FRIENDS OF THE EEL RIVER

Working for the recovery of our Wild & Scenic River, its fisheries and communities.

Wednesday, November 4, 2015

Humboldt County Planning & Building Department
Attn: Steve Lazar, Senior Planner
3015 H Street
Eureka, CA 95501-4484
slazar@co.humboldt.ca.us

RE: Medical Marijuana Land Use Ordinance – Phase IV

Dear Mr. Lazar,

The following comments are offered on behalf of the board, staff, and supporters of Friends of the Eel River. FOER advocates for the protection and restoration of our Wild and Scenic Eel River, with a focus on the fisheries that are the keystone of ecosystem health in our watershed. FOER has been working for years to identify effective solutions to the environmental impacts resulting from the ongoing explosion in commercial marijuana cultivation, nominally for medicinal purposes, in the Eel River watershed.

Over the last several years, the South Fork Eel River, focus of decades of restoration work undertaken at significant public expense, has suffered the loss of several year-classes of coho salmon in tributaries critical to the hope of population recovery as diversions to marijuana gardens continued despite severe drought.[1] Not only does each fish killed by dewatered streams amount to a 'take' under the Endangered Species Act, these losses threaten to so severely undermine the viability of coho in the region as to constitute 'jeopardy' – the highest level of threat under the ESA.

The central causes of the harms to our streams and fisheries come down to people taking too much water out of creeks, and allowing too much dirt, and even poisons, to go into the water. However, the range of operations and practices generating these harms are wide and diverse.

Many small-scale growers operate in a generally reasonable way. Most are likely to be operating in violation of state water law, and to be causing unecessary environmental

[1] See, e.g., *State Water Board Comments on Sproul Creek Inspection* at http://www.willitsnews.com/article/NR/20150220/NEWS/150229984

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harms. But by storing their water and forbearing from dry-season pumping, fixing relatively inconsequential grading, drainage, and road maintenance issues, and following the suite of best management practices outlined in the North Coast Regional Water Quality Control Board's (Regional Board) waiver, most can reasonably be expected to effectively minimize their watershed impacts. The County should permit such operations, but must effectively regulate them.

Other growers operate at similar scales, but use artificial lights to grow inside houses and other strutures. "Indoor" grows require very large amounts of electric power, incurring substantial, wholly unecessary carbon footprints where fossil fuels are used to produce electricity. Because indoor grows create excellent conditions for plant pests, they are often associated with the use of pesticides and fungicides that have been detected at alarming levels in marijuana products. The county should not permit indoor or 'mixed light' grows, with the sole exception of nursery operations. Moreover, allowing indoor operations on TPZ and agricultural zoned parcels, as the County's current draft provides, is wholly irresponsible under a mitigated negative declaration as the impact of further conversion of resource lands to other uses – and, specifically, the net loss of prime agricultural land – has not been addressed. Nursery operations should be closely regulated, restricted to industrial sites serviced by the electrical grid, and required to fully offset their carbon footprints.

Other operations, generally at larger scales, often involve substantial amounts of unpermitted grading on steep, unsuitable sites; poorly designed road construction and maintenance; inadequate stream crossings; and ponds that have not been properly engineered or appropriately sited. Many such operations need to be removed and remediated to effectively protect public trust values, particularly including clean water.

The county must provide clear means to distinguish the minority of such operations which may be permitted under an effective system of regulation from the majority which should never have been established. Given the county's long history of feckless land-use regulation, it is particularly important that the county establish straightforward enforcement mechanisms, including the use of common-law nuisance, that can and will be used to shut down thousands of large, damaging operations which cannot be, should not be, or simply are not properly permitted.

At the furthest extreme, but sometimes established in conjunction with the more abusive large-scale operations on private parcels, are very large plantations grown without landowners' permission, and generally described as "trespass" grows. Trespass grows present the most severe problems associated with pesticides and fertilizers, including the widespread use of rat poisons now rippling through regional ecosystems, causing alarming increases in the mortality of already-threatened predator species like the Pacific fisher and northern spotted owl.[2] The county may not permit such operations, of course, but it should actively discourage trespass grows where it can do so.

[2] See, e.g. Gabriel et al, *Patterns of Natural and Human-caused Mortality Factors of a Rare Forest Carnivore, the Fisher (Pekania pennanti) in California*, PloS ONE, 11/04/15; *Scientists say illegal pot farming operations are poisoning threatened weasels* at https://www.washingtonpost.com/news/energy-environment/wp/2015/11/04/scientists-charge-that-illegal-marijuana-farms-are-poisoning-threatened-weasels/

County regulations must ensure permitted grows at larger scale don't generate significant environmental impacts. If significant impacts can't be prevented with a reasonable level of certainty, CEQA requires that the county prepare an Environmental Impact Report (EIR), and consider mitigations capable of reducing impacts to a less than significant level.

However, while controls must be implemented at the level of the individual operation, it is not sufficient merely to insure that no single operation has significant impacts. To insure the cumulative impacts of all permitted operations do not rise to the level of significant impacts, the county must consider how the impacts of similarly situated permitted operations will affect the environmental values at risk, at the scales appropriate to the resources at risk (e.g. at the subwatershed level for imperiled fish runs), given the number and scale of operations contemplated for permitting, and given proposed restrictions to the extent they are certain of enforcement.

All of these different kinds of growers are selling primarily to the black market, and the black market remains the critical driver of land and water abuse by the commercial marijuana industry. While Humboldt County cannot by itself do away with the black market, it can and should build regulations that recognize the threat that continued black market operations pose to its environment, public health, and safety. A regulatory scheme that would allow most current large-scale grows to continue under a pretense of permitting will only fail to protect public health, safety, and the environment less catastrophically than today's entire absence of regulation.

It is hard to overstate the challenge Humboldt County faces in moving from laissez-faire governance and an anything-goes culture to responsible management and accountable stewardship. Decades of inconsistent enforcement and generations of spirited outlawry mean neither the county nor its citizens have much experience of effective land-use regulation. The Green Rush has attracted thousands of people to the North Coast whose primary interest appears to be making a great deal of money as quickly as possible. Substantial numbers of Green Rush growers appear to be entirely indifferent to the whole question of legalization and regulation, except as it may affect their ability to sell their product. But the moment is upon us.

Overall Comments

Against this daunting backdrop, the county's initial draft ordinance measures up surprisingly well. The contrasts with the half draft put forward by California Cannabis Voice – Humboldt are notable, and entirely for the better. Where CCV-H proposed to allow mega-grows as a matter of right, the draft ordinance declares that marijuana cultivation without a permit is a public nuisance – an important recognition, and a critical assertion of the county's powers and responsibilities under the ancient doctrine of nuisance. Where CCVH seeks to secure the economic interests of the big growers who fund them, the county is offering a tiered system of conditional permits that would allow reasonable current growers to keep growing reasonably and some large-scale operators to open up in legally and environmentally appropriate locations.

As well, the county's draft would bar the establishment of future grows on TPZ land; concedes at the very least the necessity of following CEQA and preventing significant environmental impacts; requires, at least in theory, forbearance from dry-season pumping for growers dependent on surface water diversions; and asserts the county's power to reduce the size of permits if necessary to protect watersheds. These are all important shifts that will help to establish an effective regulatory program capable of protecting Humboldt county's magnificent natural resources.

However, critical gaps in the draft ordinance still must be tightened up if the final package is to protect public trust values, public health and safety, and indeed the Humboldt 'brand' on which so many are so eager to capitalize. The most critical of these gaps are the loophole allowing water trucking; the failure to ban the use of pesticides; and the weakness of enforcement mechanisms. Similarly, the demand by CCV-H that operations of up to 10,000 ft2 be granted ministerial permits would substantially diminish the effectiveness of the proposed ordinance in limiting environmental impacts.

Legal Sufficiency of Mitigated Negative Declaration

As noted above, the environmental problems the county confronts in regulating its commercial marijuana industry are complex, widespread, and have been increasing rapidly over the last decade, particularly in the last five years. There can be no question that substantial evidence exists of the significant environmental harms which have accompanied the dramatic expansion of commercial marijuana cultivation, for allegedly medical purposes, in Humboldt County since Proposition 215 provided a defense to growers charged under state law.

These harms include a dramatic increase in sediment loads in creeks which had previously been laboriously restored after decades of abusive industrial logging; streams diminished, and even entirely dewatered, by unpermitted water diversions; and by loss of their habitat, runs of native fish lost to extinction, with potentially catastrophic implications for the recovery of coho salmon and steelhead in the Eel River watershed, among others. Poorly designed and maintained roads, stream crossings, grading sites, and ponds have, are now, and will continue to discharge sediment into tributaries of the Eel River, all of which are already listed by the State Water Board under §303(d) of the Clean Water Act as "impaired" by both sediment and high water temperature.

As well, there is substantial evidence that the use of pesticides and fungicides by commercial marijuana growers has led to the release into the ecosystem of highly toxic substances, including poisons deadly to fish at very low levels, as well as bioaccumulating rodenticides that are causing predator mortality to increase rapidly, and that workers and consumers are being exposed to potentially harmful levels of quite dangerous materials. (Note, for example, that the EPA is now moving to ban the use of chlorpyrifos, a neurotoxin used to kill mites.[3] C chlorpyrifos is one many pesticides and fungicides recently detected in

[3] See *EPA Proposes to Revoke Chlorpyrifos Food Residue Tolerances* at http://www2.epa.gov/pesticides/epa-proposes-revoke-chlorpyrifos-food-residue-tolerances

tests of concentrated cannabis product sold in Oregon.[4]) Even the unregulated use of less toxic materials, such as fertilizers, has led to aquatic impacts that could readily prove cumulatively significant under close scrutiny.

These harms rise in some instances to violations not only of the county's existing ordinances, but of state and federal law, including the Clean Water Act, the Porter-Cologne Water Quality Control Act and the associated Basin Plan; the California Fish and Game Code; and the California and federal Endangered Species Act. Such impacts are without question potentially significant under the California Environmental Quality Act (CEQA).

The current MND fails to adequately assess not only the current level of impacts, but even more critically the devastating trend line of increasing impacts. If the status quo of rapid growth continues, significant impacts to watershed and fisheries are certain to continue as well. The continuing, rapid expansion in the number and size of pot farms, and the geographic expansion of high-intensity cultivation areas, are at this point clear trends.

If adequate regulations controlling the activities generating these impacts are not established and effectively implemented, these serious, significant, and cumulative harms are certain to continue, and likely to worsen. Put another way, if the county adopts a regulatory scheme that allows the continued expansion of both individual operations and the industry overall, and/or fails to effectively enforce the rules once adopted, these significant environmental harms will continue, and will likely continue to get worse. Both clear, adequate rules and effective enforcement are necessary to prevent significant impacts in the near future.

It is important to note that though CEQA requires public agencies to consider mitigation of potentially significant environmental impacts, the MND and ordinance do not actually propose, much less secure, mitigations of the impacts associated with existing sites and the commercial marijuana industry that now exists. Rather, what's proposed is essentially compliance with the suite of best management practices (BMPs) established under the Regional Water Board's waiver program. While those prescriptions are rather good as far as they go, the Regional Board's striking lack of capacity to actually enforce its waiver program in any detail means that the county may not rely on the beneficial effects of BMP implementation except to the extent that its own regulatory program will ensure those BMPs are actually followed.[5]

There do exist a number of feasible mechanisms by which the county could effectively mitigate the harms associated with its commercial marijuana industry. To comply with the letter and spirit of our clean water and wildlife-protection laws, as well as the disclosure and environmental protection requirements of the California Environmental Quality Act (CEQA), the county should adopt and enforce regulations that will immediately reduce both the size and scale, and thus the impacts, of the current industry. Optimally, the county would systematically use the contemplated ordinance to shut down and force remediation

[4] See *A tainted high - Lax state rules, inconsistent lab practices and inaccurate test results put pesticide-laced pot on dispensary shelves* at http://www.oregonlive.com/marijuana-legalization/pesticides/

[5] See FOER comments to Regional Board re waiver program (attached).

of the vast majority of the class of large operations that generate disproportionate harms. Such enforcement would itself constitute perhaps the most effective potential mitigation of the environmental impacts generated by the commercial marijuana industry.

Effective mitigation could also be done by requiring analysis, upgrading, and appropriate maintenance of the private road networks that service multiple parcels and are a very significant source of sediment inputs. Similarly, the county could require growers to invest in watershed restoration efforts, or could fund such efforts directly as a form of mitigation. Finally, though CEQA might not recognize it as a directly relevant form of mitigation, funding effective programs to prevent and clean up trespass grows would help to reduce the serious environmental harms entailed by those operations.

Humboldt County may not be technically responsible under CEQA for the impacts of operations it does not permit. But there can be no question that significant environmental harms could – and should – have been prevented if only the county had seen fit to enforce its existing regulations as the Green Rush swept over the Humboldt hills. Now that marijuana legalization has finally come to California, not only by passage of state laws regulating the 'medical' marijuana industry, but also with Congressional actions and federal court decisions that make it clear that the state may regulate marijuana production despite the plant's status under federal law, we have run out of excuses either to commit environmental abuses to grow pot, or to tolerate them.

Under a MND, the county must insure cumulative effects of actions taken under its proposed program will be limited to a less than significant level. Given the clear evidence that potentially significant impacts will continue in the absence of regulatory program stronger than the one proposed in the county's draft, CEQA requires that an Environmental Impact Report be prepared.

Specific Comments on Proposed Ordinance

Forebearance Period and Water Trucking

FOER strongly supports the requirement that growers dependent on surface water diversions agree to forbear from dry-season diversions. We agree with DFW that the period should be designated May 15 – October 31.

However, we must respectfully insist that the county not permit any operations which use 'imported water deliveries.' This loophole renders the otherwise excellent forebearance requirement a hollow gesture, as, in practice, it will allow permittees to maintain inadequate storage, then to choose freely between filling their tanks with water deliveries or the water diversions they've pledged to forebear from. In either case, potentially significant environmental impacts are entailed, and are almost impossible to address through direct regulation. In either case, the county will have failed to prevent a set of environmental harms – harms that are entirely foreseeable because they are happening today.

Water trucking implicates at least three kinds of potentially significant impacts: unpermitted pumping from surface waters; sediment increases from very heavy vehicles (often overloaded) on roads not engineered for such loads; and the carbon impact of unnecessary use of fossil fuels. It should not escape the notice of county staff and decision-makers that water trucks are causing very severe impacts to county roads as well, to the collective detriment of water quality, fisheries, and the county's woefully inadequate road maintenance budget.

The difficulty of storing large volumes of water on many sites is an additional, important reason to limit 'ordinary' operations to a manageable scale. Water trucking should be allowed only for critical domestic uses and genuine, unforeseeable emergencies where otherwise adequate water storage has been lost due to circumstances beyond the permittee's control (e.g., a tree falls on a water tank).

All commercial cultivation should be subject to some form of discretionary review, and a Conditional Use Permit should indeed be required for operations larger than 2000 square feet.

Because of the significant impacts associated with the commercial marijuana industry today, and because the details are often of real significance in evaluating and correcting these impacts, it is not only appropriate that all commercial cultivation operations be subject to some form of discretionary review – it is a necessity. However, FOER sees the value in creating a streamlined permitting process for operations in the 500-2000 ft2 range. We support the draft ordinance in requiring a Special Permit for operations in this range, and making such permits subject to a discretionary administrative process unless neighbors object and call for full Planning Commission review.

For the county to allow operations of up to 5000 ft2 under ministerial permits, as some suggest, would be to virtually ensure that the average grow on the Humboldt landscape continues to get bigger, with an attendant increase in impacts. It is very difficult to square such continued increases with the reduction in environmental impacts the county claims will result from adoption of this ordinance. While it makes a lot of sense to provide a ministerial permitting pathway for smaller operations that are relatively easier to make sustainable, big grows and big growers should not get a free pass.

It is entirely appropriate that persons wishing to establish larger-scale operations should be required to obtain a Conditional Use Permit, and to prove that all of their development activity fully complies with all state and local laws. A great deal of evidence exists that people who get involved with large operations, established with the intent of making the largest possible amount of money, are especially prone to shortcuts, evasions, and even deception to secure their anticipated returns. Effective government oversight is the only feasible way to ensure such operations do not succumb to the powerful temptation to cut corners. Moreover, a discretionary permit process would allow for input from neighbors and other agencies with on-the-ground experience that may otherwise be missed through a ministerial process.

Large commercial site restrictions are appropriate.

FOER strongly supports the proposed site requirements for operations in excess of 10,000 ft2. Such operations need to be located in appropriate, low-impact areas. They should also be capped in number, particularly as the county works out the kinks in its regulatory program. It will always be easier to allow more later than to reduce improvidently granted permissions in the future.

TPZ limits

FOER appreciates the attempt to limit additional operations on TPZ land. However, it would be far better for our watersheds, and more consistent with the purpose of TPZ lands, which enjoy a substantial tax advantage, to phase out commercial marijuana production on TPZ lands over time. In any instance, operations on TPZ land should be subject to a reasonably low upper limit rather than having that set on a case-by-case basis.

Operations must be measured by cultivation area, not canopy.

Cultivation area is by far the more reasonable method to measure marijuana growing operations. Canopy is highly variable and highly subjective. A canopy-based standard would fail to provide the bright-line guidance that growers and law enforcement need to make a regulatory system work.

Caps on total number of operations.

The county can most effectively insure that its program will reduce the impacts of the currently existing commercial marijuana industry by capping the number of permits to be issued under the proposed ordinance. We believe that this would be most effectively done at the subwatershed scale, and that such caps should be developed in consultation with appropriate state agencies. We believe that whatever scale at which a capping system is applied, the number of operations permitted must be below current baseline conditions.

Given that the current number of parcels with commercial growing is very likely in the range of 2500-3200 parcels, FOER would strongly support a cap of no more than 1500 ministerial permits for 'ordinary' grows of less than 2000 ft2, with perhaps another 100 permits available for large scale grows on appropriate sites, processing operations, and nurseries. Once the county has established that it can implement the new system effectively and environmental impacts have been reduced to a level below potential significance, the county may wish to consider auctioning a smaller number of additional permits to qualified applicants and parcels in future years.

Indoor Grows and 'Mixed Light" Operations

The most credible study of indoor marijuana cultivation in California to date concluded that the amount of electricity then being used to grow indoor pot in the state was approximately equal to the total reductions in energy use achieved in the state's attempt to

reduce its carbon footprint.[6] Given these impacts alone, it is impossible to conceive of an environmental justification for growing marijuana to harvest under artificial lights. The county should not permit indoor operations except, as noted, for closely regulated nursery operations. Those should be restricted to industrial sites serviced by the electrical grid, and required to fully offset their carbon footprints. Similarly, the county should not permit 'mixed light' operations.

Processing only in industrial zones.

Similarly, FOER would support a provision requiring processing to be conducted in designated industrial zones. Such a requirement would substantially advance the public interest in seeing such operations subject to close oversight, would reduce the unnecessary impacts of having workers travel long distances on inadequate roads into the back country, and would help reduce some of the threats to public health and safety that the commercial marijuana industry currently entails.

Consequences of Violations

Ineligibility

Persons found to have violated the county's ordinance should not be eligible for a permit for a period of at least five years. Similarly, parcels where violations of the county's ordinance have occurred should not be eligible for future permits for a period of at least five years.

Fines

The county has the ordinary power to punish violations of its ordinance by fines. Given that the county needs to secure funding to support a dramatically increased oversight and enforcement program, and that deterring abusive operations will both support the establishment of a high standard for Humboldt County's products and significantly reduce environmental impacts, FOER encourages the county to consider a schedule of fines that would support the proposed regulatory framework. We would respectfully suggest that the county consider establishing fines for unpermitted cultivation that reflect the scale of the operation in question. Fines should, of course, run against the parcel where the violation took place.

Operations of less than 2000 ft2 which do not involve other violations of law or environmental harm should be subject to a fine of up to $10,000 for failing to obtain a county permit. Operations from 2000-5000 ft2 should be subject, however, to fines of up to $250,000; those smaller than 10,000 ft2 should be subject to fines of $500,000; and larger operations should be subject to fines of at least $1 million. Such fines would provide the county a powerful incentive to stay on top of the large, unpermitted operations that need

[6] See Evan Mills, Ph.D., *ENERGY UP IN SMOKE: THE CARBON FOOTPRINT OF INDOOR CANNABIS PRODUCTION*, Lawrence Livermore Labs April 2011

the most attention, and would give growers who are not interested in following the county's requirements an immediate incentive to relocate their operations outside the county's borders.

One permit per natural person per parcel.

The county should issue permits to cultivate marijuana only to natural persons who are residents of Humboldt County – not to corporations or other entities. Permits should be limited to one per person, and to one per parcel. The permittee should generally be expected to be present at the permitted operation.

Disincentive for land splits.

If a parcel with a permitted operation is divided, by any legal means, the resulting parcels should only be eligible for permits that are less than or equal to the amount of production that would have been allowed on the original parcel under its permit, for a period of at least five years.

Continued compliance with all other permit terms to maintain county permits.

We assume the intent of the ordinance is to require not just compliance at permitting, but continued compliance over time, with all requirements that may be imposed by any state agency with appropriate jurisdiction. The ordinance should explicitly condition permits on such continued compliance with all legal requirements.

County may reduce sizes for any reason, may also increase if watershed conditions improve, continue on trend toward recovery

It is difficult to overemphasize the importance of the Department of Fish and Wildlife's suggestion that many watersheds, particularly in the South Fork Eel River basin, are already subject to greater impacts than their biological systems can sustain without suffering the loss of critical functions, degrading public trust values, and even losing imperiled species like coho salmon. It is particularly in these watersheds that key impacts must be reduced as quickly as possible, and effective mitigations undertaken. FOER is gravely concerned that a regulatory framework that proposes to issue permits to the vast majority of currently existing operations will necessarily be incapable of accomplishing such a reduction in impacts.

FOER strongly supports, and greatly appreciates, the county explicitly stating what must be true under California law: that it retains the power to reduce the size of cultivation permits where the impacts on watersheds require a reduction in impacts. It would be even better for the county to make it clear that cultivation permits issued under the contemplated ordinance do not constitute any form of property right or entitlement, and are subject to reduction if the people, through their county government, decide that's warranted. However, FOER would also support a provision that went the other direction: if watershed conditions are steadily improving such that fish and wildlife are being adequately protected, permits in that watershed could justly be expanded to encourage such action.

Association with Trespass Grows and other heinous activities should be a permit violation.

Permits should be made subject to revocation if, in the judgment of inspecting staff, it is clear that a permitted operation is linked to a trespass grow, to production of methamphetamine, or to trafficking in Schedule 1 narcotics other than marijuana.

Ban pesticides

Pesticide use is rampant in the commercial marijuana industry, presents real threats to workers and consumers, and not insignificant threats to fish, wildlife, and environmental quality, and is in any event flatly illegal under federal law. Pesticides, fungicides, herbicides, and other such compounds may only be used on crops for which they are registered, in the manner specified for that crop. None are so designated to be used on marijuana. While Humboldt County may not directly regulate the use of pesticides, it can certainly make possession of any such substance by a permittee or on the premises of a permitted operation, or detection of any such substance in product testing, a violation of permit terms. Permittees should only be allowed to use the legal substances and techniques for pest control detailed by the Regional Board in its waiver order.

Would you eat at a restaurant knowing it received 24 hours notice before an inspection?

While it is entirely appropriate that commercial marijuana operations be subject to inspection, it is ludicrous to limit such inspections to a single annual inspection, with at least 24 hours notice, during regular business hours. We subject restaurants and organic producers to far more exacting snap inspection requirements, for good reasons that apply to an even greater extent in the context of the commercial marijuana industry. Any permitted operation should be subject to inspection at any time, without notice.

Conclusion

No waiver of liability or disclaimer can protect Humboldt County's reputation if we become known for pesticide-soaked, salmon-killing "medical" marijuana.

Thank you very much for your thoughtful consideration.

Sincerely,

Scott Greacen
Executive Director

Attachment: FOER comments to Regional Board re waiver program