



FRIENDS OF THE EEL RIVER

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

June 8, 2015

Matthias St. John
Executive Officer
North Coast Regional Water Quality Control Board

by email

Re: Comments on Draft Order R1-2015-0023, Waiver of Waste Discharge Requirements and General Water Quality Certification for Discharges of Waste Resulting from Marijuana Cultivation and Associated Activities or Operations with Similar Environmental Effects in the North Coast Region

Dear Mr. St John,

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.

Although we are unable to support the proposed program in its current form, we do very much appreciate the Regional Board staff's thoughtful and realistic approach to the complex problems raised by the increasing and severe watershed and fisheries impacts associated with marijuana cultivation in the Eel River watershed and across the North Coast. The proposed waiver is an important step in the right direction. That it is not adequate to fulfill the Board's duty to protect water quality and beneficial uses is largely a consequence of the agency's lack of capacity to implement and enforce it.

As the Draft Waiver accurately notes, increased marijuana cultivation throughout the North Coast Region since passage of Prop 215 and AB 420, but especially over the last decade, "has resulted in significant waste discharges and a loss 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 beneficial uses of water." Even this alarming summary may understate the magnitude and severity of our present challenges. The ongoing boom in the number and size of marijuana cultivation operations, and accompanying increases in stream diversions and sediment inputs, has overlapped, for the last four years, with our historically unprecedented severe drought. The result has been the loss of critically important year-classes of coho salmon and steelhead in streams in the Eel River watershed that have been the focus of fisheries restoration efforts

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for decades, a dramatic setback for the hope of coho recovery not just in the Eel but across the region.

New operations are being established as we speak, and expansion of existing operations continues apace, with no real hint of interest from local government in addressing hundreds of obvious violations of state and local laws, including Humboldt County's grading ordinance. Despite the overwhelming evidence that the booming marijuana industry, at least in its present form and current practices, has already overshot the carrying capacity of many North Coast watersheds, cannabis cultivators are pressing a proposal in Humboldt County that would allow cultivation by right of up to 10,000 square feet of cannabis canopy on every private parcel larger than five acres in the county, regardless of site conditions. It is thus vitally important that an effective system of regulation be established for this industry as soon as practicable.

The implementation and enforcement strategy for the waiver was not outlined in the draft waiver, but has been expounded by the Regional Board Chair during the public comment period. Mr. Corbett has declared his intention to issue "5000 licenses in the next year"¹ following the model of the practices employed by the Humboldt County Assessor's office to collect property taxes: identification of operations using aerial imagery; issuance of notice letters to the owners of record of identified parcels; and the issuance of fines and, where necessary, liens to secure compliance with the waiver's requirements that fees be paid, and that mitigation plans be prepared and followed, for every instance in which more than six marijuana plants are being grown across the region.

While it is impossible to know in advance how successful such an approach might prove in generating the budget Mr. Corbett hopes to secure "based upon the number of people that are enrolling,"² the history of efforts to regulate both water quality generally and the booming, black-market focused marijuana industry in the Emerald Triangle in particular, strongly suggest that voluntary compliance with such a program will be far less than complete, and not just because the Regional Board will be asking pot growers, who are after all subject to potentially serious sanctions for federal felonies, to do something quite a bit more complicated than simply paying property taxes. Piling up a stack of plans from those willing to cooperate will probably help improve water quality, but without resources and will sufficient to bring nearly every significant operation into compliance, there is no assurance that the program will actually protect water quality and beneficial uses that are now degraded, and being further harmed, by the industry's impacts.

However, when Mr. Corbett explains "(t)hat doesn't mean that we won't enforce against the few bad apples," he gives the game away: the Board's scant enforcement resources are not, in this perspective, a problem, because they will only be needed to deal with "the few bad apples," rather than with ensuring that the thousands of operations now causing significant individual and cumulative impacts to water quality and the beneficial

¹ Personal communication.

² As quoted in the Willits News, <http://www.willitsnews.com/general-news/20150605/regulatory-agencies-continue-to-move-forward-to-bring-growers-into-compliance>

uses of our streams and rivers are effectively regulated. This picture is contradicted by the Board's own reporting on the industry's impacts. It is wishful thinking elevated to a strategy.

In fact, even if the draft waiver secures an entirely unprecedented level of voluntary cooperation from an industry that has evolved in open defiance of legal prohibitions and constraints for many decades, and only a few hundreds or thousands of operations (of the thirty thousand cultivation operations estimated in the region) remain outside the program, it would still take the Board decades to address the scofflaws with its existing enforcement resources. That fact alone strongly suggests that many cultivators will do the math themselves and choose to risk continue operating without the benefit of a permit from the Board.

The gross mismatch between the scale of the industry and its impacts and the Board's enforcement capacity means that the Board cannot assure the public that its program will actually be effective in protecting water quality and beneficial uses. Rather, the proposed waiver, for all its virtues, must be understood and analyzed as unenforceable in at least some degree, given existing resources. Because it is unenforceable, the mitigations assumed effective in reducing the admittedly significant impacts associated with the commercial cannabis industry today must be discounted. Thus, the use of a Mitigated Negative Declaration (MND) under the California Environmental Quality Act (CEQA) is clearly inappropriate, and a full Environmental Impact Report (EIR) must be prepared.

Even if, *arguendo*, we assume that the Board's waiver would accomplish the impossible, by securing full, immediate, and heartfelt compliance from every party to whom a notice letter is directed, an EIR would still be required, because the draft waiver does not show that existing, and rapidly growing, cumulative effects will be effectively addressed by the proposed mitigations. It cannot, because the draft waiver does not fully characterize those impacts, nor the dramatic rate at which they are increasing. Because the number of operations is so large and the enforcement team so small, the Board will not even have the capacity to closely review thousands of filings to ensure their adequacy as documents, much less oversee their implementation to insure that water quality is actually being protected. If the Board means to issue thousands of permits in the near future, it is impossible to avoid the conclusion that at least some of those permits will be issued to operations that are now harming, and will continue to impair, water quality to the detriment of beneficial uses, and particularly to the increasingly threatened coho salmon and steelhead of the Eel River watershed.

Of course, some compliance is certain under any reasonable system, because there are many cannabis farmers pressing for a scheme that will allow them to operate as legitimate businesses, to follow all environmental laws, and to protect our watersheds and other natural resources. That's a big part of why it is important to get the large parts of this effort as right as possible – it is the low-impact, conscientious, sustainable farmers who are most likely to cooperate, and most likely to suffer economic harm from a system that allows large-scale, high-impact operations to continue – whether under legal permit or otherwise. If a system only regulates the lower-impact operators, the watershed will still be

suffering many of the impacts that drove the creation of the proposed waiver in the first place, and the board will have failed to protect water quality.

What is uncertain, in the extreme, is the likely extent and effectiveness of compliance with the proposed waiver. It is essential that policy makers and the public are informed of the impacts associated with the industry, the rate at which those impacts are increasing, and the implications for beneficial uses, particularly for ESA-listed fisheries. This information is critical if we are to understand how those impacts are likely to be reduced under varying levels of successful implementation of the proposed waiver's substantive requirements. Both questions must be addressed in an EIR in order to assess what additional measures, including increased enforcement resources, are likely to prove necessary to protect water quality in our already-degraded streams and rivers.

Given the parlous state of coho and steelhead in the Eel River, at least some of the impacts associated with cannabis cultivation should now certainly be considered "take" of listed species, and the current operations of the cannabis industry as jeopardizing the survival and recovery of these runs. Such impacts would include dewatering, which has led to the loss of coho from China Creek, and threatens to extinguish the runs in Redwood and Sprowel Creeks. Coho are very unlikely to recover in the South Fork Eel River without substantial recovery of populations in Sprowel and Redwood Creeks, so the loss of those runs is a blow to the potential recovery of coho across the region extending from the Eel to Oregon's Rogue River. Similarly, sediment impacts associated with marijuana cultivation are clearly impairing reproduction and juvenile feeding in areas where fish are hanging on. Because its implementation and mitigations are so uncertain, the Board cannot show that the proposed waiver will prevent jeopardy or even mere take of these species, let alone that such impacts would be reduced below the level of significance. Thus, a Mitigated Negative Declaration is wholly inappropriate, and an EIR must be prepared.

Even before 2000, anthropogenic sediment sources were approximately equal in magnitude to natural sediment sources in the South Fork Eel. As Regional Board staff appreciate, the Eel has among the very highest levels of natural sediment sources for North American rivers, so that's a lot of additional sediment. But it is clear that since 2000, substantial additional roadbuilding, site clearing, and increases in the intensity of use have taken place across many areas of the North Coast, including areas with steep slopes and unstable soils and landforms. It is thus much more likely than not that anthropogenic sediment inputs are now significantly higher in many watersheds than they were in the 1990s.

It is important to be clear that despite the growing conversation about legalizing recreational use and sales of marijuana in California, the black market remains at the heart of the North Coast's pot industry. The industry exists here primarily because of prohibition; it responds poorly, if at all, to civil authority in large measure because of the risks of criminal prosecution; and those risks themselves engender the substantial financial incentives which drive the continuing boom in cultivation across the region.

Because the industry is likely to continue its rapid growth and evolution absent effective intervention, the draft waiver's provision of a five-year sunset period seems quite

sensible. Regulatory systems will need to be redesigned as the industry responds to pending legalization and other changes in the legal and political landscape. A related point is that, given that significant changes in the overall legal status of marijuana and the market for the plant and its products are likely to occur in the next five years, there is little logic to creating systems to manage marijuana cultivation on unsustainable sites. This is particularly true for large-scale operations; legalization will make agricultural land available where those operations are seen as desirable.

FOER strongly opposes any suggestion that the 2000 square foot limit in Tier 1 be raised. An operation of that scale can produce 100 pounds of finished product in a season, worth roughly \$100,000 at today's prices. Allowing operations five times that size, as some have suggested, would create powerful incentives to develop many sites that may not be suitable or sustainable.

The three-tiered structure outlined in the Draft Waiver offers important opportunities to drive cleanup and recovery across watersheds. Counties and/or the state could incorporate these categories, as established and evaluated by the Regional Board, into their frameworks for permitting commercial marijuana cultivation. We would suggest that permits be issued for commercial cultivation – ie, operations larger than 2000 square feet – only in watersheds where all Tier 2 and Tier 3 sites have been effectively addressed to the satisfaction of Regional Board staff and other interested agencies. Third party entities probably have the best chance to effectively coordinate between individual parcel owners. If focused efforts were made to immediately address these problems, we could well see dramatic improvements in watershed conditions in the relatively near term.

Once all Tier 2 and 3 sites are addressed and water quality goals met, it may make sense to look to the possibility of expanding the existing industry on existing or additional sites on truly sustainable templates. However, until we reach that goal, further expansion of the industry should be discouraged with all available policy tools.

Unfortunately, it is likely that the majority of existing operations significantly larger than 2000 square feet are Tier 3. We frankly wish the Regional Board would – or maybe the word here is could – shut all such damaging, large-scale operations down in this fourth year of our ongoing drought. The fact that we're not considering such an option, that there's no agency in the state that appears capable of actually enforcing such a decision, says a lot about the fundamental mismatch between the scale of the challenges on the ground and in the creeks, as against the political will and resources needed to address those challenges.

Where the harms are likely to be greatest, and cooperation least forthcoming, in Tier 3 sites over 2000 sq ft in size, and where there is evidence of wilful violations, the Regional Board and all other agencies should make it an overriding priority to identify and close those operations. Failure to respond to this order, or deceptive responses, should be taken as evidence of wilful violation of this order and other applicable laws. To allow such operations to continue under any color of official sanction is to reward scofflaws and those abusing our watersheds with an unearned competitive advantage over people who are not only playing by the rules and protecting our streams and fish, but risking losses and incurring costs by complying with regulations.

Similarly, we would advise that parcels with operations significantly above 2000 ft be considered ineligible for T1 status for at least two years as a disincentive to increase the size of established operations. While we understand the Board's desire to adopt a cooperative, non-confrontational approach to working with willing landowners, given the scale of the industry and its history of non-cooperation, we strongly encourage the Board to carefully consider ways to increase the persuasive effect of its proposed regulatory structure. Consider, for example, assessing penalties on 3rd contact (ie, first contact is informational, second is warning, third is fine) as a general rule, with escalating schedule of fines to encourage rapid compliance.

To protect water quality, a regulatory framework for marijuana cultivation must ban the use of water trucks to supply pot farms. Water trucking should be allowed only for critical domestic uses. Given their impact on water quality through both illegal, unpermitted diversions and sediment delivery from very heavy trucks traversing roads not engineered for those loads, the use of water trucks by any marijuana cultivation operation should constitute a violation of the standard conditions and should result in both the operator and the property being ineligible for a permit for at least several years.

Finally, If the Board is going to protect water quality in these areas, it must address high-impact roads, including both chronic sediment sources and those which present risk of catastrophic failure. A comprehensive framework should not only assess road conditions, surface maintenance, and crossings, but also road location. Streamside and midslope roads are subject to higher failure rates and cause significantly greater harm to watersheds than ridgetop routes. Similarly, roads constructed on unstable landforms are often major sources of sediment that can be redirected to provide access at much lower impact. The private landscape the draft waiver seeks to regulate here is often networked with road systems adapted from logging roads first established in the second half of the twentieth century, but often many decades ago. On industrial timberlands, much of that older road system has been the rightful focus on decades of work to relocate roads, upgrade and armor stream crossings, and ensure that roads are designed and maintained to meet the needs for which they are created. We are long overdue for a similarly systematic effort to address road systems across the private landscape. Of course, such an effort will have significant benefits for public safety and transportation as well as stream health.

Thank you for your consideration of these comments.

Sincerely yours,

/s/
Robert Scott Greacen
Executive Director
Friends of the Eel River