have had detrimental effects on the Eel River, including diversions and minimized stream flow. Moreover, they have resulted in the current impairment of four watersheds.¹¹ (CDFW Fisheries Presentation to Mendocino County, BOS Packet 4/12/21, slides 16, 20.) In relationship to public trust land, the Supreme Court has stated courts should “look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that [public trust] resource to more restricted uses *or* to subject public uses to the self-interest of private parties.” *Zack's, Inc. v. City of Sausalito* (2008) 165 Cal. App. 4th 1163, 1176.)¹² The County cannot promote cannabis cultivation to the peril of the public trust, including reallocating water that should be used for public enjoyment.

IV. Conclusion

WEC recognizes that cannabis cultivation plays an important role in Mendocino County and the County government faces difficult resource, regulatory, and policy challenges. However, the County must meet its environmental obligations by evaluating the cumulative environmental impact of its chosen course of action and implement realistic mitigations to prevent environmental harm. To this end, in addition to this letter, we are also submitting into the public record the Center for Biological Diversity’s July 31, 2017, comments on the CDFW’s CalCannabis Cultivator Licensing Program EIR, which extensively documents the environmental impacts of cannabis cultivation. (see Exhibits L-1, L-2, L-3, L-4.) WEC invites the Board to

¹⁰ See also *Colberg, Inc. v. State of California ex rel. Dept. Pub. Wks.* (1967) 67 Cal.2d 408, 416.

¹¹ *The South Fork Eel, Russian, Navarro, and Garcia.*

¹² See also *Illinois Central Railroad v. Illinois*, 146 U.S. 387 1892.

work with WEC and its attorneys to protect the County's natural resources, develop a workable permit regime and comply with CEQA.

Please contact me if you have any questions or concerns or desire further discussion of this matter.

Sincerely,

A handwritten signature in black ink that reads "Rachel S. Doughty". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Rachel Doughty

CC: Julia Krog, Assistant Planning Director (ackej@mendocinocounty.org)

Matthew Kiedrowski, County Counsel, (kiedrowskim@co.mendocino.ca.us)

APPENDIX OF EXHIBITS

Exhibit	Description
Exhibit A	Appendix G to 14 California Code of Regulations (Environmental Checklist Form)
Exhibit B	CDFA Memorandum: CEQA Practice Recommendations from CDFA for Cannabis Licensing –General Recommendations (May 13, 2019)
Exhibit C	Email correspondence between CDFA and Planning Staff (3/2021)
Exhibit D	Bodwitch, et al, <i>Barriers to Compliance in Cannabis Agriculture</i> (Dec. 2020)
Exhibit E	Letters from California Attorney General's Office regarding the need to evaluate wildfire risk of development in rural areas
Exhibit F	Bauer S, Olson J, Cockrill A, van Hatten M, Miller L, et al. (2015) Impacts of Surface Water Diversions for Marijuana Cultivation on Aquatic Habitat in Four Northwestern California Watersheds. PLoS ONE 10(3): e0120016. doi:10.1371/journal.pone.0120016
Exhibit G	North Coast Regional Water Quality Control Board Investigative Order No. R1-2019-0023 (Revised) (Dec. 12, 2020)
Exhibit H	W. Cornwall, <i>Overwhelming Cause of California Wildfires: Humans</i> , National Geographic (May 17, 2014)
Exhibit I	Sumner et al., Cannabis in California (2020)
Exhibit J	Excerpts, Draft Proposed Amendments to Agricultural Resources Element of the Sonoma County General Plan
Exhibit K	Rich, et. al, <i>Anthropogenic Noise: Potential Influences on Wildlife and Applications to Cannabis Cultivation</i> , Cal. Fish & Wildlife, Cannabis Special Issue 108-119 (2020)
Exhibit L	CBD Comments to CDFA (July 31, 2017)
Exhibit M	Gabriel, et. al, <i>Anticoagulant Rodenticides on our Public and Community Lands: Spatial Distribution of Exposure and Poisoning of a Rare Forest Carnivore</i> (2012)